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Mr. Wigmore's article upon the jurisprudence of Louisiana presents in a very clear light the history of the law in that State, and will be especially interesting to the bar of this Province which has a code based upon the same model, and where the decisions of the Louisiana Courts are so often cited.

We have received the first issue (January, 1889) of *The Green Bag*, "a useless but entertaining magazine for lawyers," published by Mr. C. C. Soule, Boston, and edited by Mr. H. W. Fuller. If the epithet "useless" were strictly applicable to the contents we should have some doubt as to the stability of our new contemporary, for a mere comic journal devoted to the law would probably be more tedious than the average comic paper. But the opening number of *The Green Bag* is better than its title might lead the reader to anticipate. There is a notice of Chief Justice Fuller, with a very handsome portrait; an article on the Whitechapel Tragedies; a poem by Mr. Irving Browne, who is always amusing when he bursts into rhyme; a descriptive article on the Harvard Law School, with beautifully executed illustrations; the *cause célèbre* of Papavoine; and other matter. The mechanical execution of the number is in the style of an art journal, and leaves nothing to be desired. The idea is to supply the profession with "a bright, entertaining magazine, designed rather to interest and amuse than to instruct." The present number promises well, and we have no doubt that *The Green Bag* will become a favorite visitor.

SUPERIOR COURT.

SHERBROOKE, 1888.

Coram BROOKS, J.

HILL v. THE GRAND TRUNK RAILWAY CO.

Railway—R.S., ch. 109, s. 47—Raising bridge—Right of Proprietor injured to indemnity.

HELD:—*That a railway company which, under the provisions of 44 Vic., cap. 24, s. 3, (now Revised Statutes of Canada, cap. 109, s. 47,) extended to defendant by 46 Vict. cap. 24, without obtaining the consent of the municipality or the owner, raised a municipal bridge passing over their railway and also the approaches thereto, is liable to the adjoining proprietor, for the damage sustained by him by reason of the increased height of the highway as it approaches the bridge.*

PER CURIAM.—The plaintiff alleges that he is the owner of a quarter of an acre of land in Richmond, and brick dwelling house, bounded in front by the Queen's highway, and on one side by defendants, having acquired this property in 1876. The defendants, in July or August, 1883, raised the bridge crossing defendants' track and the highway approaching it in front of plaintiff's house, to plaintiff's damage of $1,700. That defendants caused an increased quantity of snow to accumulate on plaintiff's property, increased the difficulty of ingress and egress, injured the house in appearance, and rendered it damp and unhealthy.

The defendants plead, 1st. That the highway is under the control of the municipal authorities of the Town of Richmond, and the plaintiff's action, if any, should have been against Richmond.

2nd. That the work was done under 44 Vict., ch. 24, (1881), now Revised Statutes of Canada, ch. 109, s. 47, extended to defendants by 46 Victoria, ch. 24, and this was done with the consent and knowledge of the municipality of Richmond, the approaches raised to correspond with the bridge, and the defendants not responsible.

3rd. General issue.

As to the first question, that the action should have been brought against the municipality, I think it is untenable. In the *Lessard & Lambert* cases, 10 R.L., pp. 359 and 441, Queen's Bench, Appeal side, the actions against the corporation were dismissed on the ground stated in the judgment, that the works were done by the Railroad Company, and that the Corporation had no control. That is not the present case. See Revised Statutes, Canada, cap. 109, sec. 47, sub-sec. 2, which declares that the Railroad Company shall

raise the bridges *after having first obtained* the consent of the municipality or owners.

In this case the defendants went on with works *without so doing*. In fact no action of the Municipal Council was taken, and the defendants proceeded with the work at their own costs and risk, and though possibly the municipality may have been liable, the defendants, I think, are also liable for any damages they may have caused plaintiff.

The protest by plaintiff against the municipality meant nothing but protecting himself. What defendants' counsel say is quite true as to the rights and obligation and the mode of procedure in cases of *garantie simple* and *garantie formelle*, but does not apply to this case. Here the party doing the work is equally responsible with the municipality who might or should have controlled it.

