LOUISIANA CIVIL CODE

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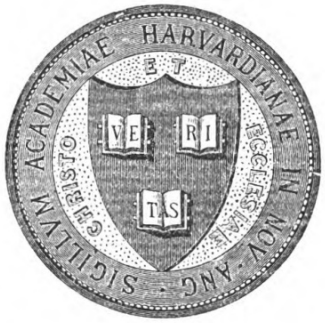

THE COLONIAL LEGAL SYSTEMS OF ARKANSAS, LOUISIANA AND TEXAS

BY

HENRY PLAUCHÉ DART
OF THE NEW ORLEANS BAR

Address at Tri-State Annual Convention, Arkansas, Louisiana and Texas Bar Associations, Texarkana, Arkansas-Texas, April 22, 1926.

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I.

The communities now called Arkansas and Louisiana were linked by LaSalle in 1682 with the remainder of the Valley of the Mississippi as units of the French colony which he named La Louisiane. The abortive attempt of the same leader in 1685 to found a colony on the coast of Texas checked but did not destroy French aspiration to include that region in the great plan that contemplated a continental colonial empire in the heart of North America, intended to sustain the French against invasion of the Valley by England's colonies on the east and by Spanish claimants on the south and west and intended also to create a vantage ground for attacks by the French on the mining wealth of New Spain. LaSalle's expedition and the wanderings of the explorer and his followers over the eastern hinterland of Texas laid the basis for the claim that Texas was part of Louisiana asserted by the French Crown then and for many years thereafter. This pretension was kept alive after the Cession of Louisiana in 1803 and its shadow was not dissipated until the treaty between the United States and Spain in 1821, finally adjusted the Texas boundary as it now exists in relation to the rest of the Louisiana Purchase.

In 1699 France founded the colony at Biloxi, Miss., as notice to the world that she had taken physical possession

of the extreme southern limits of La Louisiane, and she maintained this attitude notwithstanding the protests of Spain that the whole coast region from Florida to Mexico lay under the protection of that Kingdom. This Spanish protest was based primarily on discoveries and explorations in Florida, and the southern tier of what is now the United States together with like efforts west and south of Texas without however having had physical possession of the latter. But in 1699 the protest was better founded on the fact that Spain had acted promptly (or as promptly as she ever acted) after LaSalle's adventure, to occupy the Gulf Coast at Pensacola and to establish missions, presidios and pueblos at San Antonio and at other places in Texas.

The colony planted by the French at Biloxi was in its nature a military outpost and it was soon connected up with the Country of the Illinois, the northern limits of La Louisiane, by another series of posts, chiefly located along and in proximity to the Mississippi which was the main highway in that era for the traffic, the movement of population and the military operations of the French colony. A dominating position in this system was the Post of the Arkansas which was established as early as 1686, thirteen years before Iberville's arrival at Biloxi. Situated on the Arkansas within easy reach of the Mississippi and about the middle distance between the extreme limits of the colony, it grew in importance especially after the removal of the capital to New Orleans in 1722, and its maintenance and protection was a necessary part of French military and colonial policy. It retained its prominence as a trading post through all subsequent colonial mutations, and when Spain gave up

Spanish Luziane in 1803 the Post of the Arkansas rose quickly in national interest as headquarters for western frontier trade, and became one of the principal communities in the District (afterwards Territory) of Louisiana created in 1804, when Congress sheared off the lower end of Old La Louisiane and called it the Territory of Orleans.

Not only was the Post of the Arkansas a subject of early concern to the French, but the whole area now comprised within the State of Arkansas was constantly exploited in France as a wonderland of gold, silver and precious ores and as being particularly rich in timber and fur-bearing animals. Its agricutural possibilities were not overlooked and the colonization of that part of La Louisiane was considered even before the people at Versailles began to think about a City at the mouth of the Mississippi. Indeed, Law's famous grant in 1719 of many leagues square in Arkansas preceded by three years the actual removal of the capital of the colony from Biloxi to New Orleans. Preparations on a vast scale had been made by Law to colonize his domain. His scheme included the transplanting of thousands of German farmers to Arkansas and his arrangements were all made and several shiploads had arrived at Biloxi and been rerouted to his grant before the financial crash in 1722 ended his wonderful career and changed the course of history in Arkansas. His abandoned settlers found their way to New Orleans and were there definitely located near the capital and became a valuable element in the population of that part of the colony.

The military aspect of the first era of colonization in La Louisiane gave way in 1712 to a form of government estab-

lished in behalf of Anthony Crozat to whom the colony was conceded by Louis XIV for the purpose of developing its agricultural, mineral and other riches. This grantee after some years of operation surrendered his grant, and a corporate overlord for the colony was created in 1717 under the advice of John Law, the financier of the Duke of Orleans, Regent of France during the minority of Louis XV. This corporation called first the Company of the West and later the Company of the Indies governed the colony for fourteen years and established it firmly in the place it continued to fill in North America until its division between England and Spain in 1762.

The two grants, to Crozat and to the Company are important to the legal historian, because through them the Colony was formally released from its military aspect and erected into a government with all the paraphernalia of such institutions under the French method in the 18th Century, and because for the first time the colonists were now accorded the rights and privileges of French citizens. The protection of the law of France was extended to them and to their property and among the rights thus accorded none were more important than the right to acquire, own and possess the soil of the colony in fee simple with freedom from seigneural service and a special exemption from taxation during the period of the company's control. These beginnings of civil government in La Louisiane have an added interest and a particular application here, because it was through these documents and the contemporary regal legislation that the law of the land was established and tribunals created to administer justice in the colony.

We have previously noted that no serious attempt had been made by Spain to establish its authority in the region now called Texas until the alarm, caused by LaSalle's visit, but this quieted down when investigation disclosed the failure of his attempt at colonization. The matter, however, assumed another aspect when St. Denis under the commission of Governor Cadillac of Louisiana found his way to the Rio Grande in 1714 and repeated his visit in 1717. The rigorous prosecution of this affair at Mexico and the imprisonment of the leader had the effect of suspending further efforts to extend the jurisdiction of Louisiana, and in 1727 Mexico advanced the disputed territory into the position of a province of New Spain with vaguely defined limits, and a name of its own, Tejas or Texas, after the tribe or confederacy of Indians of that name.

With the Spanish grip tightened on Texas and the French grip maintained on La Louisiane the local authorities on either side had little to do beyond inciting friendly Indians in their respective territories to make unfriendly visits to their neighbors. The business of stealing Texas horses and Louisiana slaves with an occasional murder of unoffending whites and the felonious destruction of their habitations went merrily on throughout the wilderness from the Gulf to Canada for more than half a century and until the flag of France disappeared in the debacle of 1762. The scene of these efforts is now a country of another civilization which has largely forgotten its ancient rulers and cares even less for the history made in those days, save when it has to turn its mind restlessly back to the legal system of that era to adjust some complex problem of today

by a re-examination of primary legal principles hitherto accepted without much regard to their source or origin.

