DEVELOPMENT OF COMMON LAW

Common Law of England

The law of real or immovable property followed in all states in the United States, except Louisiana, was derived principally from the common law of England. The term "common law" means law that is and/or was common to England. Common law was originally developed in England after the Norman Invasion in 1066.

The subsequent development of the common law in England is principally attributable to the influence of two factors, namely, a decentralized court system and the principle of stare decisis.

Decentralized Court System

The English Court System was decentralized with the appearance of the Royal Courts - the Court of Common Pleas, the Court of Kings Bench, and the Exchequer. An important procedural device utilized by the courts and developed during the reign of Henry II (1154 - 1189) was the writ, which was an order purchased by the plaintiff and which directed the defendant to appear before the King's Court. Each writ, or form of action, differed from the others and carried with it the development of a separate body of substantive law.

Stare Decisis

The Common Courts developed a system of abiding by decided cases. This doctrine required that courts look to past disputes involving similar facts to determine the outcome of current cases on the basis of these earlier decisions. This decision became known as the principle of stare decisis.

The use of earlier cases as precedent created a mark of distinction in the Anglo-American legal system, which relies on the judicial decisions already rendered in similar circumstances to decide the case currently before the court. The use of earlier decisions to determine the substance of the law distinguishes the common law from the civil or Roman law system, which relies principally on a comprehensive code of laws to decide a case currently under consideration. Civil law is the basis for the law in all of Europe, Central and South America, Japan, Quebec, and Louisiana.
Equity

Because of deficiencies in the common law, the principal of "Equity" developed as a source of law. By the Middle Ages, common law procedures had become rigid, and the courts could provide no relief to many parties who had just claims. For instance, the common law only acted after the fact; damages could be awarded to an injured party after an injury, but a wrongdoer could not be ordered to cease his illegal behavior before the injury occurred.

As a result of such inadequacies, parties began to seek relief from the King when the common law could not provide satisfaction. The King, through his Chancellor, often aided these parties and eventually established a separate court, the Court of Chancery, to hear the cases. These courts, which attempted to do equity and to act in good conscience when the common law courts could not provide relief, developed the law of equity, which differed from the common law.

Although the dual system of law and equity was adopted in the United States, law and equity came to be administered by the same court. Despite this merger, however, procedural and remedial distinctions remained.

Louisiana Legislation Rather Than Courts As Source Of Law

In Louisiana, law is a solemn expression of legislative will. Custom cannot repeal a law in this state. In theory, at least, judicial opinions can be used to apply laws and to interpret them, but Louisiana does not utilize the principle of stare decisis. True, in those cases where the question at issue is not regulated by statute, our courts have stated that the law is what the court has announced it to be. The Louisiana Civil Code is the private, non-commercial, substantive law for Louisiana. The Civil Code sets forth various substantive rights and obligations. A separate Code of Civil Procedure sets forth the procedure by which those rights are to be enforced. The Louisiana Revised Statutes contain ancillaries to the Civil Code.

DEVELOPMENT OF THE LOUISIANA CIVIL LAW SYSTEM

Rich in history, the Louisiana Civil Law System is largely indebted to the legal systems that were produced from and shaped by Roman law. Ancient Roman law was also basic to the law as developed in Spain and in southern France, while Germanic and Frankish custom were more prevalent in the laws of northern France.
Spanish Exploration

How did Louisiana law develop? Why did it develop in a manner and content distinct from the Anglo-Saxon Law?

The pre-law history of Louisiana began in 1519, with Spanish explorers. Alonso Alvarez de Pineda discovered the mouth of the Mississippi. Some say that area was discovered by Panifilo de Narvaez. Hernando de DeSoto explored the area, and is probably buried at the junction of the Red and the Mississippi Rivers. In 1543, the survivors of DeSoto's expedition descended to the mouth of the Mississippi River. In spite of the rather extensive Spanish exploration, no one claimed Louisiana in the name of Spain.

French Possession

In 1662, Robert Cavalier, sieur de la Salle, took possession of Louisiana in the name of France. He attempted to settle a colony in 1684, but died without finding the mouth of the Mississippi.

French Settlement

After several unsuccessful attempts by France to colonize in Louisiana, in 1697 Pierre le Moyne d'Iberville was appointed to lead another colony. He reached the Gulf Coast and founded the first settlement in the area now known as Louisiana. The first Louisiana settlement was a fort about forty miles north of the mouth of the Mississippi.