In *Brodeur v. Roxton*, 11 R.L., p. 447, Buchanan, J., where the decision was in an action *en garantie* Municipality v. Railway, the authorities cited are in favor of the plaintiff. The reference to Pierce on Railways, p. 241, p. 453, R.L., vol. 11, speaks of special damages which in this case are caused by defendants, and the whole tenor of decisions supports plaintiff's pretentions.

As to the second point, that the work was compulsory on defendants, *i.e.*, raising of bridge, I do not think it exonerates them. They have special privileges, and when building their road were obliged to pay such damages as they then occasioned. The change was in the interest of the public generally and for the safety of their employees in particular. What with the substitution of steel for iron rails, the building of larger and more powerful engines, the increased size and height of freight cars, they are acting for their own benefit in the interest of their own business, and the legislature steps in for the protection of life, and says, you must have higher bridges. They put them in and injure private property. Who should suffer, the individual, or the Company who, to increase their business and lessen their expenses, have rendered them necessary? Undoubtedly, the Company.

Now we come to the more serious question, what amount of damage has plaintiff sustained. I think by his declaration and by his witnesses he has claimed and attempted to prove altogether too much, and too remote damage in many instances. The main damage is difficulty of egress and ingress throwing water and snow on to plaintiff, dampness to the house and injury to the cellar wall. The plaintiff's witnesses place it too high, much too high, unreasonably high; they say you have to keep front windows shut for dust, and view either horizontal or oblique, &c.

But having carefully examined the evidence, I think that Mr. Hart's evidence as to damages is much more reasonable than plaintiff's witnesses, who give all the way from $500 to $2,500, when the property is only assessed at $1,500 on the assessment roll. I think if the plaintiff gets 20 per cent, or one fifth, of the estimated value, *i.e.*, by valuators, the amount on which he pays taxes, he will be amply compensated.

Judgment for $300, interest and costs.

Hon. H. Aylmer for plaintiff.

Hall, White & Cate for defendants.

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*LOUISIANA: THE STORY OF ITS JURISPRUDENCE.**

It is the fashion nowadays to have an opinion about codification or the newest code, but even a slight acquaintance with the earliest of our codes seems to be regarded as an acquisition scarcely worth the pains, or even as a valuable accomplishment. To the ordinary lawyer in one of our common-law States the jurisprudence of Louisiana is a mere rumor, an unprofitable subject, a matter of scantiest information. Perhaps the savor of Roman jurisprudence, itself now out of favor with most of us, has helped to repel acquaintance with the characteristics and the history of the law of Louisiana. Yet for this lack of appreciation there is no good reason. Few subjects so well reward attention as the unique position in American jurisprudence occupied by the law of Louisiana, and the singularly interesting course of events which out of such varied material has given us the system of law now so much in contrast with the other systems of the Union. Other states have codes; other governments of modern times have composite bodies of

* By J. H. Wigmore in *American Law Review*.

law; but in few other modern states has the work of a genius lent character and interest to a jurisprudence as has the work of Edward Livingston, entering into and strengthening the legal system of Louisiana. At an earlier period, too, than the compilation of the codes, our interest gathers about the strange and incoherent mixture of law in force in the early days of our ownership of the territory, and the confusing complications that ensued. We are led back to the Spanish codes of Ferdinand and of Alfonso, and to the Siete Partidas of 1348—the Pandects of Spain,—and we realize that mediæval customs of Spain were in full force in Louisiana as late as the first decades of this century.

