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Louisiana Law: Its Development in the First Quarter-Century of American Rule

SAMUEL B. GRONER*

“ . . . we have treated, for a thing beyond the constitution, and rely on the nation to sanction an act done for its great good, without its previous authority.”¹ So Thomas Jefferson expressed his constitutional doubts and his practical confidence of the net effect that purchase of the Louisiana Territory from the French Empire was to have on the history of his country. The acquisition of a country which at the time was “less known than any other (inhabited by a civilized people) of the same extent on the globe”² was hailed by Robert R. Livingston, the then American minister at Paris, as “the noblest work of our whole lives.”³ By this one transaction, the United States had at least doubled itself in area, although the actual extent of the territory purchased was unknown,⁴ and it had gained a city of eight thousand persons in an area of which the total population was almost fifty thousand.⁵

The Stars and Stripes was the third national flag to fly over Louisiana in the one hundred years of its Occidental history, and

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1. Jefferson's letter to John Dickinson, August 9, 1803, 8 Ford, *The Writings of Thomas Jefferson* (1897) 262.

2. Stoddard, *Sketches, Historical and Descriptive, of Louisiana* (1812) v; the author, a major in the “Corps United States’ Artillerists,” states that in March 1804 he took possession of upper Louisiana under the treaty of cession.

3. 4 Channing, *A History of the United States* (1938) 319.

4. The “Agent and Attorney in Fact of the Florida Parishes” observed that “Just what the United States acquired by purchase from France was a question which bewildered the negotiators of the Treaty of Purchase, is still in doubt, and is likely to remain forever in doubt.” (Skipwith, *Historical Synopsis of the Claim of the Florida Parishes of Louisiana* 2); the negotiator for France later related that Napoleon observed, with regard to the vagueness of the boundaries of Louisiana, that “If the obscurity were not there, it would perhaps be good politics to put it there,” (Barbé-Marbois, *Histoire de la Louisiane* (1829) 311-312). Channing, *op. cit.* supra note 3, at 321, erroneously attributes the remark to Barbé-Marbois himself. See also Mezler, *Geschichte und Handlung der französischen Pflanzstädte in Nordamerika, etc.* (1756) 359, and Morse, *The American Gazeteer, etc.* (1810) Louisiana.

5. 2 Gayarré, *Essai Historique sur la Louisiane* (1831); 60 Morse, *op. cit.* supra note 4, estimates the population of New Orleans to be 10,000 or 11,000 as of 1802 (Id. at c. New Orleans) and the number of individuals who can “read and write well” in all Louisiana to be not more than 200. (Id. at c. Louisiana).

the change effected by the purchase of 1803 was the fourth change of sovereignty the territory had known. Since the territory was first settled by French adventurers coming down from Canada in 1699, the early civil government was pioneer in form, administered under the Superior Council, which was already operating in Canada; in 1716, an edict of Louis XV made permanent the Superior Council of Louisiana.⁶ It is noteworthy that, from the beginning, there were two features which distinguished the territory of Louisiana from other areas held by the French crown: (1) Land was held in allodial tenure, as opposed to feudal, for the grants Louis XIV had made to Antoine Crozat in 1712⁷ and to the Company of the West in 1717⁸ had reserved to himself nothing but liege homage, which every subject owed to his sovereign,⁹ and (2) there was no preference by nobility or office, and all were equal before the law.¹⁰ Nor was this system later changed.

When the charter of the Western Company expired in 1731,¹¹ the French Government undertook direct rule over its possession in Louisiana. The law applied in the territory remained fundamentally what it had been from the beginning—the basic Civil Law of France, together with the additional body of rules called the Custom of Paris. These had constituted the law guiding the original Superior Council in its process of government, both in its rather autocratic legislative activities and in its exercise of judicial process.

The origin of this legal system was, of course, the Roman law. This system, as we now know it, began with the legislation of Justinian, with that famous *Corpus Juris* which, “summing up the results of the whole development of the [Roman] law during the preceding thousand years,” and being at the same time the “starting point and basis of modern law,” occupies “the central position in the whole history of law.”¹² Southern France, conquered early by Rome, had constituted a single jurisdiction with the Iberian peninsula; together with Spain, it had been conquered in the fifth century by the Western barbarians, the Visigoths, while northern

6. Dart, *The Sources of the Civil Code of Louisiana* (1911) 31.

7. See note 16, *infra*.

8. See notes 19 and 20, *infra*.

9. Stoddard, *op. cit. supra* note 2, at 244.

10. Dart, *op. cit. supra* note 6, at 31. As a matter of fact, it had been expressly stated in the decree forming the *Compagnie de l'Occident* that members of the nobility were permitted to engage in commerce without loss of dignity. (Beer, *A Valuable Book on Louisiana* (1902) 342, citing Chambon, *La Commerce de l'Amérique par Marseille, etc.* (1764)).

11. See note 21, *infra*.

12. Dart, *op. cit. supra* note 6, citing Mackenzie, *Roman Law*, 33.

France had been overrun by the Franks. The southern country had, as a result of various general factors and under the influence of the *Breviary* (or *Lex Romano Visigothorum*) of Alaric II, promulgated in 506, become a country governed by written law, and was also later much influenced by the legal study revival of the 11th and 12th centuries. The Frankish country, however, maintained the existence of specific tribal custom coordinately with the general Roman law, and this was, indeed, the first defection from the undivided authority of the law of Rome. This area became the country of customary law, where the Roman law had been affected by the barbarian laws of the Salian Franks and other Teutonic conquerors. Up to the beginning of the tenth century, the Visigothic Code and non-written tribal customs were the law there, and the customs of each tribe constituted the law for it. Inevitably, as a result of the existence of these numerous "Customs" (as the body of local law for each community came to be called), confusion prevailed as to the status or applicability of any proposition of general law.¹³ The Custom of Paris applied, of course, in the area nearest to the seat of royal government and after the tenth century, when the Counts of Paris established their leadership, it had become one of the most important. It, together with the Custom of Orleans, were powerful influences in the agglomeration of Roman civil law with the ancient Customs of France, that was accomplished in the century following the edict of Charles VII at Montil-de-Tours in April 1453.¹⁴ These Customs were important, also, in the subsequent rewriting of the French Civil Law that culminated in the Code Napoléon of 1804.

During the sixteenth and seventeenth centuries, it came to be prescribed by France that the law of her colonies should be the general laws and edicts and ordinances of the realm, and the Custom of Paris.¹⁵ This was done early for New France, or Canada, and we find traces of the civil law and the Custom of Paris in what later became the Northwest Territory; in 1810, the territorial legislature of Michigan formally repealed the "Contume de Paris" and

13. As Voltaire was later mordantly to observe, "we have more laws than all Europe together; almost every city has its own . . . you change jurisprudence while changing [post-] horses." (*Dialogue entre un Plaideur et un Avocat*, 39 Voltaire, *Oeuvres* (Beuchot ed. 1830) 381-382).

14. Dart, *op. cit. supra* note 6, at 22; Dart, *The Colonial Legal Systems of Arkansas, Louisiana and Texas* (1926) 12 A. B. A. J. 481, 483.

15. 1 Sherman, *Roman Law in the Modern World* (3 ed. 1937) 251. See also Gérin-Lajoie, *Introduction de la Coutume de Paris au Canada* (1941) 1 *Revue du Barreau* (Quebec) 61.

laws and "ordonnances" effected under "the ancient French crown."¹⁶ The same system came in from the South, after the granting of the commerce of Louisiana, together with a considerable share in its government, to the French merchant Antoine Crozat on September 14, 1712.¹⁷ Thus, New France and Louisiana were theoretically governed by the same system of law, Roman at foundation, but modified by statute, edict, ordinance and custom.¹⁸

For eighty years after René Robert Cavalier Sieur de La Salle's two thousand-mile journey down from Canada to the mouth of the Mississippi in 1682, Louisiana was claimed by France. The charter granted September 6, 1717¹⁹ to John Law's newly formed Company of the West²⁰ had been surrendered July 1, 1731;²¹ in the meantime, the Custom of Paris and the other laws of Louisiana had been supplemented by the application to procedural matters of the *Code Louis* of April 1677.²² The French and Indian War, fourth phase of the hundred-year struggle for world domination between Louis XIV and XV of France, and England's Georges I and II, was about to result in the temporary obfuscation of France on the stage of world imperium from India to the New World. On November 3, 1762, His Most Christian Majesty of France ceded Louisiana by secret treaty to his Most Catholic cousin, Charles II of Spain, at Fontainebleau.²³

The French inhabitants of Louisiana were little more pleased about this transaction than were the British, and refused to yield

16. Repealing Acts, Sept. 1 and 16, 1810, 1 Territorial Laws of Michigan (1871) 210; *Lorman v. Benson*, 8 Mich. 18, 25 (1860). Cf. *Coburn v. Harvey*, 18 Wisc. 147, 149-151 (1864).

17. de Villiers du Terrage, *La Louisiane* (1929) 3. Oudard, *Vieille Amérique* (1931) 114, gives the date as September 12.

18. Howe, *Law in the Louisiana Purchase* (1904) 14 *Yale L. J.* 77, 78.

19. La Harpe, *Journal Historique de l'Établissement des Français à la Louisiane* (1831) 139.

20. *La Compagnie de la Louisiane ou de l'Occident*. This company absorbed Crozat's organization as well as another, the *Compagnie du Canada*. Within two years, this fantastically prosperous company also absorbed the *Compagnies des Indes Orientales et de la Chine*, and changed its own name to the *Compagnie des Indes*; this was the famous "Mississippi Bubble." Shortly after the latter company's amalgamation with the *Banque Royale* in 1720, the Bubble burst, and in December of that year Law took quick and quiet leave of France.

21. Ireland, *Louisiana's Legal System Reappraised* (1937) 11 *Tulane L. Rev.* 585, 586. Dart, *op. cit. supra* note 6, at 32, states that the charter was not surrendered until the following January.

