# THE CIVIL LAW AS TRANSPLANTED IN LOUISIANA: A PAPER READ BEFORE THE AMERICAN BAR ASSOCIATION AT SARATOGA SPRINGS, AUGUST 10TH, 1882

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## A PAPER

READ BEFORE THE

## AMERICAN BAR ASSOCIATION,



THOMAS J. SEMMES.

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PAPER

READ BY

# THOMAS J. SEMMES.

*The Civil Law as Transplanted in Louisiana.*

Although the Civil Code of Louisiana is subject to criticism, its excellence, recognized by distinguished jurists, is attested by the fact that no radical change has been made since its adoption in 1825, save the alterations resulting from the abolition of slavery. In other respects the hand of innovation has lightly touched it, the amendments during a period of fifty-seven years being few and unimportant.

Although it deals in definitions and explanations to a considerable extent, and in that respect may be considered, according to Mr. Austin's standard, an improvement on the European codes, yet its principles and distinctions are borrowed from the ancient Roman law, and presuppose a knowledge of it, as modified by the jurisprudence of France and Spain.

This unwritten law constitutes a subsidiary system of jurisprudence, let in by the side of the code, and it governs in the absence of express legislation.

This defect, if defect it be, is not so great as might be imagined; for the Roman law, or at least that portion of it which was made by the writings or opinions of jurisconsults, and which is styled Pandect law, is the most coherent body of law of which we have knowledge. "Although it was made in succession by a series of jurisconsults continuing for more

than two centuries, each of these jurisconsults was so completely possessed of the principles of the Roman law, and they were all so completely masters of the same mode of reasoning from and applying those principles, that their successive works have the coherency commonly belonging only to the productions of one master mind."

"Leibnitz and others had remarked that of the forty jurisconsults or thereabouts, of excerpts from whose writings the Pandects are composed, the passages from any one are so like those from all the others in style and manner, that it is impossible from internal evidence to distinguish them. Leibnitz expressed this by rather an odd phrase, borrowed from the Roman law itself, calling them fungible persons, *res fungibiles* being the technical term for articles which are bought and sold *in genere*, and not individually."

"Each of these writers was master of the Roman law in its full extent. Each had the whole of its principles constantly present to his mind, and could argue down from them with the greatest certainty."

It was for this reason Leibnitz said, "that after the writings of the geometricians, there is nothing extant comparable for force or subtilty with the writings of the Roman jurisconsults; so much nerve is there in them, and so much profundity." This was due to the influence of stoicism. "In general, at Rome, a small number of men given up to meditation and enthusiasm preferred Pythagoras and Plato; men of the world and those who cultivated the natural sciences were attached to Epicurus; orators and statesmen to the new Academy; lawyers to the Portico." (Degerando, *Hist. de Philosoph.*, vol. iii., p. 196.) Cicero compares the Stoics and Peripatetics, and praises the precision of the former. In his *De Claris Oratoribus*, he says:

"*Omnes fere stoici prudentissimi in disserando sint, et id arte faciant, sintque architecti pene verborum; iidem traducti a dis-*

*putando ad dicendum, inopes reperiantur; unum excipio, Catonem.* * * * * * * * *Peripateticorum institutis, commodius fingeretur oratio* * * *nam ut stoicorum astrictior est oratio, aliquantoque quam aures populi requirunt; sic illorum, liberior et latior, quam patitur consuetudo judicorum et fori.*"

During the period in which the Louisiana Code has endured almost intact, the spirit of reform in Great Britain and all the common law states of this Union has revolted against the pedantry, the fictions, the feudal conceits, and the artificial theories, with all their train of intricate and unintelligible modes and distinctions, which learned judges had vainly attempted to adapt to the wants of modern civilization and has substituted in their place a simplicity suggestive of its classic origin, and bearing the impress of minds enriched by the study of the Roman law.

My object, however, is not to eulogize the Roman jurisprudence, or to compare it with the common law, whose principal merit, its advocates think, consists in its being unwritten; not reflecting that case law, as Mr. Maine says, is only different from code law because written in a different way.

An attempt to compare the two systems would, I fear, encounter vigorous outcries from those who fancy the perfection of a legal system is to be found in Magna Charta, extorted from King John by barons and nobles, few of whom could write their names, and most of whom despised lawyers and legal science.

This paper has been prepared at the suggestion—I might almost say at the request—of the committee, who desired that I should bring to the attention of the Association the existing law of Louisiana, in so far as it differs from the law of other states of the Union.