The law of that period of life in Texas was like the law in La Louisiane, the offspring of a common parentage. Indeed, so very much alike that when in 1762 the warring English drove in the last outpost of France in North America and fixed the limits of Spanish authority at the Mississippi River, save for the little island on the east side that contained the City of New Orleans, the people of the city and of all western La Louisiane had no difficulty in maintaining their ancient civilization under the mild rulers who enforced the orders of the King of Spain and his famous Council of the Indies. For thirty-four years, that is, for the remainder of the 18th Century, and for the first three years of the 19th, one system of law governed New Orleans and the Spanish Provinces of Texas and Luziane west of the Mississippi, including Arkansas and all the territory northward to the undefined Canadian boundary line.

In 1801 Napoleon obtained for France from the subservient Spanish Government the retrocession of Louisiana as it was at the time of the treaty of 1763, and in 1803 received possession only to convey the whole thereof immediately to the United States thus pushing back the Spanish line to a no-man's land which left open the question of the true boundary of ancient Louisiana, but nevertheless saved Texas in its full original integrity as a Spanish possession until revolution in Mexico wrested that country and with it Texas from the Crown of Spain. The succeeding period, 1803-1836, exceedingly fruitful in other aspects, is also of considerable interest to the historian of Texas law. Among

the many changes of that era there stands out the action of the Cortes of Spain which in 1820 abolished the system of entails and other features of the existing Spanish mediaeval form of land tenure. This was confirmed by Mexico in 1823, thus giving Texas at her revolution in 1836, a free hand to deal with her land problems, a matter at that moment of the greatest importance to the new republic.

II.

Let us now return over the way we have come to consider briefly the legal system that prevailed in Louisiana and Arkansas anterior to the elimination of France as a continental power in North America. We have already noted that Civil Government began in La Louisiane with the grant to Crozat in September, 1712. The Letters Patent or Edict by which this was accomplished sets out in its 7th Article, that "our ordonnances and the custom and usage of the Prevoté and Vicomté of Paris shall be observed for law and custom in the said country of Louisiana," and this was revived and amplified in the Charter of the Company of the West, granted in 1717, which provided that "the judges established in all the said places shall judge according to the laws and ordinances of the Kingdom and conform themselves to the custom of the Prevoté and Vicomté of Paris pursuant to which the inhabitants may contract without the possibility of there being introduced any other Custom."

There is no real conflict in the distinction made in these enactments bentween the Laws and Ordinances of the Kingdom and the Custom of Paris for they were all concordant parts of the Law of France. There was then, as there is

now, a distinction between public and private law and these grants put into operation in Louisiana the political rule that the King was the source of all authority, at once the sole legislator and the sole judge; that all rights emanated from him and that the people were his subjects over whom he had the power of life and death. There was no constitution to regulate the conduct of government and to guarantee the privileges of the citizen. Neither was there any trial by jury, nor a judiciary wholly free from the influence of the Crown, though French history preserves some illustrious examples of fearless judges. Yet, when this commonplace of history has been restated it remains a fact that the people who lived in Louisiana during the reign of Louis XIV and Louis XV, that is, during the period 1699-1769, were governed by laws that could not be disobeyed even by the King, who was hedged about by centuries of established principles, and methods of administration that could not be disregarded nor overthrown. Notwithstanding sporadic abuses of power, it can be said that under French rule in all that concerned life and property the people of Louisiana were as secure in their rights as we are today. They enjoyed moreover a general freedom from tyranny and oppression that tended to create a certain independence of thought and action, so much so, that during the French period a contemporaneous official critic said that they had "become republican in their thoughts, feelings and manners."

Under the public policy of France, a colony could be kept in hand as a Crown possession, or it could be lifted into autonomous activity under a form of government and rule

of law general or special. When the Edicts of 1712-1717 were promulgated, the first effect was to open Louisiana to settlement with the special privileges already recited while the wider gift of all the laws of France carried the body of legislation that had established certain principles of government and law for the welfare and protection of the subjects of France. To attempt to recite here any considerable portion of this slow accretion of the preceding five centuries would be as uninteresting as an index to the acts of the legislature, but it may be said briefly that anterior to the reign of Louis XIV, many preeminent statutes had created the method of proof in civil and criminal cases, the right of the wife to dower in the property of her husband, the separation and limitation of civil and ecclesiastical jurisdiction, the abridgement, and the beginning of the extinction of ecclesiastical ownership of land and serfs, the enfranchisement in 1315 of the serfs occupying the Royal Domain with its resounding declaration that according to the law of nature all men are born free, the rules for the protection of minors, for the publicity of marriages, for the confection of wills, in short, a great system touching the entire administration of government and law in a civilized community. The reign of Louis XIV (1643-1715) added to this collection still further legislation in the nature of a restatement and codification of the law of France, and the succeeding reign (Louis XV) brought that system to a state of completion that left little to the writers of Napoleon's Codes but the classification, simplification and co-ordination of the ancient system and its amalgamation with the new theories of government and administration

brought in by the Revolution and by the concentration of political power under the Empire.

All this ancient regal legislation extending over many centuries was in its nature the original creation of a system of law, to supply the deficiencies of the primary law of the Kingdom which in its inception was customary, that is to say, a growth from tribal usages to a fixed system applicable to the communities in which it existed. France had found its "place in the sun" by combining many units of territory into one Kingdom. The early Kings took with these units the customs, laws and regulations in force in their respective areas; these communities traced their customs to either Roman or Germanic sources, and at the date of the political unification of France all the customs were infected with principles drawn from germanic, roman, canon and feudal sources without, however, approaching uniformity and, of course without having effect beyond the borders of each Custom. There was one essential difference between them growing out of the situation at the origin, thus in the north of France the Custom was based on the Customs that were in force before Caesar's time and that were brought in at the Germanic Invasion, whereas the roman population in the south of France retained after the Invasion the law of its origin (the Roman law) as a Custom based on the written law. No Custom was at any time a system of law complete within itself, and eventually great confusion arose out of the conflicts of opinion in the different jurisdictions, while the ardent propaganda of the jurists and the occasional intervention of an Edict from the King added to the legal chaos. At last, in 1452, Charles VII ordered the Com-

pilation of all the Customs. This work called the Redaction occupied the best legal minds of France for a century. The revision had a practical result in so far as it placed all the Customs in written form and found common expression for common principles, but the residuum of variation was still so great it was necessary to provide that in all cases where no provision existed, or where there was conflict or doubt or obscurity, the judges should decide according to the Custom of Paris. This particular Custom was redacted in 1510 and materially revised in 1580, and in the old law of France it was called "the flower of the Customs."

The Redaction of the Customs of France was executed with the consent of all the localities in interest, it received the approval of the local judges, and the Parliament of Paris registered and promulgated each redacted Custom. This grave and momentous step in the Codification of the Custom was surrounded with all the pomp and ceremony that the genius of France could devise, with the purpose of establishing the Custom as part of the permanent law of the land. This procedure fixed forever the status of the Custom in France, and the approval and signature of the King gave it the force of a written law "to be observed as a statute, a perpetual and irrevocable Edict."