French Colonization

Encouraged by this success, the King of France granted a charter to Antoine Crozat. He was directed to develop the territory and to govern according to the laws then in effect in Paris. These were laws written in the 1500's. In 1717, Crozat surrendered his charter because of financial problems. As a result, France issued a new charter to the Western Company owned by John Law. It was later incorporated as the Company of the Indies. During this time, the same French laws remained in effect. Jean Baptiste le Moyne, sieur de Bienville, was appointed as governor, and he founded New Orleans. In 1718, vessels arrived from France with scores of immigrants. More arrived in 1719 from the Guinea coast.
French Crown Colony

The Company of the Indies also suffered financial reversals and surrendered its charter in 1731. Thereafter, Louisiana became a crown colony, still governed by the written laws of Paris.

De Bienville governed for forty years. During his reign, cotton culture began, sugar cane was introduced, and the French law became well established.

Forty-year Spanish Rule

After eleven governors ruled Louisiana through fourteen administrations, in 1762, France transferred the Louisiana providence to Spain in a secret treaty. But French laws continued to apply.

Florida Parishes

In 1763, by a treaty between Great Britain and Portugal and another between France and Spain, the portion of "Louisiana" lying East of the Mississippi River, the Iberville River, Lake Maurepas, and Lake Ponchartrain was ceded to Great Britain. A proclamation was issued in 1764 proclaiming Louisiana to be owned by Spain. This was the first example of printing in the province of Louisiana.

Acadians

During the transition between French and Spanish rule, most of the colonists were unaware of the treaty ceding Louisiana to Spain, and several hundred French exiles from Acadia arrived in Louisiana in 1765.

French Resistance

In 1766, Spain sent its distinguished naval officer, Antonio de Ulloa, to take possession of Louisiana for the Spanish king. But, without military force, de Ulloa was required to rule through the French Governor, Charles Phillippe Aubry. As a result, de Ulloa exhibited no power, and, in November of 1768, the rebellious 5,500 colonists forced him to leave. At that time, the colonists were contemplating their own independence. The French population frequently settled their affairs among themselves, extrajudicially, but using French law, customs, and usages.
Imposition of Spanish Law

In 1769, a new governor was sent by Spain. Don Alejander O'Reilly arrived with 3,600 troops and quashed the festering revolution. After inviting popular Louisiana leaders to a reception, O'Reilly arrested them, executed five, and imprisoned the rest in Havana. He then issued an ordinance designed to organize an efficient government and to administer justice in accordance with Spanish laws. Spanish replaced French as the official language.

O'Reilly's Code

Whether or not O'Reilly's code, as his ordinance was called, replaced the French law is still the subject of much debate.

Acceptance of Spanish Authority

At the age of twenty-one, Bernardo de Galvez became governor of the Spanish colony. He was the most liberal of the Spanish rulers, but was also a popular leader. During the American Revolution, de Galvez rendered valuable aid to the United States. When Spain joined the war against Great Britain, Galvez captured all the important posts in the British colony of West Florida. This area is now known as the Florida Parishes.

Influence of Spanish Law

While under Spanish rule, there were eleven Spanish governors during ten Spanish administrations. Spanish law forms a basis for some of the Louisiana Civil Law. The Spanish law was based upon the ancient Roman law and was combined with visigothic elements of law. In fact, the first instance of a system of law was developed in Spain and applied to all inhabitants of a territory, without regard to their origin.

France Rule Again, But Spanish Law

In 1800, Louisiana was re-ceded to France. Again, by secret treaty. France actually assumed sovereignty three years later on November 30, 1803. The colonial prefect, representing Napoleon, abolished the Spanish authorities and created a municipal government for Louisiana. He organized a militia comprised of local colonists, and he re-
introduced the French code Noir. But, the majority of the pre-existing Spanish laws remained in force. On December 20, 1803, the United States took possession of the Louisiana territory. Twenty days was not sufficient for any major impact by the French authorities.

Shortly thereafter, the British ceded the Florida parishes to the United States.

**Affirmation of Ancient Laws**

President Jefferson appointed W.C. Claiborne to exercise all the powers and authorities formerly exercised by the colonial governor. Claiborne's first official act was to affirm the application of laws then in force, which were Spanish.

**Failure of English Common Law**

Governor Claiborne, a lawyer from Virginia, trained in the British common law system, attempted to introduce the common law into the territory of Louisiana. Louisianians did not want a foreign law forced upon them, especially if that law derived from England. As a result, the impetus toward Louisiana codification began.

**Influence of Edward Livingston**

Edward Livingston was a New York lawyer who immigrated to Louisiana in 1803 and was converted to the cause of the civil law. He studied civil law and became convinced that its system was far superior to the common law that prevailed in all other sister states. He was a leader in the formation of the Louisiana tradition of codified laws.