22. Tucker, *Source Books of Louisiana Law, Part II—The Code of Practice* (1932) 7 *Tulane L. Rev.* 82.

23. This treaty remained unknown to the people of Louisiana until the proclamation of d'Abbadie, Director of Louisiana, in 1764. This proclamation, incidentally, was the province's first example of printing. Parsons, *Louisiana*, 14 *Encyclopaedia Britannica* (1945) 427.

power to Don Antonio Ulloa when he came to take possession for the King of Spain in the Fall of 1766. After patiently "awaiting reinforcements" for eighteen months,²⁴ Ulloa departed. The paradoxically named Don Alejandro O'Reilly was more successful, and took possession of the area for Spain on August 18, 1769.²⁵ Soon thereafter, on November 25, 1769, O'Reilly proclaimed²⁶ the abolition of all French law in the jurisdiction and its supercession in entirety by the laws of Spain.²⁷

Thus Spanish law became authoritative throughout the Territory universally and at once in theory, more limitedly and more gradually in fact. (In practice, of course, it had little application outside the immediate vicinity of the city of New Orleans and the "island" on which it stood; elsewhere throughout the vast expanse of Louisiana the legal authority was in an even more primitive stage of crystallization than in those rough and lawless settlements of the American Far West during the last century, about which it was written that "There is no law of God or man, To the west of ninety-four" and "No Sunday west of Bismarck; West of Miles City, no God.") O'Reilly organized the government thoroughly; he summarized and attempted to make available information of the Spanish law for the area, and on the first day of December in 1769 established the Cabildo, or Spanish colonial government. He also issued a code of instructions in regard to legal practice according to the law of Castile and the Indies, to which was annexed an abridgement of the original law. And, from the accession of Alexander O'Reilly to power at New Orleans, "it is believed the laws of Spain became the sole guide of the tribunals in their decisions" in Louisiana.²⁸

The jurisprudence of Spain had developed, as has been said, in accordance with formalized rather than with unwritten law. The work of the Romans—Papinian, Paul, Gaius, Ulpian and others—had been followed by that of Theodosius, who in his Code of 438 made the first attempt by Rome to cover the whole field of the law.

24. Ficklen, *History and Civil Government of Louisiana* (1901) 67.

25. Dart, *op. cit. supra* note 6, at 32.

26. 1 Moreau-Lislet and Carleton, *The Laws of Las Siete Partidas* (1820) xx; Tucker, *Source Books of Louisiana Law, Part III—Spanish Laws* (1934) 8 *Tulane L. Rev.* 396.

27. On August 27, 1769, about a week after taking possession, O'Reilly had declared that the French Code Noir, or Slave Code, promulgated in 1724 by Louis XIV should continue in force, but this also was taken to be abrogated by his later proclamation. *Beard v. Poydras*, 4 Mart. (O.S.) 348, 366-368 (La. 1816).

28. Martin, *Louisiana* (1882) 211.

Development of the law, continuing through the *Edictum Theodorici* of the Ostrogoths in 500 and Gundobold's *Lex Romana Burgundiorum* early in the sixth century, had culminated in the government of the Iberian peninsula under the *Breviary* of the Visigoths Euric and Alaric II in 506. Later attempts at revision and continued codification of the law followed, with the laws of Kindaswind and the West Gothic *Liber Judicorum* in 650, which became the *Forum Judicum* or *Fuero Juzgo* of 693, the *Fuero Viejo* in 992, the *Fuero Real* of Alphonso the Learned in 1255, and, finally, the famous *Código de las Siete Partidas* of 1263. These *Siete Partidas*, and occasionally the *Fuero Juzgo*,²⁹ seem later to have been the most frequently adverted to as the effective Spanish law by legal authorities in Louisiana; there is little mention made, on the whole, of the other laws just listed or of other statutory authority, as the *Nueva Recopilación* of 1567, the *Recopilación de las Indias* of 1661, or of specially issued *Cédulas*.³⁰

The Spanish regime terminated in law on October 1, 1800, when the Second Treaty of San Ildefonso,³¹ secret like its predecessor of 1762, receded Louisiana to France, where the short-lived First Republic was even then being strangled by the powerful hands of its First Director and Emperor-to-be, Napoléon Bonaparte. Actual physical transfer of the province did not take place, however, until December 1, 1803, by which time (in April of the same year) the territory had already been sold by the French Empire to the United States.

Pierre Clément de Laussat, Colonial Prefect of Louisiana since October 9 of the preceding year,³² was in New Orleans on April 30, 1803, when Napoleon signed the Louisiana Purchase treaties.³³ He

29. See Lobingier, *The Forum Judicum (Fuero Juzgo)—A Study in the Early Spanish Law* (1913) 8 Ill. L. Rev. 1. Scott, in his translation (*Visigothic Code (Forum Judicum)* (1910)), says the *Partidas* borrowed much from this Code.

30. Ireland, *op. cit. supra* note 21, at 586. But Dart, *op. cit. supra* note 14, asserts that the *Nueva Recopilación* and the *Recopilación de las Indias* were the main sources of Spanish law in Louisiana (*Id.* at 645).

31. The First Treaty of San Ildefonso (August 19, 1796) had solemnized the Hispano-French alliance against England, but Spain had been unwilling to surrender Louisiana to France at that time. (Renaut, *La Question de la Louisiane 1796-1806* (1918) 30, 49, 212-216.)

32. Lyon, *Louisiana in French Diplomacy 1759-1804* (1934) 134.

33. There were in fact three treaties, all under date of April 30, 1803. The first was the actual Treaty of Cession (U. S. State Dept. Treaty Series, No. 86; 1 Malloy, *Treaties, Conventions, etc.* (61st Cong., 2nd Sess. (1910) Sen. Doc. No. 357) 508; 2 Miller, *Treaties, Etc.*, of the United States of America (U. S. State Dept. Publ. No. 175) 498; 8 Stat. 200). The second was the treaty of Payment (U. S. State Dept. Treaty Series, No. 86a; 1 Malloy, *op. cit. supra*, at 512; 2 Miller, *op. cit. supra*, at 512; 8 Stat. 206 (1803)). The third provided

had arrived there from France in March of the same year,³⁴ as one of the officials of the new government which Bonaparte had created for Louisiana when and as France would come into possession. Laussat had no authority to act alone, but under the terms of his orders had to await the arrival of General Victor's³⁵ army of occupation that was to accompany the new French government. His original authority, naturally, ended on the signing of the treaty of sale to the United States. He was thereafter commissioned, on June 6, 1803,³⁶ to receive possession of Louisiana from Spain and to deliver it to the Commissioners of the United States. Laussat had not welcomed that sale³⁷ and, in the time before the three weeks when he finally held the prevailing power in Louisiana, he was busy on his own initiative organizing a government for Louisiana to go into effect immediately he should receive possession from Spain. When he did receive it, from the grim Casa Calvo and the decrepit Salcedo on the last day of November in 1803, he issued a proclamation to the populace announcing the transfer to France "for an instant only," and the forthcoming immediate cession to the United States. He did not make delivery, however, until December 20, and he energetically occupied his brief hour of power in putting his governmental changes briskly into operation. His purpose, as he himself said, was to "create an irresistible political lever." The changes were made without consulting the Americans, and his twenty days of activity left many troublesome problems to plague the administrative capacities of the new owners.³⁸

The United States Commissioners took possession of the province on December twentieth. "American observers said that the populace greeted the change of masters with enthusiasm. French and Spanish observers saw only apathy unmoved by the efforts of

for payment by the United States of debts due its citizens by France (U. S. State Dept. Treaty Series, No. 86b; 1 Malloy, *op. cit. supra*, at 513; 2 Miller, *op. cit. supra*, at 516; 8 Stat. 208 (1803)).

34. Hubert-Robert, *L'Histoire Merveilleuse de la Louisiane Francaise* (1941) 347; Lauvriere, *Histoire de la Louisiane Francaise* (1940) 419; de Villier du Terrage, *op. cit. supra* note 17, at 61.

35. General Victor had been named Captain-General of Louisiana as early as April 27, 1802. (de Villiers du Terrage, *op. cit. supra* note 17, at 61; Lyons, *op. cit. supra* note 32, at 131.)

36. 2 American State Papers, Class I, Foreign Relations (1832) 582.

37. As a matter of fact, he was unable to believe it for a time, and termed the first report of the sale "this improbable and impudent lie." (Letter, Laussat to Décrez, 20 thermidor an XI (August 17, 1803), in Robertson, *Louisiana under the Rule of Spain, France and the United States, 1785-1807* (1911) 52; Lauvriere, *op. cit. supra* note 34, at 419.)

38. Dart, *The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana* (1931) 6 *Tulane L. Rev.* 83, 84 (1932) 18 *A. B. A. J.* 125.

an American claque to stampede the crowd into a demonstration of joy."³⁹ A spectator, watching the flag rather than the crowd, observed that, as the Stars and Stripes was being raised in place of the lowered Tricolor, it "remained for a long time hesitating, in spite of the efforts to raise it, as if it was confused at taking the place of that to which it owed its glorious independence."⁴⁰ Other evidence indicates, however, that, had his sight been somewhat more bifocal, he would have observed that the two flags both paused courteously when together at mid-height, while artillery celebrated that union.⁴¹ Nevertheless, the two commissioners reported cheerfully from New Orleans that "the flag of our country was raised in this city amidst the acclamations of the inhabitants."⁴² At any rate, the "saturated" hearts which had owed fidelity to three sovereigns within a single month could now come to the repose at least of certainty.⁴³

The United States Commissioners were two, one destined to be not very famous, and the other, very infamous. Of William C. C. Claiborne and General Wilkinson, Laussat wrote, on his departure for Martinique the following winter,⁴⁴ "it was hardly possible that the Government of the United States should have made a worse beginning, and that it should have sent two men more deficient in the proper requisites to conciliate the hearts of the Louisianians. The first . . . has little intellect . . . and is extremely beneath the position in which he has been placed. The second . . . has been long known here in the most unfavorable manner. . . ."⁴⁵ These were the men who were to receive from France the empire of Louisiana, consisting of the "fertile solitudes" where the Spaniard ruled

39. Whitaker, *The Mississippi Question 1795-1803* (1934) 252.

40. 2 Robin, *Voyages dans l'Intérieur de la Louisiane* (1807) 138.

41. Guénin, *La Louisiane* (1904) 378.

42. Letter, William C. C. Claiborne and James Wilkinson to James Madison, December 20, 1803, 2 *American State Papers*, op. cit. supra note 36, at 581.

43. Hubert-Robert, op. cit. supra note 34, at 363.

44. 2 Martin, *History of Louisiana* (1829) 244; 4 Gayarré, *History of Louisiana* (1866) 10; "Extract of letter from General James Wilkinson to the secretary of war," April 25, 1804, in *Message from the President of the United States Supplementary to his Message of the Sixth Instant, Communicating Documents Respecting Louisiana* (1805) 20.