From this period and henceforth, until the confection of the Codes of Napoleon, there coexisted two sources of law in France. The lawyers became specialists and after the manner of the age the schools of thought divided, one faction steadfastly contending that the common law of France was customary, the other that it was the Roman law as modified by the legislation of the Kings. The struggle created

great lawyers, their opinions were reflected in the jurisprudence of the times, passed into Edicts of the Kings, and ultimately were embodied in the law of France and of Louisiana, for the Civil Code of France and the Civil Code of Louisiana are today a mixture of Customary and Roman law, just as the Civil Law of France at the birth of Louisiana commingled the same elements.

Inasmuch as at that date (1712-1717) all France had its local law and no unit of the Kingdom agreed upon the Custom of the other, and inasmuch as these Customs and the general legislation of the Kingdom were complimentary parts of the same system, it was necessary to designate a Custom for Louisiana, for without such designation there would have been a hiatus in her legal system. The Custom of Paris must therefore be considered the local book of law and practice for Louisiana, just as the Custom of Paris and other Customs of France were in like relation to the respective territorial departments of the Kingdom. It might also be safely added that here the Custom was the paramount law in all matters covered by it where the general legislation or the special Edicts of the Kings had not explained, qualified, added to, or abrogated it.

As received in Louisiana in 1712, the Custom of Paris was a written code, covering remedies and rights, so much akin to existing provisions of the Civil Code and Code of Practice of Louisiana, that we would recognize the similarity even though we did not know that the Custom was absorbed into the Napoleonic legislation, from which our Civil Code derives so much of its vitality. This local law of French Colonial Louisiana is a model of brevity, comprised

within three hundred and sixty-two numbered articles of an average length of less than fifty words to the article. This matter is distributed under sixteen titles and aside from the first two which treat of the relations of lord and vassal there is no part of this book that did not have application to the affairs of the colonists of Louisiana, and some of its principles are still the law there today.

We should not leave the subject without illustrating briefly the simplicity and variety of the Custom; thus, the third title opens with the statement that "in the Prevoté and Vicomté of Paris there are two sorts and species of things only, to-wit, movables and immovables." The Civil Code of Louisiana (Article 46) says, "the third and last division of things is into movable and immovable." It will be noticed that the Custom of Paris here opens with the words that in our law today close the general definition of Things, but the remaining eight articles of Title III of the Custom contain the elements, or beginnings, let us say, of all the vast jurisprudence that is now compressed into the thirty-nine articles of Title I of the Civil Code of Louisiana on the subject of Things. Of course, it should also be noticed that the differentiation of Things in both Custom and Code is directly derived from the Roman Law. Under the caption of Action in Seizen (Title IV) we have the principle of the possessory action of Louisiana whose primary object is to reinstate a disturbed or evicted owner of real property and to throw upon the other party the burden of establishing title.

The Louisiana hypothecary action, the plea in compensation, the plea in reconvention, these and other things of

similar import all find their roots in the practice under the Custom. We find here also the Louisiana law of Prescription (Statute of Limitations) in its aspect as a method of acquiring property with or without title and in its common phase as a method of discharging debts and obligations, another importation from the Roman Law. On a subject of momentary importance in this part of the world, the Custom of Paris is very explicit. Title X treats of the Community of property as to which old Claude de Ferriere its annotator in the time of Louis XIV says:

> "The community of goods which forms the subject of this Title is a partnership (Société) formed in the country of the Customs by the marriage between the future husband and wife in the movable property and immovable acquisitions made and maintained during the marriage. This partnership has effect in all of Customary France except Normandie, Reims and Auvergne. It results from an express stipulation or by the terms of the Custom of the place of the domicile of the parties and where the marriage is contracted without any agreement on the part of the contractants."

The 220th article of the Custom of Paris says:

> "Men and women joined together in marriage are common in movable property and immovable acquisitions made and maintained during the said marriage and the community begins on the day of the espousal and nuptial benediction."

This 220th Article of the Redacted and Revised Custom was Article 110 of the Ancient Custom of Paris, and its origin beyond that compilation is lost in the mists of the old Germanic Customs. But it is certain that this principle lies at the foundation of every Custom that traces back to the

days of tribal law in northern Europe. A partnership in some shape or other always followed the relation of husband and wife in Ancient Gaul, and it maintained itself in France through all the ages to come and was the Customary Law of a great part of that country at the time of the Codification by Napoleon.

More than enough has been said to show the vital and important place held by the Custom of Paris in the legal system of La Louisiane during the French era, but as the State of Louisiana still retains many of its principles in her legal system, it may not be indiscreet to add that thru it we are enjoying a system older than the Common Law. Before the Courts of England had begun to formulate the great rival of the Civil Law, the ancient but vigorous Custom of Paris was intrenched and observed across the channel. It sustained itself against all comers, receiving and assimilating, but never losing its own distinctive virtues that still flower in the Code of Louisiana.

When Civil Government was organized in La Louisiane concurrently with Crozat's Grant an anomalous system was created that was purposely maintained throughout the Colonial Era. The principle was a division of executive authority between the Governor and the Commissaire Ordonnateur with no fixed demarcation of their duties. The Governor was the titular head, but the Commissaire Ordonnateur (an untranslatable title) exercised the powers of a French Intendant of Justice, Police and Finance. In these capacities he controlled the income and expenditure of the colony; was charged with the suppression of disorder and the prosecution of offenders and was President of the

Superior Council and Presiding Judge on its judicial side. History tells us much about the French Governors of La Louisiane and something about the Intendants, but the student of her legal institutions soon feels the influence of this powerful official; he was an all pervading presence; like Martha, busy about many things, his work survives in the judicial archives of the colony and commands a respect that his highly ornamental coadjutor seldom receives.

The Judiciary of the colony was established by royal Edict of 1712 creating a Superior Council as the sole tribunal of the colony with exclusive civil and criminal jurisdiction throughout the length and breadth of the land. Its membership was fixed at seven, among whom one was named by the Crown as First Judge, with all the powers of the Presidents of the Courts in France, and this office was always held by the Commissaire Ordonnateur. The Superior Council was made a permanent institution in 1716, and under the Company of the West in 1719 its powers were extended and enlarged and thereafter it continued to function throughout the French era. It was at once a probate court and a court of law and equity. Matters arising away from the capital were heard before the local Commander who could summon a council of like composition to assist where the issue required such attention, but an appeal lay from that jurisdiction to the primary body at Biloxi or at New Orleans after it became in 1722 the seat of justice.