Early law in Louisiana (before the 18th century) there was little. Justice was imperfectly administered by a military commandant. The population was an unsettled one, and the need of a system of law was not greatly felt. In 1712, when Crozat took possession under his charter, the legal history of this region begins. The custom of Paris—a code, first written down in 1510, of that mixed Roman and customary law which characterized France before the codification of Napoleon—was made the law of Louisiana by the charters of Crozat in 1712, and of the Western Company (John Law's) in 1717.* It was in 1762 that Spain, by cession from France, became owner of the territory known as Louisiana, including the greater part of the region west of the Mississippi, except Texas and California; but six years passed before the Spaniards, under Count O'Reilly, took actual possession. When a region is ceded, its local law continues in force until abrogated by the new owner.† Accordingly, in 1769, by a proclamation of O'Reilly, all French law was abrogated (with the exception of the "Black Code" or slave code, given by Louis XV. in 1724, and continued in force by O'Reilly),‡ and the Spanish law took its place; nor did the law of France ever after reappear in its own name in Louisiana. It was totally overthrown § and its influence revived only when Livingston, Lislet, and their coadjutors, went to the French code for a model. Don Alexandro O'Reilly was a young Irishman of great military ability, who, forsaking his country, had served under various continental commands, and finally had risen to distinction in the Spanish army. He was at this time in high personal favor with Charles III. of Spain. Count O'Reilly organized an efficient government for the province, and published a portion of the laws in the French language, and the substitution the Spanish system seems to have been thoroughly carried out. As it happened, the common origin of the two systems of law made the transition not a radical one. The attendant friction was due to the personality of the new government rather than to the content of the new laws.

What was this law of Spain, received by the people at the point of the bayonet, actively enforced for nearly 60 years, and tingeing ineffaceably the jurisprudence of the State?

The early streams of Spanish law were copious. Roman law, culminating in the Theodosian code of 438 A. D., held sway until the conquest of Spain by the Visigoths about the year 466, and perhaps for a short period thereafter. Euric, the first Gothic king, promulgated some written laws of uncertain extent, which probably did not displace the Roman law; and possibly the Breviary of Alaric II. (itself often called Lex Romana, and based on the Theodosian code), published 506 A. D., was in force in Spain in the sixth century. But Receswind the Goth, about the year 672, by atrocious penalties stamped out the Roman law as such, and introduced a collection of laws bearing his name, after-

* For a summary of the custom of Paris, see 1 La. Law J., No. 1, p. 15.

† 1 Bl. Comm. 107; 5 Martin's Rep. 284.

‡ Derbigny, J., in 4 Mart. Rep. 368.

§ Moreau & Carleton, Introd. to Las Siete Partidas, p. 21; Livingston, Introd. to System of Penal Law, 59 and "Batture" pamphlet, 5 Hall's J. of Law, 141; Martin, Hist. of La., p. 211 (ed. 1882); Derbigny, in 4 Mart. 368; 17 La. Rep. at 227; Gayarré, Hist. of La., Spanish Domination, p. 18; Gayarré's 3rd Ser. of Lectures (1852), p. 64; "Batture" pamphlet, Du Ponceau (Phil. 1809), p. 11; Am. State Papers, Miscell. I., 363, 369. But the opposite opinion was stoutly maintained by Jefferson (5 Hall's J. of L. 20), and by Schmidt, the learned editor of the La. Law Journal (1., No. 2, pp. 96-100); and has sometimes been adopted, loosely, it is believed, and without much examination: Amos, Civil Law, p. 463; 3 Wheaton, 202, n. a.; Barb'e Marboris, Hist. of La., p. 338.

wards united with other laws of earlier and later date in the West Gothic Code, published in the year 700.