I recognize the difficulty of accomplishing the object, for

the field of differentiation is vast, and therefore the sketch must necessarily be meagre and imperfect.

The Louisiana Code consists of a preliminary title and three books:

The first book treats of persons, including corporations.

The second book treats of things, and of the different modifications of ownership.

The third book treats of the different modes of acquiring the ownership of things.

1. The law of persons, in Louisiana, differs but little from that of other states.

The husband of the mother is considered as father of the child conceived during marriage, and the husband cannot, by alleging his natural impotence, disown it, nor can he disown it for cause of adultery, unless its birth has been concealed from him. A child born within six months after marriage may be disowned, but in no case can the father dispute the legitimacy of the child unless he does so within one month after its birth, if he be present; or within two months after his return, if he be absent at the time of birth; or within two months after the discovery of the fraud, if the birth of the child was concealed from him.

If the husband die before the expiration of the time indicated, two months are granted to his heirs to contest the legitimacy of the child, to be counted from the time when the child takes or attempts to take possession of the estate.

The legitimacy of a child born more than three hundred days after the dissolution of the marriage may be questioned; so also when the presumption of paternity is destroyed by the remoteness of the husband from the wife, so as to render cohabitation physically impossible.

This bastardism can only be impressed on the child conceived in wedlock, by judicial proceedings instituted to that end within the period mentioned—his status can be ques-

tioned in no other way. But this action *en désaveu de paternité* is of very rare occurrence; no such suit is to be found in the Louisiana Reports; but about twenty years ago, the distinguished journalist and publicist, Emile de Girardin, whose first wife was a wit and a beauty, having lived in France separate from his second wife, an English woman, who maintained an establishment in London, produced a sensation in the fashionable circles of Paris by a judgment of disavowal, obtained by him against the child of his second wife, born during the second marriage. The proceedings authorized by the Legitimacy Declaration Act of England, passed in 1858, and by most of the European codes, are similar in principle to the action *en désaveu*. Judgments in such proceedings establish the status of the parties, and are treated as judgments *in rem*, binding on all the world, as was held in Kosciusko's case, 12 Howard, 430.

The code admonishes the wife that she is not at liberty to marry again until ten months after the dissolution of the preceding marriage. This *annus luctus* of the Romans (for the old Roman year was ten months) is designed to prevent a person from being, as Blackstone says, "more than ordinarily legitimate," and according to Coke, invested with the Englishman's glorious common law privilege of selecting either of two fathers.

Children born out of wedlock, of persons capable of contracting marriage, may be legitimated by the subsequent marriage of their father and mother, if the latter acknowledge them in the contract of marriage, or prior thereto, by an act passed in presence of a notary and two witnesses. Incestuous and adulterous bastards cannot be legitimated, nor can they be acknowledged, nor can they inherit. The Code of 1825 prohibited marriage between the white and colored races; the barrier was removed in 1870. A marriage since then, it has been recently held, will legitimate children

born while the prohibition was in force. (Suc. of Caldwell, 34, A. 268.)

Fathers and mothers have, during the marriage, the enjoyment or usufruct of the estate of their children until their majority or emancipation.

Emancipation is a judicial act which liberates the minor from the paternal power and of that of tutorship, and confers on him the right to govern himself and administer his property. Emancipation is a Roman expression, but it has lost its primitive significance. Roman emancipation put an end to the paternal power, but so far from terminating that of tutorship, it was the commencement of it, if the emancipated son was a minor under the age of puberty.

A minor of either sex is emancipated by the fact of marriage, but this emancipation is not absolute; it does not confer the power of alienation of immovables.

A qualified emancipation may be granted by the parents to a minor who has attained the age of fifteen years; it is rarely applied for, and is subject to revocation for cause; but at the age of eighteen he can obtain an unlimited emancipation by decree of the court, with the consent of his parents or his tutor.

A marriage contracted in good faith, although declared null, nevertheless produces its civil effects as to the parties and their children; if only one of the parties acted in good faith, the civil effects are to be confined to that party and the children born of the marriage. This is called a putative marriage.

So that where a man married a second time, while his first marriage was undissolved, and the second wife acted in good faith in contracting the marriage, it was decided that the lawful wife and the wife *de facto* were each entitled to one-half of the community property, and that the children of each marriage were entitled as heirs-at-law to succeed to the separate property of their father.