

LAW IN THE LOUISIANA PURCHASE.

The Exposition at St. Louis and the Congress of Jurists which assembled there suggest an inquiry into the introduction and development of law in the Louisiana Purchase. The topic may have some present interest as a matter of legal history and comparative jurisprudence.

To apprehend the subject, we have to consider three sources and streams of influence—French, Spanish and English.

We go back to the sixteenth and seventeenth centuries and find France embarking in discovery and colonization in the western world, and providing, according to the habit of the time and by royal charter, some law for her new possessions. At that time, France was divided into the country of the written law and the country of the customary law. The southern portion, called the country of the written law, had formed a part of the Visigothic kingdom and had retained its memories of the compilation of Roman law known as the Breviary of Alaric II, and had also been influenced by the revival of legal studies in the eleventh and twelfth centuries. In the northern portion, on the other hand, the development of law was somewhat different. The barbarian laws, such as the customs of the Salian Franks and other tribes, came in with the Teutonic conquerors. Roman law was not forgotten, for it was sure to regulate a large portion of human conduct, but it was supplemented and modified by these barbarian laws, by local grants and charters, by the feudal system and by various local customs. This northern region came to be known as the country of the customary law. There were many of these so-called customs, but naturally one of the most important and the one nearest to the seat of royal government was the custom of Paris. That city had become more and more the center of learning and was distinguished for its revival of the study of Roman law. When, therefore, in the seventeenth century colonies were established in America, it was thought proper to provide them with systems of law similar to that which prevailed in the neighborhood of the French court; and so it would be prescribed by royal charter that the laws, edicts and ordinances of the realm of a general character, and the custom of Paris, should be extended to the new possessions. This was done at an early date in

Canada, or New France, and as the explorers pushed their way to Detroit, Mackinac and the upper Mississippi, and established their settlements and posts, they took the system with them so far as they took any system at all. And so we find traces of the civil law and the custom of Paris in Michigan, and in Wisconsin while it was a part of Michigan; and in 1810 we find the territorial legislature of Michigan formally repealing the custom of Paris.*

We cannot say just how far this system of law may have penetrated into what was afterwards the Louisiana Purchase. It may not have done so at all, in any practical way. The same system was to come in by a different entrance. In 1715 the commerce of Louisiana, with a considerable share of its government, was granted to a French merchant, Anthony Crozat, and the same provision was made in the charter that the laws, edicts and ordinances of the realm of France and the custom of Paris should extend to the colony. In this way, every portion of the vast territory, whether it might be in the somewhat uncertain confines of New France or of Louisiana, was in theory governed by the same system of law, Roman at foundation, but modified by statute, edict, ordinance and custom.

In 1762 the Colony of Louisiana, so far as it lay west of the Mississippi, together with the so-called island on which New Orleans stood, was ceded to Spain, and after the usual delay, Spain took actual possession. In this way there came in some elements of Spanish law and jurisprudence. In 1769, Governor O'Reilley issued a code of instructions in regard to practice according to the law of Castile and the Indies, to which were annexed an abridgment of the criminal law and some rules in regard to wills. From that period, as Judge Martin states in his "History of Louisiana," it is believed that the laws of Spain became the sole guide of the tribunals in their decisions. But as these laws, as well as those of France, were based on the Roman system, and as there was much similarity in their provisions in regard to personal rights, property, testaments and successions, the transition was hardly perceived before it became complete.† In this way, it may be said, the entire Louisiana Purchase came in theory under the dominion of Spanish law, and the *Siete Partidas* became the leading elementary code from the Mississippi to the Rocky Mountains, and from the Gulf of Mexico to Manitoba. There was, however,

* Compare *Coburn v. Harvey*, 18 Wis. 147.

† Martin's Louisiana, 2d Ed., p. 211.

little practical application of this theory except in the neighborhood of New Orleans, because, outside of that neighborhood, there were few civilized inhabitants, except at a few scattered military posts.

In the year 1800, by secret treaty, the Colony of Louisiana was restored to France, but France did not take possession until December 1, 1803. The wide domain, however, had at that time been already purchased by the United States, and on the 20th of December, 1803, the United States took possession. Interesting questions of public policy at once presented themselves in regard to law and jurisprudence; and those questions were answered in much the same way that they had been in Canada under similar conditions, where lower Canada remained, in a way, a civil law country, while upper Canada passed to the dominion of the common law of England. In 1804 the Territory of Orleans was organized, including about the present area of the State of Louisiana. The rest of the Purchase was at first erected by Congress into the District of Louisiana; then, in 1805, into the Territory of Louisiana; and then, in 1812, into the Territory of Missouri; and so, as will be hereafter seen, the two divisions of the Purchase parted company in the juridical way.