45. Gayarré, op. cit. supra note 44, at 10; Letter, Laussat to Décrez, 18 germinal an XII (April 7, 1804), in Robertson, op. cit. supra note 37, at 53. Nevertheless, Claiborne remained to be elected in 1812 first Governor of the State of Louisiana; in January, 1817, he became a United States Senator and remained such until his death the following November. He was considered by the Louisianians to have exercised his "dangerous" authority with "probity and moderation," and was "laborious" and thoroughly honest. Fortier, *A History of Louisiana* (1904) 11-12.

in law but the Indian ruled in fact,⁴⁶ which France had received from Spain by the Treaty of San Ildefonso—"that is to say with limits extremely vague."⁴⁷

The attitude of the Louisianians—the Creoles, as distinguished from the Indians, Americans and Englishmen who were in the territory—seems not to have been, on the whole, a very receptive one toward their new sovereigns. As Henry Adams puts it, "The colonists in Louisiana had been for a century the spoiled children of France and Spain. Petted, protected, fed, paid, flattered and given every liberty except the right of self-government, they liked Spain and they loved France, but they did not love the English or the Americans."⁴⁸ After all, Louisiana had long regarded the English in West Florida, and the United States everywhere, as two very troublesome neighbors. "Uncle Sam's elbows were particularly long and sharp and were continuously in the ribs of his neighbor. . . . Louisianians regarded Englishmen and their habits, customs and laws as in exceedingly bad form and in viler taste; but, bad as the English were, the Americans were simply insufferable."⁴⁹ On the other hand, a contemporary commentator wrote that the inhabitants, "though mortified at being put up, in this manner, at auction," were yet well pleased with being transferred to the Americans. Some of them even calculated at what rate they had actually been sold, and computed it to be "about eleven sous per head, including negroes and cattle."⁵⁰ Finally, Laussat's observations on the settlers are interesting: "Everywhere the Anglo-Americans settle, the lands become productive and progress is rapid. There is a special class among them engaged in the occupation of penetrating all unsettled districts for fifty leagues ahead of the oncoming populations. . . . They build their own cabins, cut down and burn trees, kill the savages or are killed by them, and disappear from the land either by dying or by giving it up. When a score of new colonists have, in that way, gathered in a place, a couple of printers appear, one federalist, the other anti-federalist, then doctors, then lawyers, then adventurers; they drink toasts, they choose a speaker; they constitute themselves a city; they vie with each other in the procreation of children. They vainly advertise vast territories for sale; they attract and cheat as many buyers as possible. They paint inflated

46. 4 Roosevelt, *The Winning of the West* (1896) 262.

47. de Villiers du Terrage, *op. cit. supra* note 17, at 61.

48. 3 Adams, *History of the United States of America* (1890) 298-299.

49. Dart, *op. cit. supra* note 6, at 51.

50. Whitaker, *op. cit. supra* note 39, at 253.

pictures as to the size of the population, so as to arrive quickly at a figure of sixty thousand souls, . . . and there is then one more star affixed to the pavilion of the United States!"⁵¹

In his proclamation to the Louisianians, Laussat had, indeed, spoken favorably regarding the Americans. Referring to the change in the duration for which he had been ordered to hold possession, he said to them that his new mission "offers me one consolation, that in general it is still more advantageous for you" than the old, and he pointed out the disadvantage in existing as a colony far from its metropolis.⁵² He reminded them that Article 3 of the treaty of cession provided that "The inhabitants of the . . . territory shall be incorporated in the Union as soon as possible" and that "in the meantime they shall be maintained and protected in the free enjoyment of their liberty, property and the Religion which they profess."⁵³ Nevertheless, it was with "pain" and "a sort of fright" that the Louisianians came under the domination of "a foreign people, whose language they did not know, and who by their laws, their customs and their character had little in common with the population of Louisiana." Nor did Claiborne's "somewhat cold and dry" proclamation tend "to calm their spirits or to warm their hearts."⁵⁴

Claiborne had been named by Jefferson, in his capacity as a sort of "temporary king,"⁵⁵ to govern the newly acquired territory, and, since the existing laws had been left unchanged by Congress,⁵⁶ and since, in spite of Laussat's busy reorganization, he did not appear ever to have proclaimed that the Spanish legal system in itself had been terminated and replaced by the laws of France, Claiborne now joined in his person all the powers which, even under the absolute and arbitrary rule of Spain, had been divided between the Royal Governor and the Intendent. The role of despot was, no doubt, an ironical surprise for the new governor, and an unwelcome one. "He, a republican magistrate, found himself transformed into

51. Franklin, *The Place of Thomas Jefferson in the Expulsion of Spanish Medieval Law from Louisiana* (1942) 16 *Tulane L. Rev.* 319, 336, n. 47, citing Laussat, *Mémoires sur ma vie* (1831) 40; Oudard, *op. cit. supra* note 17, at 272; Oudard, *Four Cents an Acre* (1931) 279.

52. Gayarré, *op. cit. supra* note 5, at 63-67.

53. *Treaty of Cession, op. cit. supra* note 33, at Art. III.

54. Gayarré, *op. cit. supra* note 5, at 71-72.

55. Baldwin, *The Constitutional Questions Incident to the Acquisition and Government by the United States of Island Territory* (1898) *Ann. Rep. Am. Hist. Assn.* 319, 3 Selected Essays on Constitutional Law (*Assn. of Am. Law Schools*, 1938) 463, (1899) 12 *Harv. L. Rev.* 393, 396.

56. Act of Oct. 31, 1803, § 2, 2 Stat. 245. This act, together with the two of Nov. 10, 1803 (2 Stat. 245 and 2 Stat. 247), constituted congressional authorization for the Louisiana Purchase.

an absolute proconsul, in whom centered all the executive, legislative and judicial authority . . . he was to wield these extraordinary powers in maintaining and enforcing the laws and municipal regulations of Spain, which were to remain in vigor until modified . . . , and of which he was entirely ignorant. Not only were they unknown to him, but they were written in a language with which he was not acquainted, and they were thoroughly impregnated with a spirit completely foreign to his inclinations . . . and to the very moral and political training of his mind. Besides he was to construe and to execute those laws in their application or adjustment to the wants of a population of which he knew nothing.⁵⁷ Even had he been more familiar with the Spanish law in principle, it was still not readily available for consultation in fact, in spite of O'Reilly's synopsis some years before; it had been remarked early in our occupation of Louisiana that, though the Spanish laws were good, "the misfortune was that very few of the public officers were acquainted with them. . . . None of them were ever published, except one or two" so that minor officials had to make decisions "according to their conceptions of equity," which was why the Spanish government in Louisiana had been "deemed arbitrary," and military rather than civil in nature.⁵⁸

The French prefect had not had time, in his twenty days of power, entirely to complete his governmental reorganization,⁵⁹ and Claiborne soon discovered that there existed no operating judiciary in the government of which he was the head. On December 30, ten days after taking office, he issued a decree establishing a tribunal of seven judges, which he called the Court of Common Pleas. Its jurisdiction was both civil and criminal, extending to all civil cases not exceeding three thousand dollars in value, and to all criminal cases wherein the punishment would not exceed the sum of two hundred dollars or sixty days in prison. Any one of the judges had summary jurisdiction over all debts under one hundred dollars, with appeal allowed to the court *en banc*. All remaining original jurisdiction, and all appellate jurisdiction from decisions of the

57. Gayarré, *op. cit. supra* note 44, at 2.

58. Stoddard, *op. cit. supra* note 2, at 273.

59. Nevertheless, it is probably too harsh, in view of Laussat's undoubted need for relaxation to recover from his disappointment at the sudden and shocking shrinkage in the scope of his orders, to state, as does one French historian, that "eating, playing, dancing and having fun were the great occupation of Louisiana during the French rule" of this period. (de Villiers du Terrage, *Les Dernières Années de la Louisiane Française* (1903) 428-429). As a matter of fact, Laussat was later praised by Napoleon on the manner in which he had executed the mission entrusted to him in Louisiana. (*Id.* at 429, n. 1.)

Court of Common Pleas, lay in the governor's person itself which, as has been related, contained in combination the most complete ignorance of the laws and languages of both France and Spain, and utter innocence of experience with the people who were to be the parties litigant. All practice was to be in English, and in fact most of the judges appointed were Americans. The governor himself—not even attended, as the Spanish governor had been, by a legal adviser⁶⁰—presided as sole judge in the "Supreme Court" or "Governor's Court" where, knowing no alternative, he applied the "Laws of Justice."

"Louisiana grumbled itself hoarse"⁶¹ in its "revolution . . . against the common law."⁶² "Governor Claiborne fell here as if from the clouds," objected one anonymous dissident,⁶³ "without the least acquaintance with the country, with its inhabitants, with their customs, with their habits, with their very language." Such absolutism and concentration of power had not been seen even under the previous governments; Claiborne, "American and republican" as he was, "must have recoiled at the sight of asiatic despotism with which he was armed."⁶⁴ Indeed, it was true—"At the same time that, as Judge, he could hang his subjects, as intendant he could tax them, and as Governor he could shoot the disobedient. Even under the Spanish despotism appeal might be had to Havana or Madrid, but no appeal lay from Claiborne's judgment seat."⁶⁵ His power was complete as none had been before him; lawmaker, ruler and judge of last resort, he seems to have exercised in his court not only the judicial power of his predecessors, but also the jurisdiction in law and equity of the common law courts.⁶⁶ Claiborne himself, whose "conduct thru'out has been directed by the purest motives of honest patriotism," wrote⁶⁷ at the time that his "measures were rendered necessary by existing circumstances, on strong considera-

60. 2 Martin, *op. cit. supra* note 44, at 246. In fact, the precedent went back much further, for a lawyer had participated with the French Superior Council, as a representative of the King, after 1719. (Dart, *The Place of the Civil Law in Louisiana* (1930) 4 *Tulane L. Rev.* 163.)

61. Dart, *op. cit. supra* note 6, at 40.

62. Dart, *op. cit. supra* note 38, at 84.

63. *Pay Un Louisianais, Esquisse de la Situation Politique et Civile de la Louisiane, etc.* (1804) 21, 22-23.

64. Gayarré, *op. cit. supra* note 5, at 58.

65. 3 Adams, *op. cit. supra* note 48, at 299.

66. Dart, *The History of the Supreme Court of Louisiana* (1913) 133 La. xxx, xxxiii.

67. Letter to Madison, October 26, 1804, 2 *Official Letter Books of W. C. C. Claiborne* (Rowland ed. 1917) 376.

tions of political expediency," which probably states his position as clearly as is possible.

