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## CIVIL LAW AND COMMON LAW IN EARLY TEXAS

J. E. ERICSON and MARY P. WINSTON

Some of the most significant developments in Texas legal history occurred during the period of the Republic of Texas. One of them, the blending of the civil law systems of Spain and France with the common law system of Anglo-America, produced a unique legal system peculiar to Texas. The Spanish civil law evolved from the grafting of Roman law, principally the Justinian Code, upon the customs and usages of the Visigoths as codified in the *Codex Eurici*. This draft, the Visigothic Code (*Fuero Juzgo*), issued in Castilian form in 693, withstood seven centuries of Moorish rule and six revisions, the latest in 1805 (the *Novísima Recopilación*). It remained the law of the Spanish world through the middle ages and, in large measure, to the time of Spanish colonization of Texas in the Seventeenth Century.<sup>1</sup> It was transmitted to Texas during more than a century of Spanish colonial government and administration under the general direction of the *Leyes de los Reinos de las Indias*,<sup>2</sup> and more than a decade of Mexican rule.

The French civil law also evolved from the Roman codes, principally the *Institutes* of Gaius and Justinian; from the glosses of such French commentators as Domat, Pothier, and D'Aquesseau; from Frankish customs and usages, especially those of the north of France; and from decisions of the *parlement* of Paris. From those sources a Napoleonic commission promulgated the Code Civil in 1814; and from those same sources French settlers in Louisiana evolved their civil codes.<sup>3</sup> After the Louisiana Purchase the United States generously allowed the people of Louisiana to retain their codes, and as a result many Texans, immigrants from the Louisiana territory, were thoroughly familiar with their contents.

The English common law developed from custom and usage through the work of the common law courts of Exchequer, Common Pleas, and King's Bench. Though influenced slightly by Roman law from time to time, it was never codified; but in later times it was supplemented by legislation enacted by the British Parliament. The common law was brought to the United States by British settlers, primarily in the form of Blackstone's *Commentaries*. It was transmitted to Texas after 1820 through the agency of lawyers trained in its precepts in the American states of the Old Southwest.<sup>4</sup>

Since it is almost universally conceded that private rights of individuals under the law of a previous sovereignty remain unchanged and unaffected unless they are abrogated or altered by positive action of the new sovereignty,<sup>5</sup> the preservation of the civil law in Texas did not depend upon a positive statement to that effect by the new governments created after the Revolution. The Consultation of 1835, however, resolved all doubts on November 7 by a vote to retain the existing legal system.<sup>6</sup> Moreover, the Ordinance Establishing a Provisional Government provided that judges of Texas had jurisdiction over all crimes and misdemeanors recognized and known to the common law of England, that they could issue writs of *habeas*

corpus under the common law of England, that they could issue writs of sequestrations, attachment, or arrest in all cases established by the Civil Code and the Code of Practice of the State of Louisiana, and that they should follow the proceedings of the common law in criminal cases.<sup>7</sup> Thus, as early as 1835, Texans began the arduous attempt to blend the two basic legal systems into a coherent whole suited to Texas circumstances.

The Constitutional Convention of 1836, although composed almost exclusively of Anglo-Americans, recognized the necessity of continuing some elements of the old system; for the Constitution of 1836 provided that all elements of the civil law were to be retained except those in conflict with the constitution, but the English common law should be introduced by statute as early as practicable.<sup>8</sup> As a former President of the State Bar of Texas has shrewdly observed:

It is significant that the idea of ultimately adopting the common law of England was qualified as to time and as to extent. It was to be introduced when practicable and with modifications appropriate to the conditions of the people of Texas.<sup>9</sup>

After the formation of the government of the Republic of Texas, there continued to be two parties in the controversy, one composed of recent immigrants from the common law states of the United States who favored that system, and the other composed of native Texans (those born in Texas), earlier immigrants from the United States, persons of European extraction, and immigrants from Louisiana who favored the civil law system. The First Congress of the Republic essayed a beginning to the settlement of the controversy on December 20, 1836, by providing that the common law of England as it applied to juries and evidence should be followed by the courts of the Republic. The common law used in those courts, however, could not be inconsistent with any of the laws of Congress.<sup>10</sup> This 1836 statute obviously did not completely exclude the civil law, for all previous Texas law was based on the statutes of the State of Coahuila and Texas, which were colored by the Spanish civil law and many of which were still in force. The complete exclusion of the civil law at this point would have caused conflicts and inconveniences in such matters as descent and inheritance, land tenures, and marital rights. Consequently, the Texas Supreme Court ruled in a case involving title to the San Jose Mission lands that the former system of laws and rights survived whole subject only to later constitutional or statutory changes.<sup>11</sup>

Conflicting legal provisions that applied to Texans, drawn from both civil and common law systems, continued to plague the courts, and on December 18, 1837, the Congress attempted further clarification. It provided that nothing in the several acts establishing courts of justice should be interpreted so as to take away the rights of either party to propose interrogations to his adversary to be answered on oath according to law and practice heretofore existing.<sup>12</sup> At the same time President M. B. Lamar admonished Congress that:

Unfortunately for the country, we have now in force many portions of two systems different in their origin, discordant in their provisions, and calculated to lead to the most conflicting decisions. Of the cases that presented themselves before the courts, many are

included in neither code, many are differently provided for by both, leaving the parties without remedy in the first instance, and often wholly uncertain as to the proper remedy in the second.<sup>13</sup>

As a solution President Lamar urged Congress to enact a strong code of laws for the entire Republic.