Curiously enough, this code, placed imperiously above the Roman system, was in many portions compiled from the Breviary of Alaric,* and was therefore largely Roman in its materials. It is noticeable, too, that when the statutes and the customary law were silent, the Roman law was applied by the judges as a matter of conscience. This code† was known as the *Forum Judicum*, afterwards corrupted into *Fuero Juzgo*, and enjoyed sole authority, in the kingdom of Castile at least, until the reign of Alfonso the Wise. Meanwhile the terrible political convulsions attending the expulsion of the Moors and the consolidation of the Spanish kingdom left its laws as a whole in a distracted state. Other codes made their appearance, based partly on custom, partly on the civil law,—the *Fuero Viejo*, the *Fuero Hidalgo*, and the *Fuero de Leon*. In 1256 Alfonso the Wise began the preparation of a uniform system of jurisprudence for his dominions. Here again, while indigenous customs found a place, the jurisconsults took from the legislation of Justinian, sometimes by translation almost literal, the body of their code. They chose for some reason (probably the penalty which still technically attended the citation of Roman law), as in the *Fuero Juzgo*, not to acknowledge the source of their borrowing, and referred to the rules of Roman Law as the precepts of the ancient sages (*los sabios antiguos*). The code was published in 1348,‡ and this great work, known as the *Siete Partidas*, has ever since furnished the fundamental principles of the law of Spain. § In the next few centuries several supplementary compilations made their appearance. The different bodies of law in force in Louisiana under the dominion of Spain were the *Siete Partidas*, the *Recopilacion* of Castile (published in 1567, and last amended in 1777), the *Recopilacion* of the Indies (containing laws specially applicable to Spain's colonial possessions), whatever royal Edicts (*Cedulas*) had been directed to the courts of Louisiana, and, to an uncertain extent, the early codes already mentioned.

In 1801, Louisiana was ceded by Spain to its former owner, but not until late in 1803 did France enter upon the territory, and then only in order to deliver possession to our own nation, purchaser under the treaty of 1803. This temporary occupation, however, was not attended by the promulgation of any system of law,* and so by the rule already mentioned, the Spanish law was in no way abated, but remained in full vigor. In 1804 the United States established a territorial government for its new region, and in March, 1805, the district of Orleans (substantially corresponding to the present State of Louisiana) was set apart and a separate government given.

What, then, under the new ownership, was the condition of the law of Louisiana? Most perplexing and intolerable.

The perplexity lay in this. Until repealed, expressly or impliedly, by the new power, all Spanish law remained in force. The legislative Acts material to effect a repeal were five in number, three Acts of Congress and two Acts of the first territorial government. The Act of Congress authorizing the president to take possession of the province (31 Oct., 1803) left unchanged its old laws, vesting in new officers the power to administer them. The Act of 26 March, 1804, organized the different branches of government, and provided, among other things, for the writ of *habeas corpus* and for trial by jury; expressly declaring, moreover, that all laws in force in the territory at the passage of the Act and

* See Savigny, Gesch. des Rom. Rechts, II., ch. VIII., § 25; Palgrave, in 31 Edinb. Rev. 94, 109; Dahn, Westgothische Studien, 3-12 *et passim*, Die Könige der Germanen, vol. VI.

† Strikingly different from the other codes of that time, says Savigny, in the originality, eloquence and philosophic tone it exhibited.

‡ A part of it, *El Fuero Real*, bearing to the principal work the relation which the Institutes of Justinian bear to the Digest, having appeared in the reign of Alfonso.

§ "A code of legal principles," says Chancellor Kent (2 Com. 240), "which is at once plain, simple, concise, just and unostentatious to an eminent degree."

* A few edicts concerning the form of government were put forth, and by a special proclamation, the Black Code, already mentioned, was continued in force. It was re-enacted by the teritorial legislature June 7, 1806.

not inconsistent with it, should continue in force until altered by legislation. The Act of 2 March, 1805, contained the same clause. The legislative council, on 4 May, 1805, passed an Act for the punishment of crimes and misdemeanors, specifying a number of offences, and directing that they be construed and tried according to the common law of England. A subsequent statute of 3 July in the same year, adding a few crimes to the list and prescribing a common-law trial for "all other crimes," was repealed in the ensuing year. Finally, it should be remembered that upon the cession, the constitution of the United States became the supreme law of the territory.