The issue was essentially a justiciable one, but as a practical matter the next step had to be taken by Congress, which took it after only three months of American rule.⁶⁸ This act divided Louisiana into two parts, with substantially the present state of that name becoming the Territory of Orleans, and all the rest being organized as the District of Louisiana. This district was attached for administration to the Territory of Indiana. (In 1805 the district became the Territory of Louisiana;⁶⁹ in 1812 it was made the Territory of Missouri;⁷⁰ in 1819 there was created the Territory of Arkansas.⁷¹ In 1816, the Legislature of Missouri, which at that time controlled the whole Territory, passed a law expressly enacting that the common law, and not the civil, reigned there, and thus the State of Louisiana, and all the rest of the great Purchase, parted juridical company.)⁷² Executive authority under this statute⁷³ still lay in the governor, a position which Claiborne continued to occupy under appointment by the president. The gubernatorial powers, though substantially reduced, remained unusual in comparison with those exercised by the executive officials in the Northwest Territory, and were therefore excessive as judged by the expectations of the Louisianians under the treaty of cession by France. So, too, was judged the provision that the President of the United States had power to appoint the Governor of the Territory, the secretary, judges, the district attorney, the marshal and general officers of the militia.

Legislative power in the colony was vested in the governor and thirteen of the "most fit and discreet persons of the territory," who were to constitute the legislative council, and who were to be appointed annually by the president from among those who held real estate and who had resided at least one year in the Territory. The governor, by and with the advice and consent of the majority of the legislative council, had power to alter, modify, or repeal the laws in force at the time of passage of this Act of Congress. "All rightful subjects of legislation" were within the province of the legislative council, subject only to consistency with the Constitution and Laws of the United States, and to the population's freedom of worship.

68. Act of March 26, 1804, 2 Stat. 283.

69. Act of March 3, 1805, 2 Stat. 331.

70. Act of June 4, 1812, 2 Stat. 743.

71. Act of March 2, 1819, 3 Stat. 493.

72. Mo. Stat. (1815-1816) 32.

73. Act of March 26, 1804, 2 Stat. 283.

However, there was no power in governor or council to dispose of the soil, to tax the lands of the federal government, or to interfere with claims to land within the Territory. The governor himself had power to convene or prorogue the legislative council whenever he deemed it expedient.

Judicial power under the statute lay in a superior court and in such inferior courts and justices of the peace as the territorial legislature might from time to time establish. The superior court, consisting of three judges whose term of office was four years, had jurisdiction in all criminal cases, with that jurisdiction exclusive in capital cases. It had original and appellate jurisdiction in all civil cases of value over one hundred dollars. Provision was made for trial by jury in all criminal cases which were capital, and optionally in all others, and the usual provisions were included making applicable the benefits of habeas corpus, bail, and the prohibition of the infliction of cruel and unusual punishment.⁷⁴ Finally, it was provided that "the laws in force in 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."⁷⁵

The Louisianians were still discontented, however, with the arbitrary powers conferred on the president and his appointees by this act, and especially with the fourth section thereof, which in

74. These latter provisions of the statute, introducing protections which are generally considered as being afforded by the common law, have been recently adduced (together with a good deal of other evidence) as indicating that Louisiana is today no civil law jurisdiction at all, but that she applies the common law pretty much as thoroughly as it is applied anywhere. (Ireland, *op. cit.* supra note 21, at 585-598). This view has been both supported and fiercely resisted, and in defense of the honor of the state as "one of France's proudest daughters" it has been asserted that the writ of habeas corpus, for one, "was known in Rome before England was called England" (Tullis, *Louisiana's Legal System Reappraised* (1937) 12 *Tulane L. Rev.* 113-114), and that the common law owes many generally unacknowledged debts to the law of Rome in the form of legal institutions which probably came to England, as to Spain, from the Roman law through the canonists and the early English judges, who were clerics. (Howe, *Studies in the Civil Law* (2 ed. 1905) 109-130.) The issue is joined also in Greenburg, *Must Louisiana Resign to the Common Law?* (1937) 11 *Tulane L. Rev.* 598, and Daggett, Dainow, Hebert, McMahon, *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana* (1937) 12 *Tulane L. Rev.* 12. The present writer does not presume to lend his feeble strength to either side of this conflict of authorities, even by allowing the possibility of inference, and has only wished to point out that, in 1804, Section 5 of the Act of Congress of March 26 does seem to have brought the writs and rights therein enumerated into effect in approximately the region now constituting the State of Louisiana, in which area it is not recorded that they existed before that time. This is meant as a mere historical and ministerial, rather than as a judicial or jurisprudential, statement.

75. Act of March 26, 1804, § 11, 2 Stat. 286.

effect excluded the natives from any democratic or elective participation in the government.⁷⁶ Meetings of protest were held in New Orleans on June 1, at the beginning of July, and on July 18, 1804;⁷⁷ during the next spring, relief was forthcoming.⁷⁸

The government erected by this statute was organized October 1, 1804, with Claiborne still governor. The legislative council convened for the first time on December 3 of that year and proceeded to enact a body of law of which some still remains a part of the organic law of Louisiana. The Territory was divided into twelve counties, with an inferior court for each. These courts each had a single judge,⁷⁹ who had all the powers previously exercised by the Spanish *commandant*⁸⁰ under the regime of O'Reilly.

Three other very important enactments were made. The first, the Joint Resolution of February 4, 1805,⁸¹ authorized the legislative committee previously appointed, "to draught and report a civil and criminal code" for the Territory, "to employ two counsellors at law, to assist them in draughting the said codes." The second, an act approved April 10, 1805,⁸² consisted of the Code of Procedure prepared by Edward Livingston, a statute which contained the seeds of the later Louisiana Code of Practice and which eliminated complex Spanish forms without adopting cumbersome procedures from the common law, introduced the extraordinary writs and in general established a simple system of written pleading. The third, known as "the Crimes Act of 1805," was adopted on May 4, 1805,⁸³ "for the punishment of crimes and misdemeanors." It was drawn by James Workman who, like Livingston, was a lawyer of common law experience; this statute remained the basic law governing this subject in Louisiana until the enactment of the Code of Criminal Procedure in 1928.⁸⁴

The joint resolution authorizing the creation of a civil and criminal code resulted in the preparation of the proposed Code of 1806, which was immediately vetoed by Governor Claiborne. Discussion

76. See letter, Laussat to Décrés, 18 germinal an xii (April 7, 1804) in Robertson, *op. cit. supra* note 37, at 55.

77. Gayarré, *op. cit. supra* note 44, at 17; Fortier, *op. cit. supra* note 45, at 16.

78. See p. 367 et seq., *infra*.

79. La. Acts 1804, c. XXV, pp. 144-145, 148-149.

80. *Id.* at c. XLIV, pp. 388-389.

81. *Id.* at pp. 458-459.

82. *Id.* at c. XXVI, pp. 210-261.

83. *Id.* at c. L, pp. 416-455.

84. Arts. 1-583, La. Code of Crim. Law and Proc. of 1928.

of this, at the time, excited a great deal of furore.⁸⁵ The Code as prepared was a system of private law based neither on the American common law nor on the Code Napoléon which had in 1804 been promulgated in France, but rather essentially on the principles of Spanish medieval law. And, if it is true that slavery was the main cause of Claiborne's troubles during his early years as governor of the Territory of Orleans,⁸⁶ the history behind this proposed code may furnish an illuminating illustration.

Legally, it would appear to be correct to hold that, at this time, the Spanish system of law furnished the source of the general residual Louisiana law.⁸⁷ Nevertheless, the position of the Louisiana French was, at the least, paradoxical and self-contradictory.⁸⁸ In their *Remonstrance*⁸⁹ submitted to the Senate of the United States on December 31, 1804, the Louisianians not only requested statehood for their Territory in the name of the Treaty of Cession and of "the laws of nature . . . your declaration of independence . . . your constitution . . . the writings of your revolutionary patriots and statesmen." They did not omit, also, to object to "Taxation without representation," and to ask whether "political axioms on the At-

85. Letters to Madison, 3 Official Letter Books, etc., op. cit. supra note 67, at 305-306, 309-310, 313.

86. See Dart, *Slavery in Louisiana* (1924) 7 La. Hist. Q. 333, and Andry, *Histoire de la Louisiane* (1882) 93.

87. This is consistent with prevailing modern legal opinion on the subject, since the Spanish law promulgated by O'Reilly in 1769 had never been superseded by the deliberate abrogation required in international law on the cession of territory to a new sovereign, except only to the extent required by consistency with the Constitution and laws of the United States. Agreement that this was the situation in Louisiana at the time now under discussion is voiced by Wigmore, *Louisiana: The Story of its Legal System* (1916) 1 So. L. Q. 1, 2; and by Dart, op. cit. supra note 38, at 86; and is in accord with later court decisions on the question (e.g., *Beard v. Poydras*, 4 Mart. (O. S.) 348, 368 (La. 1816); *Berlucaux v. Berlucaux*, 7 La. 539, 543 (1835); *Pecquet v. Pecquet's Executor*, 17 La. Ann. 204, 227 (1865). See notes 114, 119, 120, 157, 161, 163, infra.) See also *Murray v. Gerrick & Co.*, 291 U. S. 315, 319, 54 S. Ct. 432, 434, 78 L. Ed. 821, 824 (1934); *Panama R. R. Co. v. Bosse*, 249 U. S. 41, 44, 39 S. Ct. 211, 212, 63 L. Ed. 466, 469 (1919); *Vilas v. City of Manila*, 220 U. S. 345, 357, 31 S. Ct. 416, 419, 55 L. Ed. 491, 496 (1911); *Ortega v. Lara*, 202 U. S. 339, 342, 26 S. Ct. 707-708, 50 L. Ed. 1055, 1056 (1906); *United States v. Chaves*, 159 U. S. 452, 459, 16 S. Ct. 57, 59, 60, 40 L. Ed. 215, 218 (1895); *Chicago, R. I. & Pac. Ry. Co. v. McGlinn*, 114 U. S. 542, 546-547, 5 S. Ct. 1005, 1006-1007, 29 L. Ed. 270, 271-272 (1885); *United States v. Perot*, 98 U. S. 428, 430, 25 L. Ed. 251, 252 (1878); *Fremont v. United States*, 58 U. S. 542, 556, 15 L. Ed. 241, 245 (1851); *Strother v. Lucas*, 37 U. S. 410, 436, 438, 9 L. Ed. 1137, 1147, 1148 (1838); *American Insurance Co. v. Canter*, 26 U. S. 511, 542, 7 L. Ed. 242, 255 (1828). See also 3 Beale, *Cases on Conflict of Laws* (1900-1902) Summary §§ 9, 10; Beale, *Treatise on the Conflict of Laws* (1916) § 131; 1 Hackworth, *Digest of International Law* (1940) 527-539; 1 Hyde, *International Law* (1945) 397-400, § 122; Saunders, *Revised Civil Code of Louisiana* (Marr's Saunders 1920) vii, viii-x; citing Jefferson, Taylor, *International Public Law* (1901) 609-610; Langdell, *The Status of Our New Territories* (1899) 12 Harv. L. Rev. 387-388.

lantic become problems when transferred to the shores of the Mississippi? . . . we may . . . be told that we are incapable of managing our own concerns . . . and that when, in the school of slavery, we have learned how to be free, our rights shall be restored. . . ." The petitioners added, with somewhat ingenuous virtue, a complaint that "The African trade is absolutely prohibited . . ." Within a week, on January 5, 1805, in a similar remonstrance by upper Louisiana to the House of Representatives,⁹⁰ statehood, slavery and other "rights" were likewise demanded in the name of republican principles.