Congress responded to Lamar's plea by appointing a committee composed of William H. Jack and D. S. Kaufman to compile a code of laws for the Republic.<sup>14</sup> Edward L. Holmes, Chairman of the House Judiciary Committee, counterproposed that a committee of ten be appointed to examine as many codes of the several states as could be procured and that those codes be used as the basis for the Texas code. Holmes' proposal, however, was defeated largely as a result of the determined opposition of D. S. Kaufman.<sup>15</sup>

Kaufman, in a report to the House on January 11, 1839, stated that his committee was not able to compile a code of laws as instructed for two fundamental reasons. First, it was necessary to have a translation of all legislation enacted by the State of Coahuila and Texas from its inception down to May, 1835. He alleged that such a translation was not available. Second, the committee had not been instructed by the House whether the new code should be based upon the civil law or the common law. Without instructions the committee hesitated to embark upon the codification because of the strong differences of opinion regarding the two systems.<sup>16</sup>

Finally, on January 20, 1840, Congress enacted a statute that had been introduced on November 23, 1839, which was destined to provide a basis for settlement of the controversy. It provided that the common law of England, so far as it was not inconsistent with the Constitution of the Republic and acts of Congress then in force, should be the rule of decision in all courts of the Republic. The statute further provided:

. . . that all laws in force in this Republic, prior to the first of September, 1836 (except the laws of the Consultation and Provisional Government now in force, and except such laws as relate exclusive [*sic*] to grants and the colonization of lands in the state of Coahuila and Texas, and also such laws as relate to the reservation of Islands and lands, and also of salt-lakes, licks, and salt springs, mines and minerals of every description; made by the General and State government) be and the same are hereby repealed.<sup>17</sup>

This act was prospective and applied only to cases arising after its effective date. Therefore, the Texas courts had to apply civil law doctrines so far as they were able in cases which arose or in which rights accrued prior to January 20, 1840.<sup>18</sup> Furthermore, the act, sweeping as its provisions were, did not abolish every vestige of civil law in Texas, for civil law principles still governed prior land grants and many other civil law concepts were already incorporated into Texas statutory law. In fact, the same statute enacted the essential features of the Spanish community property system,<sup>19</sup> by which upon marriage, unless otherwise agreed, the husband and wife became partners as to subsequent gains, with the profits of the partnership equally divided upon its dissolution and with the husband

as temporary manager of the partnership. Each spouse could maintain separate property, and as a general rule property owned at marriage and property acquired after marriage by inheritance or by gift remained separate property.

A supplementary statute of February 5, 1840, declared that the adoption of the common law would not be interpreted to require that system of pleading. The proceedings in all civil suits must continue the civil law method of petition and answer involving as many issues of law and fact as the parties might choose to rely upon.<sup>20</sup> Texas courts continued to be combined courts of law and equity as civil law had never developed that distinction. Thus a mixed system in which the civil law governs the pleadings while the common law furnishes the rule of decision was introduced in Texas.

A complete list of civil law doctrines that have been incorporated in the Texas legal system is probably not possible at this time nor is it pertinent to this study. But in addition to community property, pleadings by petition and answer, and combined courts of law and equity, already included to, it is possible to delineate some other important civil law contributions. It is generally conceded that the greatest Spanish influence in the Texas laws of today is in the field of property rights. One of these, the homestead exemption, based on a policy of the Mexican state of Coahuila and Texas,<sup>21</sup> was specifically established after the Revolution by a statute of Congress on January 26, 1839.<sup>22</sup> It provided that a married man was entitled to have his homestead exempt from debts except repairs on his home and taxes. It further safeguarded his livestock and some rural acreage so that he might continue to earn a livelihood for his family.<sup>23</sup>

A recent study of the Spanish influence on the law of water rights demonstrated that the civil law doctrines concerning riparian rights has been of tremendous importance in making irrigation an important source of wealth in Texas.<sup>24</sup> The Spanish system was one whereby water was divided by a process of taking turns as the supply afforded from a ditch which was owned by the community.