In all the legislative Acts there was no express repeal. Whatever change occurred was effected by implication,—that is, such laws as were inconsistent with the new provisions were thereby abrogated. Briefly, then, the laws repealed were (1) those inconsistent with the new form of government,—such as the royal prerogative, the mode of appointing officers; (2) those inconsistent with the institutions of our constitution,—such as laws interfering with the liberty of the press, with the right to trial by jury; (3) the offences corresponding to those referred to in the territorial Act, and the law of evidence and of procedure so far only as those offences were concerned; perhaps, also,* the laws dealing in any way with offences prohibited since the cession. What procedure was to apply to other offences already existing or subsequently created was not indicated.

Confusing, indeed, then, was the condition of jurisprudence in Louisiana. The *Fuero Juzgo, Fuero Viejo, Fuero Real, Recopilacions, Siete Partidas, Cedulas,* our Federal constitution, several legislative Acts representing the incorporation of an uncertain element of common law,—it was not enough that these codes and statutes pressed in on all sides and claimed the obedience of the citizen. It was not even certain that all of these codes did in fact have the force of law, or what part of each, if any, was in force.† Worse than this, copies of the older codes were rare. Complete collection of all there was none. Of some not a single copy existed.‡ Yet all, old or new, rare or plentiful, were still as potent rules of conduct—so far as they were in force—as the most public and recent proclamation. Moreover, the institutions of the two systems, differing in parentage as well as in language, were repugnant and not easily reconciled. The confusion of tongues, too, impeded the administration of justice.§ For offences and suits other than those enumerated in express legislation it was difficult to say how the administration of justice should be conducted,—whether Spanish or English rules of evidence and procedure should be adopted.

But this was not all. Remaining at the beginning of this century, in a republican community, were provisions dating back to the time of the Gothic conquerers,

"Enrolled penalties * * * strict statutes, and most biting laws,"

—some barbarous, others merely absurd or repugnant to modern notions, but all equally out of date and unfit for enforcement. For example, if a lawyer died after beginning a suit, the heirs, if they tendered another capable lawyer, might claim the whole of the stipulated fee. The penalty of infamy, entailing the most serious disabilities and penalties, was imposed without discrimination upon the lightest offenders, and even upon an unsuccessful defendant in a civil suit. The rules regulating the incompetency of witnesses far surpassed the English rules of the last century in their power to pervert justice. It was a criminal offence to throw into the street, by way of insult, a book given one to bind

* Livingston, Introd., etc., p. 62.

† At a later date, Livingston, hoping for better things, wrote: "Foreign laws can no longer be imported by the package or described in the act of introducing them, as goods are in the bill of lading, 'contents unknown.'"

‡ Martin's Hist., p. 344.

§ Courts of justice were furnished with interpreters versed in the French, Spanish and English languages, these translated the evidence and the charge of the court, but not the arguments of the counsel. The case was often opened in the English language and those of the jury not familiar with it were allowed to retire to the gallery. The defence being in French, a similar privilege was then allowed to those jurymen who did not understand that language. The jury then retired, and, each contending that the argument he had heard was conclusive, a verdict was finally reached as best they could. Martin, p. 345.

or clothes given one to repair.* If an injured party afterwards sat with the wrong-doer or lived with him, the right to reparation was lost.† Banishment and confiscation of property were the fate of the advocate who betrayed the secrets of his client or intentionally cited the law falsely.‡ It seems beyond a doubt that torture was a legal possibility—not to compel the accused to confess (for this the constitution forbade), but to force out testimony as to accomplices, and to extract the truth from a prevaricating witness.§ In many instances the sentence lay wholly in discretion of the judge. In capital cases he could at his pleasure choose, as the mode of punishment, decapitation by the sword (though not—such was the tenderness of the law—by the saw or the reaping-hook), burning, hanging, or wild beasts; and a judge was found (according to a trustworthy account), who exemplified the terrible potentiality of these obsolete yet living laws, and condemned a slave to be burned alive at the stake, the sentence being executed in his presence.