Their stand was very severely attacked, especially by Thomas Paine, who wrote against the author of the pamphlet, "some person who is not of your people,"⁹¹ that "his making *our* merits in that Revolution the ground of *your* claims, as if *our* merits could become *yours*, shows he does not understand *your* situation. . . ." He approved "the principles of liberty it contains, considered in the abstract. . . . Instead of their serving you as a ground of reclamation against us, they change into a satire on yourselves. Why did you not speak thus when you ought to have spoken it? We fought for liberty when you stood quiet in slavery. . . . You are arriving at freedom by the easiest means that any people ever enjoyed it; without contest, without expense, and even without any contrivance of your own. And you already so far mistake principles, that under the name of *rights* you ask for *powers*; *power to import and enslave Africans*; and *to govern* a territory that *we* have purchased. . . . You speak . . . as if the territory was purchased that *you* exclusively might govern it. . . . You . . . petition for *power*, under the name of *rights*, to import and enslave Africans! *Dare you put up a petition to heaven for such a power, without fearing to be struck from the earth by its justice? Why, then, do you ask it of man against man? Do you want to renew in Louisiana the horrors of Domingo?*"⁹²

88. This is so even with their insistence on the historical justification of the de jure effectiveness of the Spanish law for, as Saunders remarks, "It is very probable that, after the law of Spain had been recognized and declared by the United States to be the law of the Colony, it was much more accurately and fully enforced by the Territorial Courts than it had ever been by the Courts existing during the Spanish regime." Saunders, *op. cit. supra* note 87, at x.

89. Remonstrance of the People of Louisiana, Ann. Cong. 8th Cong., 2nd Sess. (1852) 1597-1607.

90. *Id.* at 1608-1619.

91. I.e., that non-Louisianian, Edward Livingston. In fact, however, there had been three other men, Louisianians, on the drafting committee with him. Fortier, *op. cit. supra* note 45, at 17.

92. Paine, *To the French Inhabitants of Louisiana* (1804) 10 *The Life and Works of Thomas Paine* (Van der Weyde's ed. 1925) 177-182.

The deeper significance which lay behind this attempted adoption of the Spanish medieval system, and the rejection both of the French revised code and the Anglo-American common law, cannot be discussed at greater length here; it may be mentioned, however, that at least one author has regarded it as following a scheme first conceived by Talleyrand, whereby there would be introduced a puissant and disruptive force which would smash American unity and scatter its economic and political interests to create a milieu in which the foreign ambitions of Napoleonic imperialism could after all be realized.⁹³ Certainly the Louisianians were quite incensed over Claiborne's veto of their proposed legal system, and a motion that the legislature dissolve itself in protest was narrowly defeated.⁹⁴ "They separated, however, & have disseminated all the discontent they could."⁹⁵

The discontented population was finally afforded some relief when Congress enacted the Act of March 2, 1805,⁹⁶ which authorized the president to establish in the Territory of Orleans a form of government similar to that then existing in the Territory of Mississippi, and provided that the inhabitants of Louisiana should enjoy all the rights, privileges and advantages protected by the Northwest Ordinance of July 13, 1787.⁹⁷ The act further provided that the people of the Territory should be authorized to form a constitution and state government as soon as a census showed that it had sixty thousand inhabitants. The Governor of the Territory was required to cause to be elected twenty-five members to the House of Representatives; under the act, the General Assembly of Louisiana was established to consist of this house and a legislative council, which

93. Franklin, *The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806* (1942) 16 *Tulane L. Rev.* 514, 545. See also Barbé-Marbois, *op. cit. supra* note 4, at 183; Lyon, *op. cit. supra* note 31, at 112, 114, 126, 134; Lauvriere, *op. cit. supra* note 34, at 416-417. For contemporary comment on Napoleon's designs in Louisiana, see, e.g., Brown, *An Address to the Government of the United States on the Cession of Louisiana to the French, etc.* (1803) 83 and Orr, *The Possession of Louisiana by the French, Considered, etc.* (1803) 13, 43-45. Lauvriere (*id.* at 421) indicates that many plans were later laid in New Orleans to get Napoleon out of exile.

94. Letters to Madison, 3 *Official Letter Books, etc.*, *op. cit. supra* note 67, at 309 and 319.

95. Jefferson's letter to John Dickinson, Jan. 13, 1807, 9 Ford, *op. cit. supra* note 1, at 9.

96. 2 Stat. 322 (1805).

97. Documents Illustrative of the Formation of the Union of the American States (69th Cong., 1st Sess., H. Doc. No. 398, 1927) 47; 32 *Journals of the American Congress 1774-1789* (1936) 334; 4 *Journals of the American Congress 1774-1788* (1823) 752. Expressly excluded, however, were those provisions of that Ordinance which regulated descent and the distribution of estates (paragraph 2) and which prohibited slavery (Article 6 of the Compact). Documents, etc. 48, 54; 32 *Journals, etc.* 334, 343; 4 *Journals, etc.*, 35c. 752, 754.

was composed of five persons chosen by the president out of ten nominees submitted to him by the house.⁹⁸ The judiciary remained unchanged. This Act of Congress was bitterly criticized in some quarters as establishing a program slower than that to which the Louisianians were entitled under the treaty of cession, but it was certainly a long step forward.

The first legislature to meet under this act convened in New Orleans on March 25, 1806. The legal situation in Louisiana at this time was obscure and vexing; and it was, indeed, destined to become within the next two decades even more confounded and perplexing. It was later remarked that "Up to this time, our courts had the most singularly ridiculous aspect"⁹⁹ and reference was made to the necessity for removing "the oppression, the reproach, the absurdity of being governed by laws, of which a complete collection has never been seen in the state, written in languages which few, even of the advocates or judges, understand, and so voluminous, so obscure, so contradictory, that human intellect however enlarged, human life however prolonged would be insufficient to understand, or even to peruse them."¹⁰⁰ It must be admitted, nevertheless, that, quite apart from the sympathies of the populace, substitution of the common law would have been at least as bad, for, as Livingston later wrote: "The framers of our [Louisiana] Constitution had been witnesses to, and had participated in the anxiety and dismay that pervaded the whole community when an attempt was made, in the earliest stage of our political connexion with the United States, to take advantage of an ambiguous expression in the ordinance given for our government, in order to introduce a new system of jurisprudence, totally unknown to, and the knowledge of which was unattainable by the people of the territory. They dreaded the common law of England. They feared another attempt to introduce it. Their escape was too recent not to make them apprehend that in future times the struggle might be renewed. They wisely thought that to be free, a people must know the laws by which they were governed. They were aware of the difficulty, nay, the utter impossibility of this knowledge being acquired when the law was unwritten, or if written, dispersed through hundreds of volumes in a language unknown to three-fourths of their constituents. They saw the danger

98. Cf. Documents, etc., supra note 97, at 48-49; 32 Journals, etc., supra note 97, at 336-337; 4 Journals, etc., supra note 97, at 753.

99. Gayarré, op. cit. supra note 5, at 104.

100. Livingston, Report of the Commission on Revision of the Louisiana Civil Code (1823) 9.

of permitting a particular class of men to become the sole depositaries of this knowledge, and the sole interpreters of the laws; and they did everything that prudent foresight could do to prevent these evils."¹⁰¹

The first step that this "prudent foresight" guided them to take was a well-advised one, being the enactment of the memorable Resolution of June 7, 1806, authorizing the preparation of "a Civil Code for the use of the territory" by James Brown and Louis Moreau-Lislet, and providing that "the two jurisconsults shall make the civil law by which the territory is now governed, the ground work of said code." They were to work in cooperation with a committee of the legislature, which committee was composed of four members of the House of Representatives and two from the legislative council.¹⁰²

There was dire need for such a codification and clarification. The congressional enactment of 1804¹⁰³ had created a superior court of three judges, but difficulty had been met in filling the bench. In October, 1804, the president had organized the court by the appointment of Duponceau, Kirby and John B. Prevost as judges. The first declined; the second died while en route to take his seat; the third accepted and served and was, therefore, the first judge of the first Appellate Court of Louisiana. He was not, indeed, a Louisiana Frenchman, but rather a lawyer holding a small judicial position in New York City; the actual organization of the Superior Court of Orleans Territory had to await his arrival from that place, and did not occur until November 5, 1804.¹⁰⁴ Very shortly after his arrival he was confronted with a case calling for a decision as to what was the intention of Congress on the subject of the law of the land when Louisiana passed to the United States. The court—with Prevost as its only judge—held that "the law in force in the Territory" within the intent of that statute (the Act of October 31, 1803) was the civil law of Spain. Soon after, when the court was fully constituted, the question was reargued by "all the best lawyers in New Orleans" before Judge George Mathews, also an "American," but

101. Livingston, Introductory Report to the System of Penal Law, in his *A System of Penal Law for the State of Louisiana* (1833) 77. See also his concluding argument in *Cottin v. Cottin*, 5 Mart. (O. S.) 93, 104 (La. 1817).

102. La. Acts 1806, pp. 214-215.

103. 2 Stat. 283 (1804).

104. Dart, *op. cit. supra* note 66, at xxxiii.

the decision was the same.¹⁰⁵ It was against this background that Moreau-Lislet and Brown began their labors.

While they were working on their rather formidable project, the Legislature of 1807 convened, and reorganized the lower judiciary of the Territory by their Act of March 31, 1807.¹⁰⁶ By this act the counties and county courts set up in 1804 were abolished, and replaced by a division of the Territory into parishes, and a system of parish courts with one judge per parish. This judge was given civil and criminal jurisdiction, and probate and other powers.¹⁰⁷ This system, in fact, very largely followed O'Reilly's organization of 1769.

It was 1808 when the two "jurisconsults" were prepared to submit the fruit of their labors. Their report as Code Commissioners, a "Digest of the Civil Laws now in force in the territory of Orleans," was approved by the legislature and signed by the governor on March 31, 1808.¹⁰⁸ It is now commonly referred to as the Old Code, or the Code of 1808.