Spanish and Mexican grants created property ownership rights over some twenty-seven million acres of Texas land. According to the express statutory terms of 1840 every land transaction made prior to that time must be measured by the laws of the prior sovereigns.<sup>25</sup> Those prior sovereigns followed the Royal Mining Ordinance promulgated in 1783 by Charles III of Spain which vested in the sovereign title to all minerals. Texas succeeded to the title to those rights from Mexico as the prior sovereign, and it was not until 1866 by specific constitutional authorization that the state relinquished title to all minerals beneath the surface of Texas land.<sup>26</sup>

Another significant area of civil law influence on the Texas legal system centered on paternal-filial relations. The English common law recognized a system of guardian and ward for those children whose parents were deceased, but it did not permit legal adoption. No direct action of the Republic of Texas voided the contrary child adoption system in effect in Spanish-Mexican Texas under the civil law, so under the terms of the Constitution of 1836 it carried forward.<sup>27</sup> The common law likewise permitted the

parent to will his estate to one of his heirs, usually the first-born son, leaving all others without any inheritance from his estate. Long before the Texas Revolution, Spanish law had abolished the practice, and Texas law retained the civil law view by specific provision in the Constitution of 1836.<sup>28</sup>

The approach of early Texans to the development of a system of law appears in retrospect as a pragmatic one. They were aware of the principles of at least three legal systems: the civil law of Spain and Mexico, the civil law of France and Louisiana, and the common law of England and the rest of the United States. From those sources the virile Texas frontiersmen of the Republic of Texas fashioned a legal system that discarded whenever possible intricate technical procedures and retained those elements that appealed most to their sense of justice.

### FOOTNOTES

<sup>1</sup>John H. Bickett, Jr., "Origin of Some Distinctive Features of Texas Civilization," *Proceedings of the Annual Meeting of the Philosophical Society of Texas* (Dallas, 1945), 10-13.

<sup>2</sup>O. G. Jones, "Local Government in the Spanish Colonies as Provided by the Recopilacion de Leyes de los Reynos de las Indias," *Southwestern Historical Quarterly*, XIX (July, 1915) 65-90.

<sup>3</sup>C. S. Lobingier, "Civil Law," *Encyclopaedia of the Social Sciences*, III, 604-605.

<sup>4</sup>C. H. Kinnane, *Anglo-American Law* (Indianapolis, 1932), 193-219.

<sup>5</sup>Chief Justice John Marshall in *United States v. Juan Percheman*, 7 Peters 151 (1833).

<sup>6</sup>H. P. N. Gammel, *Laws of Texas*, I, 522-523.

<sup>7</sup>*Ibid.*, I, 1074.

<sup>8</sup>Art. IV, Secs. 13, 16; General Provisions, Secs. 7, 10; Schedule, Sec. 1.

<sup>9</sup>Bickett, "Origin of Some Distinctive Features," 29.

<sup>10</sup>Gammel, *Laws of Texas*, I, 1216.

<sup>11</sup>*McMullen v. Hodge*, 5 Texas 34 (1841).

<sup>12</sup>Gammel, *Laws of Texas*, I, 1437.

<sup>13</sup>*Telegraph and Texas Register* (Houston, Texas), December 26, 1838.

<sup>14</sup>Gammel, *Laws of Texas*, I, 1445.

<sup>15</sup>*Telegraph and Texas Register* (Houston, Texas), January 12, 1839.

<sup>16</sup>*Ibid.*, January 16, 1839.

<sup>17</sup>Gammel, *Laws of Texas*, II, 177-178.

<sup>18</sup>Ford Hall, "An Account of the Adoption of the Common Law of Texas," *Texas Law Review*, XXVIII (1950), 801.

<sup>19</sup>Will Wilson, "Spanish Legacy of Texas Law," Speech before the American Studies Association of Texas (San Antonio, 1960), 7.

<sup>20</sup>Gammel, *Laws of Texas*, II, 262-267.

<sup>21</sup>*Ibid.*, 220-221.

<sup>22</sup>*Ibid.*, 347.

<sup>23</sup>Brady Cole, "The Homestead Provisions in the Texas Constitution," *Texas Law Review*, III (1925), 217; J. E. Ericson, "Origins of the Texas Bill of Rights," *Southwestern Historical Quarterly*, LXII (April, 1959), 459-460; Gerald Ashford, "Jacksonian Liberalism and Spanish Law in Early Texas," *Southwestern Historical Quarterly*, LVII (July, 1953), 1-37.

<sup>24</sup>Betty E. Dobkins, *The Spanish Element in Texas Water Law* (Austin, 1959).

<sup>25</sup>Wilson, "Spanish Legacy," 14.

<sup>26</sup>Wallace Hawkins, *El Sal del Rey* (Austin, 1947).

<sup>27</sup>Wilson, "Spanish Legacy," 13.

<sup>28</sup>*Bufford v. Holliman*, 10 Texas 560 (1853).