In April, 1805, the first step was taken towards reclaiming the land from the tangled growth of law that covered it, and Livingston's Code of Procedure was adopted. Not until 1828, however, was the last step taken and the process of codification abandoned. During those twenty years the uncertainties of the law abated only partially. To some extent the legal atmosphere was cleared by the code of 1808; but new penal statutes of doubtful bearings were constantly passed, and the sum total of gain made was little. As a last straw, the Act of 1806, creating the Superior Court provided for three judges, any one of whom constituted a quorum, and might sit separately, rendering a decision of last resort. Thus a new opportunity was offered for increasing the discord and confusion.

But this period was the Augustan age of the bar of Louisiana. The breadth of research which the circumstances forced upon them tended to make and did make jurists of them all. During those twenty years, the lawyers drew for their authority upon the Gothic, Spanish, and French codes, the Roman and the civil laws, with their attendant cloud of commentators, and, finally, upon the common law of England and its developed form in this country. This keen exercise was not reserved for the leaders of the bar; it was a matter of daily experience for all. Upon a random page in the reports of cases of that period one may expect with equal probability a citation from Binney or Ulpian, from Lopez or Pothier, from Croke or Vattel. There, first in this country, and there only, perhaps it might be added, was found at the bar a taste for comparative jurisprudence. The names of the brilliant ones of that day are not often heard now, but Hall, Derbigny, Duponceau, Brown, Lislet, Workman, Mazureau, were eminent names in that creative era.

Perhaps the leading figure, in earliest times, was François Xavier Martin, judge of the Superior Court from 1810 to 1813, and of the Supreme Court from 1813 till his death in 1846. Removing from North Carolina at an early age, he began life again in this new field. Of foreign birth and in his youth extremely poor, he was a man of broad tastes and high accomplishments. His literary vigor was remarkable, and besides a translation of Pothier on Obligations (the first ever published in English) and other legal works, he wrote a history of North Carolina, his first home, and, later, of Louisiana. His solid legal culture brought him into frequent contact with Kent and Story, and made him no unequal companion; and in 1841, Harvard University honored him with the degree of LL.D.

Better known to-day, and a greater than Martin, is Edward Livingston. In more than one way his history has been the history of his State and of the nation, and needs no mention here. But his legal genius has never been sufficiently appreciated in this country.* He may be called the greatest

* Partida 7, tit. 9, Law 6.

† *Ib.*, Law 22.

‡ *Id.*, 7, 7, 1.

§ *Id.*, 7, 30, 8. "The judge is directed to select for this operation of cruelty and horror the youngest, the most delicately framed, the most tenderly educated, and—is this an earthly or a hellish code that I am reviewing?—where there is a father and a son, to rack the limbs of the child in the presence of the parent." (Livingston, Introd., etc., p. 70.)

* Far otherwise abroad, where his name, with a few others, is especially associated with our jurisprudence.

creative jurist we have seen. He is the Benthan of American jurisprudence, without the blemishes of that great critic. It was Bentham's misfortune too often to overshoot his mark, perhaps as much by not being thoroughly grounded in the law he criticised as through any other cause. Livingston shared with Bentham his contempt for the rubbish and the useless fictions that disfigured (and in part still disfigure) the common law of England and the United States; but he had moderation and clearer perceptions, and was not only a master of the common law, but was thoroughly acquainted with the civil law and widely read in the continental writers. To this he added a store of common sense, an intimate knowledge of humanity, the spirit of high purpose, and, watching and restraining all, an eye for the feasible and the practical in legislation. One passage from his Code of Criminal Procedure will perhaps suggest the comprehensiveness of his mind and his acute perception of legislative ends and their means. The selection is from the part of the code giving a discretion to the judge as to the apportionment of punishment when circumstances of aggravation exist,—*

Hunt mentions (Life, p. 278), among those who have expressed their admiration for his work, Hugo, Villemain, Bentham and Maine (who called him 'the first legal genius of modern times"); Taillandier, Livingston's translator in France, mentions ('Notice Nécrologique") in a similar list Julius, Mittermaier, de Beaumont, and de Tocqueville.