It may be wondered, why the proposed Code of 1808 secured the approval of Governor Claiborne, while the proposed Code of 1806, just two years earlier, had been altogether unable to obtain his acquiescence. The reasons lay in two places—in Claiborne himself, and in the code. Claiborne's initial attitude toward the Louisianians had undergone a change as he had come better to understand the people whose governor he was, and he had come to have increased acceptance for them and respect for their ability to participate in their own government. Further, the code with which he was called upon to deal in 1808 was quite different from the proposed Code of 1806.¹⁰⁹ They were both based on the "civil law,"

105. 1 *Projet of the Civil Code of 1825* (1 *La. Legal Archives* 1937) vi-vii; Dart, *op. cit. supra* note 60, at 168; Dart, *op. cit. supra* note 38, at 85-86; Franklin, *op. cit. supra* note 93, at 548. Franklin says of Prevost that his "training did not entitle him to judge any legal question." No printed reports for Louisiana courts are available for these decisions; the earliest volume, 1 *Martin's Reports* (Old Series), printed in 1811, begins with the decisions of the Fall Term of 1809. See Tucker, *Source Books of Louisiana Law, Part IV—Constitutions, Reports and Digests* (1935) 9 *Tulane L. Rev.* 245, 262, and Dart, *op. cit. supra* note 66, at xxxiv.

106. *La. Acts* 1807, c. I, pp. 2-53.

107. *Id.* at 10-15, 14-17, 22-25.

108. *La. Acts* 1808, c. XXIX, pp. 120-128.

109. Claiborne has considered the proposed Code of 1806 "useless and . . . injurious." (Letter to Julien Poidrass, 3 *Official Letter Books, etc.*, *op. cit. supra* note 67, at 315.) His reasons for approving the proposal of 1808 appear in two letters he wrote to Madison, on April 3 and April 5, respectively, in 1808, wherein he praises this Digest as "of infinite service to the magistrates and

it is true, but on two very different kinds of civil law. Where the earlier document had been in principle a digest of medieval Spanish law, the later code was based on the codification of French law which Napoleon had introduced in 1804 and of which the main inspiration had been the French Revolution and its aftermath. This was a far-reaching difference; it has been asserted that the defeat of the Spanish legal system of 1806 and the promulgation of this Code of 1808, which was based essentially on modern French legal thought "consecrated the victory of Jefferson and the French revolution over the reactionary colonial legal ideas of Napoleon and over the Louisiana slave holders who two years before had rejected the *code civil francais* as 'foreign'; and this success also forecast the legal history of the entire Latin-American world."¹¹⁰ It did not please the "Spanish" faction in Louisiana, certainly, although it did not fully please the others either; indeed, new confusion was introduced when it was argued, and frankly admitted, that the Digest was based not on Spanish law at all, but on the French law as codified by Napoleon.¹¹¹

The issue had not yet been finally resolved. The enabling statute had provided "That whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable with them, is hereby abrogated."¹¹² The loophole left was very large indeed. After all, a code should be designed to be "a complete body of law intended to supersede all the other law" within its orbit,¹¹³ and the very object of its enactment is to make it neither necessary nor proper to go outside it, to look at previous statutes, in ascertaining the law.¹¹⁴ A provision like the one enacted is an "inadvertence" in draftmanship—"Such a precaution is entirely useless; the principle of tacit abrogation suffices; it is speaking and saying nothing."¹¹⁵ It accomplished nothing that would not have been equally well accomplished by its omission.¹¹⁶ It were far sounder practice, cer-

the citizens." (Letters to Madison, 4 Official Letter Books, etc., op. cit. supra note 67, at 168-169.

110. Franklin, op. cit. supra note 93, at 558-559.

111. Dart, op. cit. supra note 38, at 87.

112. La. Acts 1808, c. XXIX, § 2, pp. 126-127.

113. 2 Austin, Lectures on Jurisprudence (4 ed. 1873) 689; Capitant, Introduction à l'étude du droit civil (3 ed. 1912) 64.

114. Lord Halsbury, L. C., in Bank of England v. Vagliano Bros. [1891] A. C. 107, 120.

115. 1 Planiol, Traité élémentaire de droit civil (11 ed. 1928) 95, 1 id. (Ripert ed. 1943) at 105; Succession of Dupre, 116 La. 1090, 1093, 41 So. 324 (1906); Tracy v. Tuffley, 134 U. S. 206, 217-218, 10 S. Ct. 527, 531, 33 L. Ed. 879, 884 (1890).

116. 2 Martin, History of Louisiana (1829) 291.

tainly, if a legislature is not abrogating all previous laws in a code, to state specifically which statutes are still left in effect.¹¹⁷ Nevertheless, the balance in the struggle over what system of law should prevail in Louisiana had swung definitely away from the common law, and thus it came to pass that "out of the whole wide territory of the cession in which the Civil Law had ruled for a hundred years, the triumphant Common Law was stopped only at the Territory of Orleans, and the ancient usages and privileges of the people were reestablished and perpetuated in what is now the Civil Code of Louisiana."¹¹⁸ The "ancient"—or, more accurately, the medieval¹¹⁹—usages had indeed not been done away with by the Code of 1806, for within four years after its passage the Louisiana Supreme Court held that it was "but a digest of the civil law, which regulated the country under the French and Spanish monarchs."¹²⁰ And the court further held, in 1817, that of the Spanish law, "such parts . . . only are repealed, as are either contrary to, or incompatible with the provisions of the code."¹²¹

By this time, the Territory of Orleans was standing on the groundsel and hammering at the portals of statehood. The Louisianians had celebrated July 4, 1806, with "a degree of patriotism which afforded . . . pleasure" to Governor Claiborne,¹²² and the Census of the Marshal of the United States showed the population of the Territory in 1810 to be 76,556,¹²³ not including the western, or "Florida" parishes, east of the Mississippi. (In this latter area, the "American" inhabitants had arisen in revolt against the Spanish authority, overcome the garrison at Baton Rouge and, on September 26, 1810, declared their independence as the Republic of West Florida.¹²⁴ Shortly thereafter, following a brief interregnum, that area east of Pearl River was incorporated with the other part of the State

117. Examples of the correct practice are cited in Wilson, *The Effect of the Louisiana Code of Civil Procedure upon Prior Statutes Relating to Criminal Procedure* (1931) 6 *Tulane L. Rev.* 135, 136, n. 10, n. 11, n. 12.

118. Dart, *op. cit. supra* note 6, at 58.

119. For instance, the Council of Trent, held in the years 1545-1563, was never in effect in Louisiana—but this was not decided until 1846. *Patton v. The Cities of Philadelphia and New Orleans*, 1 *La. Ann.* 98, 103 (1846).

120. *Hayes v. Berwick*, 2 *Mart. (O. S.)* 138, 140 (*La.* 1812).

121. *Cottin v. Cottin*, 5 *Mart. (O. S.)* 93, 94, 104 (*La.* 1817).

122. Letter to Henry Dearborn, 3 *Official Letter Books, etc.*, *op. cit. supra* note 67, at 353.

123. U. S. Census Office, 3rd Census (1810) 1, 82. This was more than Delaware's 72,674 and comparable with Rhode Island's 76,931. Metropolitan New Orleans had grown to 17,242, more than double its population of seven years before. (*Ibid.*; see note 5, *supra*.)

124. 2 Monette, *History of the Discovery and Settlement of the Valley of the Mississippi* (1846) 487; Bailey, *A Diplomatic History of the American People* (1941) 162-164.

of Louisiana.)¹²⁵ On April 30, 1812—the ninth anniversary of the Treaties of Paris—the Territory of Orleans was admitted into the Union as the State of Louisiana.¹²⁶

The fight over Louisiana's admission was a most bitter one. It was the first time that the question had come up with reference to territory not "indigenously" American as of 1783, and the constitutional questions raised were argued the more passionately because of the socio-political differences in origin and history between the Louisiana-French Creoles and the Anglo-Americans of the United States. The view was very widely held that, in any case, the Louisianians were unfit and incapable in the task of governing themselves; it was remarked, for instance, by John Adams, apropos of Francisco de Miranda's plan for the liberation of Spanish America generally, that "it would be equally sensible to talk of establishing democracies among the birds, beasts, and fishes."¹²⁷ The opposition was led by Josiah Quincy of Massachusetts, who in his defiant speech of January 14, 1811, proclaimed that "sir, while there is life there is hope. So long as the fatal shaft has not yet sped, if Heaven so will it, the bow may be broken, and the vigor of the mischief-mediating arm withered . . . If this bill passes . . . it is virtually a dissolution of this Union . . . it will free the States from their moral obligation, and, as it will be the right of all, so it will be the duty of some, definitely to prepare for a separation, amicably if they can, violently if they must . . . This Constitution never was, and never can be strained to lap over all the wilderness of the West . . . It was never constructed to form a covering for the inhabitants of the Missouri, and the Red River country. And whenever it is attempted to be stretched over them, it will rend asunder . . ." ¹²⁸ He went on to enunciate so vigorously his views and possible future recommendations on the secession of New England that debate was for a time side-tracked to the question of "whether it was consistent with the propriety of debate . . . for any member to use arguments going to dissolve the Government, and tumble

125. Act of April 14, 1812, 2 Stat. 708; La. Acts 1812, pp. 4-7. See Tullis, *The Louisiana Civil Law, in the Light of Its Origin and Development* (1938) 2 U. of Toronto L. J. 298, 304. For a discussion of whether this area already belonged to the United States by virtue of the Louisiana Purchase, see Skipwith, *op. cit. supra* note 4, and documents in 7 State Papers and Public Documents of the United States (2 ed. 1817) 478-488.

126. Enabling Act of February 20, 1811, 2 Stat. 641; Act of Admission, April 8, 1812, 2 Stat. 701.

127. Whitaker, *op. cit. supra* note 39, at 240.

128. Ann. Cong., 11th Cong. 3rd Sess. 526, 538.

this body itself to dust and ashes."¹²⁹ Finally, however, the bill to admit the Territory of Orleans as a state was passed, and was approved February 20, 1811,¹³⁰ while Josiah Quincy's speech remained on the records to be evaluated by Theodore Roosevelt in his statement that "The Jeremiads of the Federalist leaders in Congress were the same in kind as those in which many cultivated men of the East always indulged whenever we enlarged our territory."¹³¹

The Louisiana State Constitution of 1812 was largely derived from the Kentucky Constitution of 1799,¹³² but contained also a provision, said to have been inserted at the instigation of the wealthy and powerful Creole, Bernard Marigny,¹³³ that "The existing laws in this Territory, when this Constitution goes into effect, shall continue in force until altered or abolished by the Legislature: Provided, however, That the Legislature shall never adopt any system or code of laws by a general reference to the said system or code, but in all cases shall specify the several provisions of the laws it may enact."¹³⁴ With this safeguard the adherents of the civil law could believe, with Livingston, that "Foreign laws can no longer be imported by the package or described in the act of introducing them, as goods are in the bill of lading, 'contents unknown'."¹³⁵

At the time the Constitution of 1812 was adopted, the members of the Superior Court of the Territory were George Mathews, Joshua Lewis and Francois-Xavier Martin, sitting under presidential commissions. These judges held, in response to an inquiry from the State Senate, that, upon the admission of Louisiana to statehood on May 1, 1812, their responsibilities as territorial judges had terminated and they had accordingly resigned to the President of the United States, but that they had, nevertheless, under the new State Constitution, continued in office as judges of the Superior Court of the State.¹³⁶ Their able argument on the constitutional point involved

129. *Id.* at 526; Gayarré, *op. cit.* supra note 44, at 249, 250-252, 262-264.