While the membership rolls included the chief officials of the colony there was always a representative minority chosen from the nonofficial class. It was by its composition a body of laymen with one exception, the Procureur Gen-

eral, but its archives show an intelligent appreciation and disposition of the many difficult problems the Council had to solve. Speaking from its records the methods of pro cedure before this body were exceedingly simple, pleadings were by petition and answer, and it was permissible to urge in the latter all the exceptions and defenses which in France could be pleaded separately. Proof was offered in accordance with the rules prescribed in the Civil Ordinance of 1687. A writing excluded all other evidence, oral testimony if given was under interrogation of the Presiding Judge or an auditor appointed by him from the membership of the Court. There seems to have been no right in the parties to direct the trial. The judge was the sole seeker after the truth. Even the Procureur was silenced under this system. Judgment in civil cases required the concurrence of three members of the Council and five in criminal cases, and a clerk kept its minutes and records.

Procedure in all classes of cases except prosecutions for crimes followed the forms of practice in France before the Chatelet of Paris, a Court primarily devoted to the enforcement of the Custom of Paris. But the Superior Council had also to construe and enforce the statutes concerning its own jurisdiction, the several grants to Crazat and the Company of the West, and the Edicts, special and general of the Crown. The Civil Ordinance of 1667 and the Criminal Ordinance of 1670 were constantly in use before it, covering as these statutes did the whole field of French Civil and Criminal procedure. During its long career, there came before the Superior Council every conceivable question of law and fact that could disturb the public peace or involve the rights of private liti-

gants. It sat daily and worked hard. It was served by a Procureur appointed by the King and he was the legal adviser and only lawyer in the establishment. He had many duties of a professional character, but an unusual one was the duty to sum up every issue and give the Court an unbiased opinion, whether for or against the government or the parties *pro* and *con*. His "conclusions" were generally reduced briefly to writing, but many of them were well considered and carefully presented statements of the fact and the law.

The judgments of the court were preceded by a brief resumé, something akin to modern reasons for judgment, but more nearly resembling the familiar form of the High Court of France. All judgments were signed by the necessary number of members of the Council and frequently by all of them. The execution of these judgments was controlled by orders to its executive officer, the huissier or sheriff of the Court. The Judges were paid by the Crown, but the costs of Court were taxed according to a schedule or fee bill revised from time to time by the Council. While the Edicts creating this body vested plenary and final jurisdiction in the Council a right of review of its judgments was always exercised by the Council of State at Versailles. This remedy was, however, a matter of grace, not of right, and it was exercised by notice given by the aggrieved party of the intention to appeal followed by original procedure in France for a review.

Besides its judicial function, the Superior Council was the notarial depository of the Colony and the place of registry of the vital statistics of the day. Here also were recorded

those marriage contracts in which provisions were made for mutual gifts or for the establishment of dower. Private and public agreements and contracts, wills and scores of other matters were deposited in its archives, and the registry thereof was notice to the world and created proof by writing which was a cardinal feature of the rules of evidence of that period.

The Council also exercised some municipal functions chiefly regulations of public order, but this seems to have been an assumption of power not contemplated in its creation. There is ample evidence the Intendant exercised this power as a prerogative of his office and there were times indeed when the "usurpations" of the Council were the subject of hot complaints to the home government. On this point it may be said that the tribunal was intended to be an instrument of limited powers. It was to be the mouthpiece of the Crown and of the local representatives of the corporate interests under whose control the body began its existence but it was was not always subservient; it often failed to function along expected lines; it was often in contempt of constituted authority, it was purged and suppressed and set up again, but in truth it could never wholly be depended upon to carry on against its own convictions. The last act of its official life was to revolt against the Spanish transfer of 1763, its last "usurpation" was its assumption of the reins of government in the interregnum before O'Reilly's army marched into New Orleans in 1769 and extinguished the Superior Council in the blood of its patriotic leaders.

We have at the Cabildo in New Orleans thousands of documents preserving the labors of this tribunal during more than fifty years of life in La Louisiane in the 18th Century, adjudications covering every kind and species of litigation wherein the Custom of Paris and the Great Monuments of the general law of France were in constant application, a body of historical evidence justifying the statement that liberty and protection of life and property under the law of France was the guiding principle of this primitive court of the fine old days when Louis was King in La Louisiane.

The Council during that entire period was a fixed element in the life of the people of New Orleans and in that part of the old colony now comprised within the boundaries of the State of Louisiana. No son of that soil can rise from a study of these records of the ancient regime without understanding the reasons that in 1803 kept the native born of Louisiana, their children, and their children's children true to a system of law that had its roots deep down in the history of their race.

III.

Under the Treaty of Paris, 1763, La Louisiane west of the Mississippi was transferred to Spain together with the island on the east bank containing New Orleans, but the instructions of France to her local representative misled the people of New Orleans and concealed the true facts of the transfer. A revolution ensued, and the Superior Council drove out Governor Ulloa who had been sent by Spain to represent that country in Louisiana, and the Council controlled the local government and ruled until 1769 when a Spanish army under Captain General O'Reilly took posses-

sion. He abolished the French system of government, abrogated the ancient laws of the colony, established a municipal council or Cabildo for New Orleans, and promulgated a brief code of law and practice based on the Neuva Recopilación de Castilla and the Recopilación de las Indias. This preliminary code was to serve until the inhabitants acquired a knowledge of the laws of Spain. Here for the first time Arkansas and Louisiana joined Texas under the Spanish Colonial legal system which had prevailed in New Spain from the beginning, and which was the universal law of Spanish-American colonies wherever situated. As O'Reilly indicates, there was a law of Spain (the Neuva Recopilación) and a law of the Spanish colonies (the Recopilación de Indias), but the colonial statute provided that the general law of Spain should apply to the colonies in all things not specifically covered therein. The exact status of this Colonial law has been concisely delineated by two American scholars, but from somewhat different viewpoints. Dr. Sherman in his great work on "Roman Law in the Modern World" says:

> "The Recopilación de las Indias is the primary source of Spanish-American colonial law. But if the far-seeing wisdom of the Recopilación with its wealth of details had not anticipated any possible case that might arise, then it was provided in the laws of the Indies themselves that the laws of Castile should be observed. The order in which these should be employed was as follows: (1) the latest laws enacted for the colonies; (2) the Neuva Recopilación; (3) the laws of Toro; (4) the royal ordinances of Castile; (5) the Ordenamiento of Alcalá; (6) the Fuero Juzgo; (7) the Siete Par-

tidas; (8) the Consulado del Mar and the Ordinances of Burgos until the Ordinances of Bilboa were promulgated in 1737, thereafter those of Bilboa. Thus the Castillian law became the fundamental law of the Spanish possessions in America, but the condition of the colonies was not always the same as that of the mother country; hence by the Laws of the Indies it was provided that no Spanish law should be binding in America unless made applicable to the colonies by an order of the Council of the Indies. As a result not every Spanish law was extended to America; while some laws not in force at home were enacted specially for the colonies."

Gustavus Schmidt, a New Orleans lawyer, in his "Civil Law of Spain and Mexico" (published in 1851), says, p. 94:

"The Recopilación de Indias, notwithstanding its dimensions, is a mere digest of the royal orders, etc., issued from time to time for the better government of the American colonies. It appears exclusively intended to regulate the political, military and fiscal adminstration of the Spanish possessions in the new world. Hence, this code, so far from being entitled to be regarded as a complete code for the government of Spanish-America, must be considered as a mere enumeration of exceptions to the general and common law of Spain. You look in vain among its numerous provisions for a single title treating of the civil law, or indeed for any law which has not exclusive reference to the mode of administering the various departments of the government of the country. It is on this very account that laws 1 and 2, title 1 of book 2, provide, that in cases where the Recopila-

ción de Indias has no provision on the subject, the laws of Castile must be observed."