Taking up the legal history of the Territory of Orleans, we find its inhabitants mainly of French and Spanish descent, and strongly attached to the civil law in private matters. In criminal matters, a statute of 1805, which is still in force, adopted the common law of England as the basis of definition and procedure. In 1808 a civil code was adopted, suggested by the Code Napoleon, but unlike it in some details. In 1812 the territory was admitted into the Union as a state, under the name of Louisiana. In 1825 a revised civil code was adopted, a work which Sir Henry Maine has praised as most important and interesting; and in 1870 this treatise was amended so as to leave out some matters that had been rendered obsolete by the results of the Civil War.

But Louisiana did not become in all respects a civil law state. She has a composite system. In criminal matters, as we have seen, she has adopted the theories of the common law. In commercial matters, having no code of commerce, her supreme court has long ago held that the law merchant of England and the other states of the Union should be followed. Having no code of evidence, but having juries both in criminal, and often in civil cases, the same court has said that it will

follow the general rules of evidence prevailing in the other states of our country, so far as not modified by some special statute. It will, therefore, be seen that the system is quite eclectic. So far as general provisions in regard to persons, property and obligations are concerned, Louisiana may be called a civil law state. But in other important departments of jurisprudence, as pointed out above, she is largely indebted to English and American law.

We pass now to the rest of the Purchase. It was immensely larger in area than the portion set apart as the Territory of Orleans, but for some time after its acquisition it had few civilized inhabitants. Almost no immigrants came to it from France and Spain, and the recollection of the civil law and the custom of Paris may have begun to fade very soon. A great army of settlers began to move in from those states and territories which had been nurtured in that other system of law that came from England. As pointed out by the Supreme Court of the United States many years ago,* the settlers of the thirteen colonies brought with them the general principles of the common law of England so far as applicable to their situation. They brought the Law Merchant, and even such part of the ecclesiastical law as was adapted to their circumstances. When, therefore, their descendants began to emigrate to the Purchase in westward lines, they naturally took with them to an almost uninhabited country, the same system, so familiar and so cherished. In the case of *Grande v. Foy*,† in the year 1831, the Superior Court of the Territory of Arkansas had occasion to collate some details as to the dates and methods of the introduction of the common law. The court pointed out that when, by Act of Congress of 1803, the Territory of Orleans was organized, it was also provided that the rest of the Purchase should be called the District of Louisiana, and attached to the Territory of Indiana, and the government and judges of Indiana were authorized to legislate for the district; that in 1805 the name was changed to the Territory of Louisiana and a legislature established for such territory; that in 1812 the name again changed to that of Missouri, and that in 1819 the Territory of Arkansas was set up. The court notices that this legislation in each instance continued all laws and regulations in force at the date of each act; and that in 1816 the Legislature of Missouri, which then had control of the entire area, passed a statute by which it was expressly enacted "that

* *VanNess v. Pacard*, 2 Peters 137.

† *Hempstead's Rep.* 105.

the common law of England, which is of a general nature, and all statutes of the British Parliament in aid of or to supply the defects of the common law, and of a general nature and not local to that kingdom, which common law and statutes are not contrary to the laws of this territory, and not repugnant to, nor inconsistent with, the Constitution and laws of the United States, shall be the rule of decision in this territory until altered or repealed by the Legislature."

The court also pointed out, as perhaps not necessary to the decision, that from a date as early as 1807 the territorial legislation had used the language of the common law in many instances and in regard to many subjects; and the court seems to have thought that even before 1816 the common law had been practically accepted or adopted "either by the statutory provision, or by common consent at an earlier day." The impression left by the case is that the settlers from the common law states were determined to have that system; and they certainly established it by the statute of 1816.

We have thus seen law and jurisprudence in the making, from their early beginnings to their present development. Two systems have grown up side by side in the Purchase, the one relating back to Rome, the other to early England. Yet, they are not so very unlike when we penetrate below the surface and down to vital principles. There are differences in terminology which seem more mysterious than they really are, but the two systems, in America at least, tend to resemblance. We have seen how, in the present State of Louisiana, the law of England has furnished many important rules of 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. We may at least say that the two systems are no longer as antagonistic as they were when Blackstone wrote his first lecture. The more that mere technicality disappears, the more they come to resemble each other: and, if you eliminate from the English law the peculiarities of the tenure and transmission of real estate which were largely feudal or social in origin; if you further eliminate, as they are doing in England and America, the technicalities of common law pleading; if you leave out some rules of evidence which have grown up around the practice before the English common jury; if you leave out differences of technical phrase; it will be found that the great principles of right as between man and man are much the same to-day in all parts of the Louisiana Purchase.

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