130. 2 Stat. 641 (1799).

131. Roosevelt, *op. cit.* supra note 46, at 283.

132. Tucker, *op. cit.* supra note 105, at 244, 245.

133. Dart, *op. cit.* supra note 6, at 48; Ireland, *op. cit.* supra note 21, at 587; Marr, *The Necessity of a Criminal Code for Louisiana* (1929) 4 *Tulane L. Rev.* 18.

134. La. Const. (1812) Art. IV, § 11. This provision has since been retained, in one form or another, in subsequent constitutions of the state: La. Const. (1845) Tit. VI, Art. 120; La. Const. (1852) Tit. VI, Art. 117; La. Const. (1864) Tit. VII, Art. 120; La. Const. (1868) Tit. VI, Art. 116; La. Const. (1879) Art. 31; La. Const. (1898) Art. 33; La. Const. (1913) Art. 33; La. Const. of 1921, Art. III, § 18.

135. Wigmore, *Louisiana: The Story of Its Legal System* (1916) 1 *So. L. Q.* 1, 7, n. 10.

136. 2 *Mart. (O.S.)* 161 (La. 1812).

is "one of the unusual things in the literature of the law."¹³⁷ The Supreme Court of Louisiana held its first session in March, 1813, with three Judges sitting: Dominick A. Hall, appointed February 22, 1813; George Mathews, appointed the next day; and Pierre A. C. B. Derbigny, named on March 8. By seniority of commission, Hall became the first judge of the Supreme Court of Louisiana, and served until July 3, 1813, when he resigned to accept appointment as United States District Judge and Mathews succeeded to the office of presiding judge. For almost two years, Senate opposition blocked confirmation of a third judge to fill the vacancy, and five nominations were rejected before, on February 1, 1815, Francois-Xavier Martin, who had been attorney-general of the state, attained the position.¹³⁸

The judicial decision of July, 1817¹³⁹ that the Civil Code of 1808 was only a "digest of the civil laws which were in force in this country, when it was adopted," and that "those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them," had given rise to confusion almost limitless and litigation inexhaustible. In practice, the code could only be used as an incomplete digest of existing laws, which still retained their original force; indeed, their exceptions and modifications were held to qualify several clauses by which former principles had been absolutely stated. "Thus, the people found a decoy, in what was held out as a beacon."¹⁴⁰ The *Fuero Juzgo*, the *Fuero Viejo*, the *Fuero Real*, the *Recopilacións*, the *Siete Partidas*, various *Cédulas*, the Spanish jurisprudence in general,¹⁴¹ the Custom of Paris and pre- and post- Revolutionary French law, the United States and Louisiana Constitutions, acts of the Federal Congress, various legislative enactments of the Territory and state, including the Digest of 1808, were inextricably mixed and entangled in a baffling melange of legal perplexity and uncertainty. It was impossible to know which codes, or what parts of them, had the force of law; worse still, copies of the older codes were rare; there was nowhere to be found a complete collection of all of them, and of some, not even a single copy. Yet all of them, whether old or

137. Dart, op. cit. supra note 6, at 47; Dart, op. cit. supra note 66, at xxxvi.

138. Gayarré, op. cit. supra note 44, at 316-319, 390.

139. Cottin v. Cottin, 5 Mart. (O. S.) 93, 94, 104 (La. 1817).

140. Martin, op. cit. supra note 28, at 344.

141. And "One remarkable feature in the legislation of Spain should not be overlooked, to wit, that at no time was any attempt made, upon the promulgation of a new code, to abrogate the old one." Schmidt, *The Civil Law of Spain and Mexico* (1851) 88.

new, whether rare or plentiful, were still as potent rules of conduct, so far as they were in force, as the most recent and public proclamation. The institutions of the two systems, which differed in parentage as well as in language, were mutually repugnant and not easily reconciled. Some of the more ancient laws—which were clearly technically still in force—were absurd or loathsome according to modern notions.¹⁴² Torture, for instance, was clearly permitted as a means of inducing the giving of testimony,¹⁴³ and Livingston wrote that “the judge is directed to select for this operation of cruelty and horror, the youngest, the most delicately framed, the most tenderly educated, and—is this an earthly or a hellish code that I am reviewing?—where there is a father and a son, to rack the limbs of the child in the presence of the parent. . . .”¹⁴⁴

On March 3, 1819,¹⁴⁵ the Louisiana Legislature appointed a committee of Pierre Derbigny, Stephen Mazureau and Edward Livingston to examine the work prepared by Louis Moreau-Lislet and Henry Carleton, a “translation of such parts of the Partidas as are considered to have the force of law in this State.” But the translators had found the task of selection beyond their capabilities, and their translation contained “all those laws which have not been expressly repealed by the legislature, or which are not repugnant to the Constitution of the United States, or to that of this state, leaving it to the proper tribunals to determine whether they are in force or not.”¹⁴⁶

Their work was never adopted, although distribution of it was authorized on February 26, 1822,¹⁴⁷ and a new team of three juriconsults (Pierre Derbigny, Louis Moreau-Lislet and Edward Livingston) was immediately (March 14) authorized to “revise the Civil Code by amending it as they will deem it advisable, and by adding . . . such of the laws as are still in force and not included therein, . . . to add . . . a complete system of the commercial laws in force in this state together with the alterations they will deem proper to make thereto and a treatise on the rules of civil actions and a system of the practice to be observed before our courts.”¹⁴⁸

142. Martin, *op. cit. supra* note 28, at 344-345; Wigmore, *op. cit. supra* note 135, at 86, 7-8.

143. Partida the Seventh, Title XXX (Scott transl. 1931) 1458; Laws I-IX (Id. at 1458-1462) thereunder discuss the benefits of torture, and give directions for its application.

144. Livingston, *op. cit. supra* note 101, at 70.

145. La. Acts 1819, pp. 44-47.

146. 1 Moreau-Lislet and Carleton, *op. cit. supra* note 26, at xxiv.

147. La. Acts 1822, pp. 20-21.

148. La. Acts 1822, pp. 108-109.

This committee presented its *projets* on March 22, 1823, and, after elaborate consideration and discussion, the Civil Code and the Code of Practice were adopted by the legislature on April 12, 1824,¹⁴⁹ and ordered printed in French and English. The Code of Commerce was never adopted, and such a code remains absent from Louisiana legislation to this day; in its absence, the Law Merchant of the common law has come to govern commercial transactions in the state.¹⁵⁰

The Code of Practice of 1825 took effect on October 2 of that year. Combining Roman, Spanish, French and Anglo-American elements, it maintained certain common law writs already introduced into the state, but omitted the provision of the Code of 1805 that "said writs shall pursue the forms, and be conducted according to the rules and regulations prescribed by the common law."¹⁵¹ The Supreme Court of Louisiana thereupon early held that the common law terms "ought to be considered rather as a translation of the name formerly used than as emanations from the English jurisprudence," and that "their adoption as words" could not be considered as "having introduced the English practice itself."¹⁵² But the same court later recognized the common law derivation of a great part of this Code of Practice, and turned to the common law to decide points not covered by the code.¹⁵³

The Civil Code of 1825 took effect on June 20 of that year (June 15, in West Feliciana parish).¹⁵⁴ This code was, in theory, a revision or amendment of the Digest of 1808, but was in fact substantially a reproduction of the French Civil Code, expanded by the developments of jurisprudence and doctrine, especially the comments of Robert Joseph Pothier, Jean Domat and Christophe B. M. Toullier, and altered to conform to local circumstances and relations.¹⁵⁵ This code provided that ". . . the Spanish, Roman and French laws, which were in force in this State, when Louisiana was

149. La. Acts 1824 (Sixth Legislature) pp. 172-179.

150. *Wagner v. Kenner*, 2 Rob. 120, 122-217 (La. 1842); Saunders, *op. cit. supra* note 87, at xiv; Howe, *Studies in the Civil Law* (2 ed. 1905) 139; Cross, *The Eclecticism of the Law of Louisiana: Etc.* (1921) 55 Am. L. Rev. 405, 413; Bailey, *The Commercial Law in Louisiana* (1930) 4 Tulane L. Rev. 267, 269-273.

151. Orleans Territory Acts 1804, c. XXVI, § 22, pp. 258-261.

152. *Abat v. Whitman*, 7 Mart. (N.S.) 162, 164 (La. 1828); *Agnes v. Judice*, 3 Mart. (O.S.) 182, 185-186 (La. 1813).

153. Tucker, *op. cit. supra* note 22, at 86; Ireland, *op. cit. supra* note 21, at 590, and cases there cited; Eustis, C. J., in *Succession of Franklin*, 7 La. Ann. 395, 418 (1852).

154. *L'Eglise v. Brenton*, 3 La. 435, 436 (1832).

155. Tucker, *Source Books of Louisiana Law, Part I—Civil Code* (1932) 6 Tulane L. Rev. 280, 289; Dart, *op. cit. supra* note 60, at 175.

ceded to the United States, and the acts of the Legislative Council, of the Legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code."¹⁵⁶

Still the Spanish law died hard. Despite the apparent sweeping effect of this repeal, the Louisiana Supreme Court soon nimbly held that all provisions of the old code not superseded by new provisions or expressly modified or suppressed were still in force.¹⁵⁷ The discussion was sought to be closed in March of 1828 by the repeal of all of the Code of 1808, excepting only a small part (Title 10 of Chapter III, treating of the dissolution of corporations or communities),¹⁵⁸ and by an act providing "that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated. . . ."¹⁵⁹ The court then held that, even though the cited Spanish law in issue was not tacitly abrogated by the Code of 1808 or by that of 1825, the Act of 1828 had effectively repealed the whole body of Spanish law that had remained in force after the promulgation of the Code of 1808.¹⁶⁰ Nevertheless, the same court still held in 1839 that the repeal could apply only to that law which the legislature itself had enacted, embracing only the "positive, written, or statute laws" of Spain, Rome, France and Louisiana, and "only such as were introductory of a new rule," rather than "merely declaratory," and that "the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice."¹⁶¹ In 1841 the court held that the two Acts of 1828 had not affected at least the code of that year.¹⁶² So tenacious has been the hold of the civil law that it has been held that the principles, the natural law, of the old law were not intended to be repealed.¹⁶³ ". . . even at this late day some ancient principle of that [the Span-

156. La. Civil Code of 1825, Art. 3521; 3 Louisiana Legal Archives, Compiled Edition of the Civil Codes of Louisiana, Part II (1942) 2039-2040.