But whether we take the view of Sherman or of Schmidt it is historically true that there was a material difference between the system as administered in Louisiana and in New Spain, due to the special regulations solely applicable to the latter that are found in the Laws of the Indies and that had accumulated subsequent to that compilation, and to still other subsequent rules and orders applicable to Louisiana that had no relevancy in the remainder of the Spanish colonies. Owing to the racial differences of the inhabitants and to the circumstances attending the entry of Spain in Louisiana the latter's initiation into the Spanish system was at the beginning more difficult than it is commonly believed, and the Spanish judicial archives of that period in the Cabildo at New Orleans make this very clear. The Louisianans, as this paper has shown, had lived in amicable relations with the law of France and had imbibed its principles in their daily intercourse with the Superior Council. They had been accustomed to the administration of the Commissaire Ordonnateur with his almost omniscient ability to instantly remedy any complaints; they were used to their law officer, the Procureur du Roi, whose office was always accessible, and who by the terms of his appointment was bound to serve with equal honesty and integrity the King and his subjects. From this friendly and familiar system the inhabitants of the province were literally pitched into the presence of the dignity of the Captain General of Spain and his two eminent legal advisers from Havana, and when these departed the judicial machine began to work on a departmental basis. The confused population had first the

Governor's Court with the assessor whose position was that of a judge speaking in the person of the Governor, while each of the other individual members of the governmental corps had the right to hold a court with a legal advisor sitting in like relation to the assessor in the Governor's Court. There were two Alcaldes in the City of New Orleans vested with jurisdiction over the smaller affairs of the people, each of whom consulted the official legal adviser of the court before deciding causes, and in short all the way down the administrative line the people of Louisiana found a new dispensation bristling with office holders, and whether they came into or went thru this judicial mill they paid the costs of the adventure, including compensation to the judge for every order, act and signature of that magistrate, and they paid besides the usual court expenses which had not afflicted them in the French era because there they paid but once, whereas here they were continually paying and frequently found their remedy but dead sea fruit, the ashes of the costs smothering the sum of the recovery. All proceedings were conducted in Spanish and an official translator was another cost taker so that the Louisianan quickly concluded that justice filtered thru so many channels was not a thing of beauty and of joy forever. But time brought familiarity, and before the close of the first decade the French inhabitants and the Spanish system made friends, the people began to understand and to take advantage of the laws of the Indies and the laws of Spain, finding after all that there was no fundamental difference, or at least no such difference as justified their original disgust at the change of rulers and systems.

In the region now within the territorial limits of the State of Louisiana which contained then the bulk of the population of the Spanish Province of Luziane, the people had moreover the advantage of personal contact with the officers of the legal system and those further away found in the Spanish district commander usually an old neighbor or an ex-officer of the French regime and in any event the local magistrate was enforcing a judicial procedure quite familiar to them in the ancient days with the added advantage that nothing that the commander could do was final and that the Governor's court at New Orleans had the last word in every justiciable controversy. From this point of view Louisiana was in much better shape than Texas because there the seat of justice was at Mexico and they operated at long distance so to speak and under a materially different method of administration, but whether the two methods were similar or dissimilar in their operation the legal machine worked on the whole fairly and justly.

The system of pleading in Spanish Louisiana was slightly more formal than its French predecessor. The guiding principle was simplicity, but the process was burdened by appearances or signatures of all the persons through whose hands the papers passed. This was purely mercenary, for the official corps from the Governor-Judge down to the lowest hanger on at the Courts was compensated according to the number of appearances (signatures) affixed to the plea or the process. This made for an accumulation of documents, but after all this was purely formal and did not affect the issue. The parties were allowed to

appear and reappear in written pleas to meet as far as practicable each point of fact raised in the paper next preceding. It lumbered up the record, but it was not technical and as a rule the several admissions made necessary or resulting from this procedure cleared the issue very materially. While the externals of the practice departed from the simpler French method the essence of the documents adhered with some closeness to the forms of the French era. This is so patent, particularly at the beginning, that the Spanish pleadings may be likened to a palimpsest; by rubbing out certain words or phrases the document develops the features of its source.

The machinery of the law was also sufficiently similar to the French system to make no material difference in its operation. The method of trial, the hearing and the decision, were in the same category, save that the Spanish officials loved to write and in consequence their judicial records are nearly always copious reservoirs. Indeed, they are substantial contributions to the history of life in Louisiana under the Spanish Dominion. The Court of the Governor seems to have had supervisory jurisdiction over all other courts. Whether in such cases or in those originating in that court, the Judge heard and determined the whole case, without a jury, and his decision was final unless he saw fit to grant an appeal. It is possible also that the Audiencia at Havana had the right to order the record sent up. An appeal when allowed went to the special court just named and was heard on the original record. The appellate court had the power to review the facts and the law and to render final judgment. Many of the rulings of the Audiencia of Havana

are preserved in the Cabildo at New Orleans. The approval of the Audiencia seems too to have been required in all sentences involving death where the lower judge had any doubt whatever as to the guilt of the accused or of the legal point involved. While this rule was not often called into operation there are many instances of its exercise by the colonial judges.

Aside from the two primary sources of law previously mentioned the period was rich in books of comment on the law and practice of Spain. Among those used in Louisiana was a revised and expanded 18th Century edition of the Curia Filipica, a compilation made first by Hevia Bolanos in the 17th Century. This preserves the methods of practice at that time under the civil, criminal, commercial and maritime law. If the first and second parts of this book were not used in the early drafts of the practice acts and in the confection of the later Code of Practice of Louisiana, it is a remarkable instance of great minds thinking on the same lines, for the nomenclature of Louisiana pleading and process of today tracks the labels attached to the same processes in Spanish Colonial Louisiana. It is clear the actual procedure of the Spanish Courts assimilated the forms and remedies of the French era and that this material was utilized by the creators of the early practice acts of the Territory of Orleans and of the State of Louisiana. Inasmuch as both colonial systems had roots in the Roman law we may say, as we said of the Custom of Paris, that Louisiana Procedure today is founded upon principles that began to take shape in the dawn of legal history.

I wish I could stop here and leave to your imagination the remainder of this topic for here, alas, is a pitfall out of which there is no rescue. The primary trouble is the lack of knowledge arising from the nature of the situation. There has been no modern investigation of the documents that would throw light on debatable problems and after we pass the threshhold many features of the history of the law of Spain are involved in controversies that leave the casual student in a maze of doubt.