* "Art. 433. The following are to be considered as circumstances of aggravation:

"1. If the person committing the offence, was by the duties of his office, or by his condition, obliged to prevent the particular offence committed, or to bring offenders committing it to justice.

* * * "3. Although holding no office, if his education, fortune, profession, or reputation placed him in a situation in which his example would probably influence the conduct of others.

* * * "7. When the condition of the offender created a trust which was broken by the offence or afforded him easier means of committing the offence.

* * * "10. When the injury was offered to one whom age, sex, office, conduct, or condition entitled to respect from the offender.

"11. When the injury was offered to one whose age, sex, or infirmity rendered incapable of resistance.

"12. When the general character of the defendant is marked by those passions or vices which generally lead to the commission of the offence of which he has been convicted.

"Art. 434. There are also circumstances which ought to enhance the punishment, although they form no aggravation of the offence: these are:—

"1. The frequency of the offence.

"2. The wealth of the offender * * * Where the punishment is an alternative of fine or imprisonment * * * and the wealth of the offender is so great as to render the payment of the highest fine that can be imposed a matter of little importance, imprisonment ought to be inflicted. * * * "

a subject which in existing systems of legislation has received far too little development.

Leaving the figures of this attractive period,—what was the process of codification and how far was it accomplished?

In the early days of American dominion there took place a large influx of lawyers from other States (Livingston among them), and naturally a strong effort (claiming as its justification an equivocal expression in the congressional ordinance relating to the territory) was made by them to secure the adoption of the common-law rules in which they had been bred, at least for the forms of procedure to be followed. But the unfairness of such a measure, in a community accustomed only to law of a Roman origin, excited the opposition of the native lawyers, and of Livingston, long convinced of the superior excellence of the civil law. The champions of the common law were defeated and Livingston was selected to draw up a code of procedure.* His code was adopted in 1805, and simple yet adequate, stood successfully the test of use until it was replaced by the more ambitious code of 1825.† In 1808, Moreau Lislet and James Brown (afterwards Minister to France), who had been appointed to prepare a civil code, presented their results, which were adopted by the second territorial legislature. But this document did not purport to cover the whole body of the laws, and to a limited extent only did it abrogate reference to the Spanish law. It was modeled on the *projet* of the Code Napoleon (for a complete copy of the latter was not at that time accessible), and the whole body of French jurisprudence was thus introduced into the arguments and decisions of the courts of Louisiana. Martin's Digest, authorized by the legislature, appeared in 1816, but it included only statute law. In 1820 the codifying spirit acquired fresh zeal, and by the Act of Feb. 10, the preparation of a criminal code was authorized.‡ His preliminary report was ap-

* E. Livingston: "Aux Electeurs du premier district, etc.," 21 Mai, 1825: Eustis, C. J., in 7 La. Ann. 418.

† Bentham's Works (Bowring's ed.) xi, 52.

‡ An opening sentence in the preamble—"It is of primary importance in every well-regulated State that the code of criminal law should be founded on one

proved by the legislature in 1822 and again in 1823, but by an accident the draft was destroyed in November, 1823, and when, after two years of toil, he had rewritten it, the legislative mind seems to have altered* and the code was not adopted. Futile attempts were made, the last in 1831, to secure its adoption (Livingston's absence in other fields probably contributed to the failure), and the opportunity of possessing perhaps the most enlightened and most nearly perfect criminal code ever compiled was stubbornly rejected by the people of Louisiana.