157. *Flowers v. Griffith*, 6 Mart. (N.S.) 89 (La. 1827).

158. La. Acts 1828 (Eighth Legislature) No. 40, pp. 66-67.

159. La. Acts 1828 (Eighth Legislature) No. 83, § 25, pp. 160-161.

160. *Handy v. Parkinson*, 10 La. 92, 98-99 (1836); *Wardens of Church of St. Louis of New Orleans v. Blanc, Bishop*, 8 Rob. 51, 86-90 (La. 1844).

161. *Reynolds v. Swain*, 13 La. 193, 198 (1839).

162. *Waters v. Petrovic & Blanchard*, 19 La. 584, 591 (1841).

163. *Tucker*, op. cit. supra note 155, at 291; *Reynolds v. Swain*, 13 La. 193, 198 (1839); *Hubgh v. New Orleans and Carrollton R. R. Co.*, 6 La. Ann. 495, 496 (1851); *Moulin v. Monteleone*, 165 La. 169, 183, 115 So. 447 (1928).

ish] system lifts its head in our litigation," especially in cases involving the French and Spanish land grants in Louisiana.¹⁶⁴

It would be inappropriate to leave the subject of legal development in Louisiana during the first quarter-century of American rule without mention of the subjects of evidence and criminal law, on each of which Edward Livingston submitted a draft for a code which the legislature refused to pass. There being no enacted code in existence on the subject of evidence, the Supreme Court of Louisiana found in 1819 that "The ancient laws of the country can afford no assistance"¹⁶⁵ and said further in 1831 that "By common, almost by universal consent, a resort to it [that portion of Spanish jurisprudence which relates to evidence] was abandoned, and reference had to the rule of evidence as found in the English law."¹⁶⁶ Livingston's Penal Code and Code of Criminal Procedure was too advanced for his time and place. Symbolically, perhaps, the first draft of the work was, like Carlyle's *French Revolution*, destroyed by fire; on the morning following, the sixty-year old Livingston recommenced the two years' labor of producing another. The work was rejected when he presented it, in English and French, to the legislature.¹⁶⁷ (The translation into French, having been made by Mrs. Livingston's uncle, "a scholarly man," was very good, "though it was thought that certain Americanisms were discoverable in it.")¹⁶⁸ But his draft has since given him enduring fame, and even then was acclaimed by the great students of the time, by Kent, Story, Marshall, Madison and Jefferson. Eventually, it affected countries as far away as India, where it was taken by Macaulay.¹⁶⁹ Victor Hugo said to Livingston, "You will be remembered among the men of this age who have deserved the most and best of mankind."¹⁷⁰ Sir Henry Sumner Maine called him "the first legal genius of modern times."¹⁷¹ The criminal law of Louisiana itself has since come to approximate many of Livingston's propositions, but the

164. Dart, *op. cit. supra* note 38, at 92.

165. *Planters' Bank v. George*, 6 Mart. (O.S.) 670, 673 (La. 1819).

166. *Dranguet v. Prudhomme*, 3 La. 83, 86 (1831); Wigmore, *op. cit. supra* note 135, at 14; Voorhies, *Compendium of Louisiana Jurisprudence on Evidence* (1875) 1 La. L. J. 1, 2.

167. It was first printed in 1833. Sherman, *op. cit. supra* note 15, at 252, n. 15.

168. Wilkinson, *Edward Livingston and the Penal Codes* (1922) 1 Tex. L. Rev. 25, 36.

169. Livingston's work was the basis of Macaulay's great criminal law reform of 1833 in India (Cross, *op. cit. supra* note 150, at 412).

170. Wilkinson, *op. cit. supra* note 168, at 37, 42; Hunt, *Life of Edward Livingston* (1864) 277 and note.

171. Maine, *Village-Communities in the East and West* (5 ed. 1887) 360; Hunt, *op. cit. supra* note 170, at 278, 405.

state had only a "disorganized mass of unrelated statutes" until 1942.¹⁷² Basically, indeed, by the first two of these statutes,¹⁷³ Louisiana adopted the definition and procedure of the common law in this field.¹⁷⁴

It is interesting, also, to note that the French language has never fully yielded to English, in Louisiana law. The earlier Louisiana codes were originally written in French, and the supreme court of the state once remarked that "The definition relied on from the English side of one of the articles of the Code, proves nothing but the ignorance of the person who translated it from the French."¹⁷⁵ Even today, "It is well settled, that when there exists a discrepancy between the English and French texts of the Code of 1825, the latter prevails."¹⁷⁶ However, English has for some time been the official language for all public laws, records and proceedings.¹⁷⁷ And although the lack of command and use of the French language is decried by many as a symptom and source of possible contamination of the purity of Louisiana's civil law bloodstream,¹⁷⁸ it is still asserted that, in Louisiana today, French authors are an essential part of a lawyer's library¹⁷⁹ and that "The Atlantic Ocean

172. La. Code of Crim. Law and Proc. of 1928 (Dart ed. 1943) iii. See also Wilson, *The Effect of the Louisiana Code of Criminal Procedure Upon Prior Statutes Relating to Criminal Procedure* (1931) 6 *Tulane L. Rev.* 135, 137, wherein are discussed defects of the Louisiana Code of Criminal Procedure of 1928.

173. La. Acts 1805, pp. 30-39, 416-455.

174. Howe, *op. cit. supra* note 150, at 138; Howe, *op. cit. supra* note 18, at 79.

175. *Egerton v. The Third Municipality of New Orleans*, 1 *La. Ann.* 435, 437 (1846).

176. *Phelps v. Reinach*, 38 *La. Ann.* 547, 551 (1886); *Straus v. City of New Orleans*, 166 *La.* 1035, 1047-1055, 118 *So.* 125 (1928); *Sample v. Whitaker*, 172 *La.* 722, 727, 135 *So.* 38 (1931).

177. They were required to be "in the language in which the Constitution of the United States is written," up to the end of the Civil War. *La. Const.* (1812) Art. VI, § 15; *La. Const.* (1845) Tit. VI, Art. 103; *La. Const.* (1852) Tit. VI, Art. 100; *La. Const.* (1864) Tit. VII, Art. 103. They were required to be "in the English language" by *La. Const.* (1868) Tit. VI, Art. 109. This was maintained, with permission to the legislature to use French also in areas where it deemed that appropriate, until 1921 (*La. Const.* (1879) Art. 154; *La. Const.* (1898) Art. 165; *La. Const.* (1913) Art. 165). The present Constitution, however, seems to neglect the subject of linguistics entirely in this respect, confining itself to the requirement that the English language be used in "the general exercises in the public schools." (*La. Const.* of 1921, Art. 12, § 12). Presumably, it would seem safe to infer that, even if practically the matter be not considered as settled by now it will be so as soon as all pre-1921 schoolchildren have passed away.

178. See note 74, *supra*.

179. *Fabré-Surveyer, The Civil Law in Quebec and Louisiana* (1939) 1 *LOUISIANA LAW REVIEW* 649, 658; Greenburg, *op. cit. supra* note 74, at 601; Tullis, *op. cit. supra* note 74, at 119.

could not separate the Louisiana 'jurisconsults' from the 'jurisconsulte francais'.¹⁸⁰

The Code of 1825—"of all republications of Roman law the . . . clearest, the fullest, the most philosophical, and the best adapted to the exigencies of modern society . . . [which, rather than the] Common Law of England, . . . the newest American states are taking for the substratum of their laws."¹⁸¹—is a proper stopping place for detailed discussion of the immediate results of the impact between the civil and the common law that occurred when the United States purchased the Territory of Louisiana from France. Since 1825, the evolution has been more gradual. In the forty years following that year, the code of course received various additions and alterations by legislative amendment, some of them being of substantial and far-reaching character. The Civil War, and the serious constitutional changes culminating in the Reconstruction Constitution of 1868, brought about the Code of 1870 which, in regard to the subjects here considered, does not differ substantially in principle from the Code of 1825.¹⁸²

Perhaps nowhere else, even in Canada, has there occurred a mingling of two systems of law under circumstances like those which prevailed in Louisiana in the early nineteenth century. It would appear that, in America at least, the Roman law and the common law have tended to resemblance in the arena where the struggle for supremacy has taken place.¹⁸³ In Louisiana now, English law has certainly furnished much jurisprudence; "in Missouri, on the other hand, the procedure of the courts now resembles in many respects that which is described in the fourth book of the Institutes of Justinian."¹⁸⁴ The process of statutory codification has

180. Tullis, *op. cit. supra* note 125, at 302.

181. Maine, *op. cit. supra* note 171, at 360-361. See also Sherman, *op. cit. supra* note 15, at 252, 253, § 264.

182. The substantive changes effected in the "Revised Civil Code" of 1870 are three in number: (1) Elimination of all articles relating to slavery; (2) Incorporation of all acts, amendatory of the Code, passed since 1825; and (3) Integration of acts, not specifically amendatory of the Code but dealing with matters regulated by it, passed since 1825. Tucker, *op. cit. supra* note 155, at 295; I Louisiana Legal Archives, *op. cit. supra* note 105, at v.

183. For instance, one analysis has led to the conclusion that, on the very basic question of the binding force of judicial precedents, the United States stands today at a point between the English common law *stare decisis* and the civilian jurisprudence *constante*—and is tending to shift toward the latter! See Goodhart, *Case Law in England and America* (1930) 15 *Corn. L. Q.* 173-174, 193.

184. Howe, *op. cit. supra* note 18, at 81. For a good brief discussion on the general subject of the Romanization of the common law in both England and the United States see Sherman, *op. cit. supra* note 15, at 386-388, § 403, 252-253, § 264.

made great strides in the "common law" states since David Dudley Field brought the idea to New York in 1848.¹⁸⁵ "The two systems are no longer as antagonistic as they were when Blackstone wrote his first lecture." After formality is cleared away, it seems sound to conclude, in fine, that ". . . the great principles of right as between man and man are much the same today in all parts of the Louisiana Purchase."¹⁸⁶

185. Hoy, David Dudley Field, in 5 Lewis, *Great American Lawyers*, 152; Maine, *op. cit. supra* note 171, at 361.

186. Howe, *op. cit. supra* note 18, at 81.