But there are some things we can touch without grasping the nettle, for instance, it is commonly accepted that Spain began to codify her laws immediately after the Germanic conquest and under the Visigoths this was the first kingdom organized to take over that part of the disintegrated Roman Empire. In the 6th century these Germanic rulers compiled a code, the Lex Romana Visigothorum or Breviary of Alaric, which from its promulgation in the year 506 remained for centuries a standard authority in other parts of Europe. This combination of Germanic customs and ante-Justinian Roman law established the primitive jurisprudence of Spain upon a basis very much the same as that developed in France. The Breviary was followed two hundred years later by another Visigothic code whose name was corrupted in the 13th century to Fuero Juzgo. This last codification was of wider purpose than the Breviary for that was intended primarily for the Romano-Hispanic subjects of the Visigothic Kingdom of Spain, whereas this new code was established as the law for both the conquering Germans and the vanquished Spanish Romans, both races having by the end of the 7th century practically

coalesced into one people. Regarding this code Sherman says:

> "The Fuero Juzgo is the first great medieval compilation to combine systematically Roman and Teutonic law; it contains not only ancient Gothic customs and many edicts of the Visigothic kings, but it has incorporated also considerable Canon Law from the acts of ecclesiastical councils; and much of its law of inheritance, marriage, corporations, ownership, prescription and contracts is conformable to Roman jurisprudence. Many of the germs of the great political principles, long afterwards proclaimed by far-advanced European nations, are contained in the Fuero Juzgo. Historically the modern law of Spain rests on the Fuero Juzgo, and the Visigothic Code is also the parent law of all countries in America ever under Spanish rule."

The Visigothic-Spanish Kingdom was extinguished in that extraordinary invasion which fastened the Mohammedan Kings on the major part of Spain, who maintained their territorial acquisitions for centuries before the Christion Chiefs could drive this alien race to a corner in Granada, from which they were not evicted until the century of Columbus. What part, if any, of the legislation and jurisprudence of these masterful conquerors filtered into the legal institutions of Spain is one of the vexing problems to be avoided in this presence. Passing away from it we meet the age of the Spanish Justinian, Alfonso the Wise, King of Castile, whose multifarious conceptions culminated in 1265 in the Book of the Laws, the first form of the Siete Partidas; whether it was promulgated by

Alfonso the Wise and whether it was ever observed as an obligatory statute is another problem that has disturbed the student of Spanish legal history, but it is accepted that this wise king's grandson, Alfonso XI, in the Ordenamiento of Alcala in 1348 ordered it to be published as supplementary to the ancient laws of the Kingdom and not obligatory where it conflicted with the Fueros and Royal Statutes. The Partidas was framed or modeled on the Pandects as a digest of Castillian-Spanish Law. It takes its name from the fact that it is divided into seven parts (one for each letter in Alfonso's name) and it covers many fields of law and procedure. While the Fuero Juzgo was used liberally in its confection, the book was saturated with Roman law and in that aspect it was a distinct assault upon legal principles that had long controlled the jurisprudence of Spain. The original purpose of the Partidas was undoubtedly to replace the old and establish a new system for Spain in which Roman law would dominate and though this purpose failed it is doubtful whether any statute of Spain ever attained the vogue and celebrity of the Partidas. It is constantly cited in the Spanish judicial records of Louisiana and some of its provisions are imbedded in our Civil Code, and before the adoption of that Code in 1825 the Legislature of Louisiana authorized an abridgment of the Partidas to be published as one of the source books of our system.

The struggle in Spain between the Roman and native law accentuated by the Partidas resulted in the compromise of 1505 called the Laws of Toro, a very important Spanish legal landmark often referred to in the opinions of the Supreme Court of Louisiana. Both statutes (Par-

tidas and Toro) have an historical interest in Texas because it was in these laws that the Mayorazgo the system of estates tail received its development. It was through them that the lands of the Spanish Provinces of Mexico and Texas were inflicted with ownerships in inalienable title and limitation to primogenital succession, a condition that was destroyed, as we have said in the forepart of this paper, by the legislation of the Cortes of Spain in 1820, and the similar action of Mexico after her successful revolution and before Texas became independent.

Three centuries after the Partidas Philip II of Spain attempted by the Nueva Recopilación to bring all the discordant law of Spain into a new code; he failed in this purpose, but this new compilation stands in the Spanish law as marking the commencement of the movement to unify and codify the law of all Spain which happy consummation was not reached during our colonial period. The occasion requires nothing more to be said about the ancient Spanish legal system, save this, that being founded on Germanic and Iberian Customs, and the Roman Law, we find in it striking resemblances to the ancient French system raised on similar foundations, and in this view the systems of the two countries were consanguineous, the differences (and there were many) being accounted for as we account for like differences in the development of the human family.

The task in hand is ended here for the Colonial period of Arkansas and Louisiana, closed with the Cession of 1803 and though Texas remained in bondage for another generation, the changes in her political system were worked

out by her own hands, along constantly diverging lines, until in 1836 the world welcomed her into the family of independent commonwealths. I cannot, however, break off without recalling the friendly struggle among the people of this new nation to determine her future course with reference to the civil and common law. In Louisiana a like struggle retained her ancient system, but in Texas the victory went to the common law, with reservations, that still preserve the memory of the days when Texas, Louisiana and Arkansas lived under the benign influence of the Çivil Law.

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NEW ORLEANS, Nov 17th 1926

Mr. Francis Rawle,

Packard Building,

Philadelphia, Pa.

Dear Mr. Rawle:-

Absence from the city prevented me from attending to your very kind letters of 29th ult. and 3rd inst. Upon my return, I sent you at once a copy of the genesis of the Civil Code, the paper which you desired, and I added a recent address in Texas before the three Bar Associations that I thought would be helpful to you on the Livingston question, although his name is not mentioned there. The purpose of my address was somewhat akin to that which moved me in writing the genesis above referred to, namely, to show the colonial practice of the three States which once were under French and Spanish domination.

I have from time to time written other papers on the same general lines but what you have I think is all that you have time to read.

As to Livingston. In Hunt's "Life", there are three or four pages devoted to his legal work in Louisiana and to save you trouble, I have had my secretary copy the pages in question and these will give you the Livingston side of his creative work on the Codes of Louisiana. Up to four or five years ago I had no other light on Livingston but that which you find stated in

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the extract above referred to but I was chosen to organize a research into the judicial records of the French and Spanish period in Louisiana and as a result, I obtained a certain mastery of the two systems as reflected in my Texas address.

I also acquired a working library of the books used by the courts and lawyers of that period which enabled me to pass intelligently on the problem as to just what credit Livingston's work is entitled to.

I found that pleading and practice in Louisiana in the French era (1712-1769) was governed by the civil and crminal codes of Louis XIV and the forms of these pleadings had been developed in commentaries mentioned by me in the essay on a"Louisiana Lawyer's library in the 18th Century" and the thought comes to me as I dictate that perhaps you had better have this and I am sending it to you.