In other quarters, however, the work of systematization advanced. Moreau Lislet, Livingston, and Derbigny, appointed in 1822 to prepare a civil code and a code of practice, reported in 1825 a code of practice, probably founded on the earlier one of Livingston,† but of ampler scope, and a new civil code. Both were adopted. The civil code was intended to supplant all existing law relating to the subjects covered by the new document, but a doubt arose as to the efficacy of this repeal,‡ and by the act of 25 March, 1828, all civil laws§ existing before the promulgation of the new code were repealed. Thus were finally swept away the laws of Spain.‖ It is said that the part of the code dealing with obligations was entirely from Livingston's hands. The codifiers, in their report of 1823, declare that "in the Napoleon code we have a system approaching nearer than any to perfection," and their code evinces their admiration for the continental model which they took. The form, and, in general, the titles and divisions correspond closely to those of the French code. The Louisiana jurists evidently took the latter as their original material, and in their discretion pruned from it unsuitable clauses, or added to it desirable provisions taken from other systems or suggested by their own experience. All helpful sources were freely sought, and there was no servile adherence to any model. It was intended at the same time to reduce the law merchant to the form of a code, but this part of the general work was never adopted,* and in commercial matters the law merchant of the United States remained in force, when not in conflict with legislation or usage in Louisiana;† for it had been held that by the cession the law merchant of the United States came into force,‡ and it was in existence side by side with the old code.§ It was also intended to present in codified form the rules of evidence.‖ Possibly at first the Spanish law of evidence had prevailed, but at an early date the practice changed,¶ for the harshness of the Spanish law and the difficulty of conducting jury trials by other than the accustomed rules of evidence made it easy to find a justification, on the ground that the Spanish law was inconsistent with the institutions of the new government and was therefore repealed.** The plan of a code of evidence was not carried out, but many of the leading principles of the subject were incidentally incorporated in the civil code.††

At this time then (1828) the great body of private law was in codified form, arranged and founded on Roman law principles, modified by considerations drawn from various sources. The commercial law was that in force generally throughout the United States, and was still to be found in the decisions of the judges. The criminal law included only statutory offences, but for the definitions of the larger number of those offences search had to be made in the common-law decisions. The law of evidence was the common law, still uncodified. Practice and procedure were governed by the code of 1825. The common-law element was and is perhaps larger than is usually believed by lawyers of other states. The terminology of the English law crept in with the language, and is found here and there through the law in places where it would be least looked for. Perhaps in no portion does the spring of the civil law flow pure for any long period. Yet the civil code is thoroughly and essentially Roman, and it remains true that the Roman system of law must form a fundamental part of the equipment of a lawyer in Louisiana.

Later changes in the law have not been radical, and, it may be added, have not been characterized by the reforming spirit of 1820-30. Several digests have appeared, the codes have been amended, and general revisions of the statute law have been made in 1854–5 and in 1870; but that first of all legislative duties, the publication of a penal code, has never been executed.

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principle, viz.: the prevention of crime,"—is an expression of advanced thought noticeable for those days as a legislative utterance, and in contrast even with the divided sentiment of to-day, when Sir James Stephen (doubtless misled by the English system of prosecutions and confounding the motive of the prosecutor with the object of the law) is found to declare that one of the two objects of criminal law is the satisfaction of the passion of revenge within proper limits. (Gen. View of Crim. Law, etc., pp. 98-9.)

* Largely, it is said, through the efforts of Judge Seth Lewis, a perverse defender of the established order (or disorder) of things. See "Remarks, etc., Seth Lewis, 1931; Some Strictures, etc." Seth Lewis, 1825.

† Gilpin, Biographical Notice of Livingston.

‡ 6 Mart. (N. S.) 90.

§ That is, not as distinguished from criminal laws, but as embracing all law of Roman origin: 5 La. Rep. 493.

‖ 7 La. Rep. 543.

* Martin, J., in 2 Robinson's Rep. 122; it was never prepared, according to 19 La. Rep. at 592.

† 5 La. Rep. at 408.

‡ 2 Reb 122.

§ 2 Mart. 304; 12 *Id.* 498.

‖ 8 La. Ann. 13.

¶ 3 La. Rep. at 86; 9 La. Rep. 520.

**6 Mart. at 673; 10 *Id.* at 566.

††19 La. Rep. at 591.