The French law of pleading as above indicated, is of course, of Roman origin following the system of Diocletian and the changes of subsequent emperors. It was simplicity itself, stripped, I mean to say of things that were permissible under the Roman practice, so that in Louisiana the petitioner presented in writing a brief pleading practically the same as is followed in Louisiana today and as was incorporated into the practice act of 1805 (which Hunt's book claims was Livingston's creation). The defendant answered either orally or in writing so that between the two pleadings all issues were merged in the simplest shape

and the judge without a jury decided these issues upon the testimony adduced in examinations conducted by himself, sometimes in open court but not always so and the judgment was responsive to the issues with all the power of a Chancellor and strange to say, he had also the right to and did render declaratory judgments, a matter which has been lately exciting interest.

In the Spanish era, I found generally speaking, the same condition of affairs, namely, that at the beginning the Spanish judges and scribes followed the old French forms which they found before them, but they gradually altered these by compelling pleaders to be more systematic. They also permitted the parties to reply ad infinitum to counter pleadings until the issue of fact had been boiled down to an admission or denial. The judge here had the same power that the French colonial judges had to render such judgment as the law and the equity of the case required or permitted and of course, without the intervention of a jury, which was unknown to the French and Spanish civil and criminal law.

The method of notice of citation was in each system the same. The pleading was endorsed with an order from the judge requiring the defendant to appear at the next audience (from three to seven days off). The original petition was exhibited to the defendant and a copy left with him by the sheriff or Huissier as he was called in the French period, and by the escribano of the Spanish era, or a serving officer appointed

for that purpose or by any person whom the court might designate.

In the Spanish period the hearing or trial was along the French lines, save that the oral hearing current in the French era did not apparently occur in the Spanish era, but the method of obtaining testimony was practically the same, that is, in the French period by a hearing before the judge, the parties being excluded, the judge being the sole interrogator and in the Spanish period by depositions taken before the escribano, usually upon interrogatories submitted to the court in advance of the interrogation. In both systems the parties could agree to refer their troubles to arbitration and this was favored in both eras and the judges themselves had the right to and often did refer complicated questions of fact and particularly commerce, marine or financial matters to arbitrators.

The formalities before the arbitrators must have been very simple and probably had the advantage of the parties being present, but in any event our records show that arbitration was the rule rather than the exception in all litigated cases in both systems.

Alongside of this procedure ran the right of the court to issue injunctions, provisional seizures, sequestrations, etc., and indeed, the whole procedure that we now call in our code, Conservatory Writs, was well known in both colonial legal systems and some of them carried the same names that are incorporated in Louisiana's Code of Practice today.

Execution under both systems was not a matter of right but of application to the court for aid and the order of the court took the place of our modern writ. All matters of levy, advertisement, sale, etc., followed the method of today, except that, of course, advertising was done by notice attached to the door of the court room and to the door of the parish church, and the last call for an auction, for instance, was preceded by a crier going thru' the principal streets of the town ringing a bell or making some other noice in addition to that of his voice. The sale at auction was preceded by three preliminary bids one week apart and at the last session they usually lit a candle or a portion of one and closed the auction in favor of the last person to bid before the wick flickered out.

Passing from ordinary civil practice to probate matters, they had in the French period, administrators, executors, tutors, curators, etc; the affairs of minors were referred to a family meeting; there were preferences in favor of the surviving parent; accounts were rendered; indeed, a succession record of the French period and I may also add of the Spanish period, was as carefully made up as any modern court could do it and with much protection for the minor.

There was no family meeting in the Spanish era but it really was not necessary because there the Alcaldes, of whom there were two in New Orleans, and the Court of the Governor, were advised by a graduate lawyer or licentiate, called an As-

sessor, and no judgment or order could be rendered without his vise, and as everything in the Spanish courts had to be put in writing, the judge could hardly be charged with proceeding without sufficient information.

In criminal matters the procedure was very harsh and as you are probably familiar with it yourself, I will dispose of it in a word.

One suspected of crime was arrested, thrown into jail without bail and was interrogated without the benefit of counsel. They gathered evidence outside of his presence and re-examined him upon it and finally he was faced with the witnesses before the judge and put thru' a course of interrogation that usually resulted in his conviction so far as our records show, and I imagine this is because crime was repressed with such a high hand that only few serious cases came before the judges. I have no doubt and it is so said in our histories, that the Alcaldes and other judges heard minor affairs orally and disposed of them without keeping a record.

I trust this long disposition has not bored you but it was necessary in order to give you my conclusions, namely, that when Livingston reached Louisiana with his splendid equipment as a common law lawyer and ex-judge, he found at his hands the records of the French and Spanish eras, well preserved and cared for; he found officials still here coming over from the previous regime; he found all of the books to which I have referred, in-

cluding the Spanish Recopilacion in its various shapes, that is, the laws of Spain and of the Indies; the Partidas, which as you know is a combined civil and practice code, and above all, he found books like the Curia Philipica, which industriously and learnedly discussed the Spanish system of pleading and practice, civil and criminal, a book so simple and so easily understood, that with Livingston's knowledge of Latin and Spanish, it was really an open book. The Curia Philipica was a commentary by Juan de Hevia Bolanos, published in the 17th Century and running thru' several editions, my copy being dated 1776. I have no doubt this book must be in existence in some of your great libraries and certainly should be in the Library of Congress. It covers the whole terminology and practice under the Spanish system and I have no doubt whatever that Livingston must have read it and perhaps studied it, before writing the act of 1805 and certainly before he took part in the confection of the civil code and the code of practice of Louisiana. This book and one by Febrero, another Spanish commentator, are often referred to in the decisions of the Supreme Court of Louisiana after 1812 and during the whole of Livingston's life here and I am equally satisfied that they must have been in constant use during the territorial period, i.e., 1803-12.

Consequently Livingston had little to do but to frame a statute which carried out the principles of the civil law, using familiar names of the local practice, which he did, but whether he had no assistance in this work is at least doubtful.

However, he is undoubtedly entitled to the credit of casting it into the form in which he cast it (the Statute of 1805), a Practice Act which embodied the genius and experience of the colonial eras of Louisiana, reduced to the last word in his concise English.

As to his work on the Civil Code of Louisiana, the principal claim is that he is the author of the chapter on "Obligations", a very important section of our Civil Code and my study of the civil law, both Roman and French, as well as Spanish, convinces me that he took the projet of the Code Napoleon as his guide, which as you know followed the Corpus Juris, altho' he had before him the Code Louis of 1667 as a fine earlier French example of codification and incorporated with this and as statute law, the jurisprudence in equity regarding the execution or discharge from obligations. But I would want more proof than I have ever found that he alone wrote the chapter on "Obligations". He was associated in this work with lawyers of great ability, whose local fame still survives and I would favor the idea that in conferences had from time to time, this and other chapters of the Civil Code first took shape, for they certainly must have interchanged ideas and views, very much as we do today.

There is no doubt that Livingston's career in Louisiana greatly benefitted the civil institutions of that period and that he materially contributed to the maintenance of the civil law as the basis of Louisiana law on which question I can give you more

detail should you care for it, but he was here joined by other men of great power and influence in the territory, some of whom were lawyers of equal intellect and capacity.

I have sometimes wondered whether Livingston did not stand out for the civil law in Louisiana with a somewhat selfish motive for he was one of the few, if not the only one of the American lawyers who flocked to Louisiana at that period who had a knowledge of the languages in which the civil law was written and this gave him a distinct advantage over his common law brethren, and as Livingston had come here with the idea of making a fortune easily and speedily, may it not be that he felt it was to his interest to retain a system which he could read and understand. However, that is not a question which either you or I are presently interested in, but it is a fact that the old records of the territorial period show Livingston as the leader of the American Bar, that is, he was in more cases than any other contemporary.

I was very glad to hear from you and I trust that I have helped you in your labors. I note you suggest that 80 is not the time to begin to write history. I am inclined to think that it is a hobby that helps age keep the mind alive. I have been more or less inclined that way but I did not begin doing serious work on the history of our law until I had crossed the fifties (1912) and as I grow older, I find it more entrancing than ever and a real help to me who am still in very active practice.

I showed your two letters to my daughter, Sally; she appreciates being remembered by you and sends her kindest regards, saying that she finds you are still what she conceived you to be when she first saw you,- the courtliest of men.

Before closing, you ought to know that the Farrar address which you compliment so highly, proved to be an extremely popular pamphlet. I printed several hundred copies of it and they are all gone; the paper, however, has been reprinted in the American and other Bar Journals, and every now and then somebody recalls it and writes about it. The moral I suppose, is that a great man will not soon be forgotten if besides being learned he dominates his learning with idiosyncrasies that segregate him from the mass of his fellows.

Yours sincerely,

HPD:K

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NEW ORLEANS

May 12th 1927

Dear Mr. Rawle:-

Merrick's "no radical changes" was even in 1890 somewhat inaccurate and today must be handled with care. Bearing in mind your restriction "substantially" I should say the Code of 1825 has been modified by subsequent legislation in the following material aspects:-

1st. Art. 24. There is now no essential difference between men and women with respect to their civil, social and political rights,- this drops the old world and particularly Napoleon and his theories on women out of our law.

2nd. Art. 121, 122, 124 and all others on the subject of the wife's subjection to the husband in respect to making contracts, appearing in court, etc. have been practically swept away. She is as free to act as though a femme sole,- this is a radical change.

3rd. The rights of men and women contracting second marriages, with regard to property passing by donation, from one to the other, and with regard to the inalienability of property received from a deceased spouse, etc., Arts. 1752-3 et seq, have been torn up by the roots. They are free to give to each other in full ownership without the ancient restriction on the second marriage. This lifts one of our dead hand laws and wipes out the famous Edict on Second

Marriages of the King of France and eliminates a fundamental conception of the Code of 1825. It took nearly a century to make this change.

4th. The order of descent and distribution has been changed to allow a wife to inherit in certain cases to the exclusion of collaterals, a tremendous inovation, and I may add a most merciful one.

5th. The whole iniquitous doctrine of tacit mortgages has been swept away by statutes of registry and recordation. A wife for instance, under the old law, could follow the property of the husband under any changes. Now, unless the evidence of her claims is antecedently recorded in the proper public office, her pretensions are of no avail. It required nearly half a century after the Code of 1825 to countermarch this ancient institution.

6th. The family meeting as a predicate for disposition of the property of minors, and for all things concerning his personal welfare and his estate, has not been eliminated, but radical changes have been made in its use so that the judge is now able to do without a family meeting practically everything that formerly depended upon that condition precedent. The family meeting was a very old creation of the Civil Law of France and was firmly imbedded in the Code of 1825. We began to attack it about twenty years ago with the result mentioned.

7th. We have broken in on the principle that death seizes the living ("Le mort saisit le vif") to the extent that

one may now leave his estate (or give it entre vif) for a limited term, ten years as to majors and ten years after majority as to minors. This does not destroy the ancient civil law theory that every estate must have a living owner, nor does it allow the donor or testator to give his estate over after death of the beneficiary. It simply permits him to suspend the delivery which otherwise is presumed to follow instantly on death. This does not suggest your common law and statutory trusts, but we call it a trust and it is perhaps better to say a trust for a limited purpose. This is as you know an absolute about face on the doctrines of the Code of 1825 and it is now consecrated in our new constitution (1921) following preceding legislation to that end that it was feared was unconstitutional. Dear old brother Merrick would turn over in his grave could he know what we have done here, for on the bench he set his face hard against any such perversions of the legitime of the forced heir.

These are some of the substantial and fundamental changes in the Code of 1825 and if you will permit me to rephrase Merrick's thought, I would say the Code of 1825 has remained unchanged in form and principle, but it has been subjected to radical changes in regard to the civil and political rights of women, the freedom of wives in contract and in alienation of separate property, the capacity to transmit after second marriage of husband or wife property received from a

deceased spouse, the right of husband and wife to give such property in full ownership to a second wife, the elimination of the tacit mortgage, the right of husband and wife in certain cases to inherit from each other to the exclusion of collateral, the administration of a minor's estate by the direct action of the judge without the intervention of a family meeting, the right to create trust estates and finally the incorporation of the sovereign's right to levy inheritance taxes, both propositions in derogation of the old principle that the testator could not control his estate after death, and that the State could not put any restriction on the inheritance of the forced heir,- "forced", i.e., the heir imposed by law on the testator's bounty, as a child or parent.

You probably will reduce this paraphrase to its bones in general and sweeping categories, but you should add that the Code of 1825 has proved itself virile and flexible, responding thru legislation to changed conditions and to modern conceptions; a democratic law that like the Constitution of the United States has expanded under interpretation and construction and amendment, without losing its fundamental position as an exponent of the principles of the ancient and modern civil law in all that concerns the family and the transmission of ownership, and the descent and distribution of estates among the members of the family.

As usual, I cannot compress into a few lines, the information you desire, but I hope I have helped you. I shall

look forward with pleasure to the reading of your book.
It is bound to reflect the ripe philosophy of its author.

With regards,

Sincerely yours,

HPD:K

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NEW ORLEANS

Sept 17th 1927

Dear Mr. Rawle:-

I am greatly pleased that you give me so much credit for such help as I was able to give you on the Livingston book. It is more than I deserve.

Regarding the Fuero Juzgo I am certain the date is correctly given. Our friend Judge W. W. Howe, in his lectures at Yale in 1894, fixed the adoption of the Statute in the 7th Century. S. P. Scott of Philadelphia in his preface to his translation of the Visigothic Code, 1908, fixes it in the same era. I have been moving my office and these are the only references I can put my hand on in the upset, but I am sure I carefully verified this date in 1911 when I gave it in my Sources of the Civil Code.

I shall look forward to the appearance of Rawle on Livingston and will drop everything else when it comes until it is read.

Please send me your Supreme Court brief. I happen to be much interested in that subject.

Did I tell you I found that Charles Gayarre, the historian of Louisiana, read law in the office of Francis Rawle in Philadelphia early in the last century?

With regards,

Sincerely yours,

HPD:K