In 1804, Congress divided the Louisiana territory into separate territories, one of which comprised substantially the present State of Louisiana and was called the "Territory of New Orleans." At its first session, the legislative council appointed by the President passed an act regulating the practice of the Superior Court in civil causes. This act preserved the best elements of the civil law, but introduced some common law procedures. Edward Livingston was instrumental in having Congress abolish the legislative council the following year, at which time a legislature comprised of an elected House of Representatives and an appointed legislative counsel was established.
Effort To Confirm Spanish Law

In 1806, the legislature declared that the territory of New Orleans should be governed by Roman and Spanish civil law and by the ordinances and decrees that previously applied in Louisiana. Governor Claiborne vetoed this act. However, the legislature adopted a resolution authorizing the preparation of a civil code for the territory.

1808 Code Based On French and Spanish Law

James Brown and Moreau-lislet were charged with the task of preparing a civil code for the territory. The Louisiana Civil Code of 1808 was passed and approved by Governor Claiborne. The code was largely inspired by the ideas of the French Revolution and was a concise statement of principles and rules easily ascertainable and readily available to all. The articles of the code were based largely upon the Napoleonic Code and other French statutes or French doctrinal works. About fifteen percent was based upon Spanish materials. Basically, the code was Spanish in its content, and French in its form. While the code sought to create a comprehensive body of principles of rules and law, it nevertheless did not repeal all prior laws. There was great doubt and debate as to whether French or Spanish law prevailed.

Admitted to the Union

The State of Louisiana, as it is known today, including the Florida parishes, was admitted to the United States as a state in April 1812.

More Confusion

In 1817, in the case of Cotton vs. Cotton, Edward Livingston and Moreau-lislet were opposing counsel and both counsel and the judge assumed that Spanish law was the law of Louisiana and that the French law was foreign. At issue in the case was whether a child had been born alive. Under Spanish law, a child was required to live for twenty-four hours to be an heir. The Civil Code of 1808 provided that the heir must be born alive only, without any requirement that the child survive any specific length of time. In Cotton, the Spanish law prevailed in interpreting the phrase of the Code of 1808. The Louisiana Supreme Court decision gave rise to almost limitless confusion and opened the floodgates of litigation. It was impossible to know which code had the force and effect of law.
1825 Code based on Code of Napoleon

As a result of this confusion, after elaborate consideration and discussion, the Louisiana Civil Code of 1825 was adopted. This new code followed the French Civil Code. In writing the Civil Code of 1825, the redactors relied heavily on French doctrine and jurisprudence. However, the code was printed in both French and English and was an all-inclusive piece of legislation intended to break definitively with the past. The Civil Code of 1825 was hailed as the clearest, fullest, most philosophical and best adopted to the exigencies of modern society of all republications of Roman law.

Civil Code of 1870 based on Civil Code of 1825

After the Civil War, a new constitution was adopted. Much civil law legislation had accumulated outside the 1825 Code, and the legislature authorized a revision of the Civil Code of 1825. The result was the Civil Code of 1870. Other than eliminating provisions concerning slavery, there were no major changes.

Change is Constant

However, changes have occurred and continue to occur. Although the code is still known as the Code of 1870, there have been numerous major revisions since 1976. Additionally, numerous new codes have been adopted, such as the Mineral Code, the Criminal Code, the Code of Civil Procedure, the Code of Criminal Procedure, the Code of Evidence, and the Children's Code to name a few. Also, there have been major revisions in the ancillaries to the Civil Code, including the laws regarding trusts, condominiums, and timeshares. Large portions of the Code have been rewritten, including the articles dealing with matrimonial regimes, partnership, obligations, property, and intestate successions. Although much of the basic law was not changed, some of it was, and much of the law was clarified.

Evolution of Louisiana Civil Law

When it is all said and done, insofar as the layman is concerned, the Louisiana Civil Law System is the result of evolution. The Louisiana Civil Code rests on tested values; it has retained the accumulated wisdom of the past, but contains a scheme of modern, comprehensive, and comprehensible organization of its subject matter. The Louisiana Civil Code was not adopted in a haphazard manner, but was drafted by able scholars who have spent untold hours in the study of ancient and Louisiana civilian tradition. The doctrine, jurisprudence, and legislation in developed civil law countries influenced the development of Louisiana civilian doctrine. Just as common law jurisdictions have
adopted some civilian concepts, the civilian jurisdictions have adopted a few common law concepts. But a failure to understand and appreciate that the Louisiana system is unique unto itself could easily result in misapplication and misinterpretation of the law and injury to those who engaged in the real estate profession or to those served by them.

The real estate profession must be comfortable with both the layman whom he serves and the legal profession with whom he must invariably come in contact. Understanding, then, of the background and history of Louisiana and its law will perhaps convince the layman who is tempted to avoid the Louisiana system because of its seemingly strange terminology and concept that Louisiana has a perhaps unique, but superior system of laws. Those countries that utilize the civil law have a much broader base, more ancient history, and represent by far the majority of population of this world. Louisiana is but one small state in this union, but is a part of a very great tradition in the law. Whether a licensee favors the Louisiana civil law system or not, and whether the licensee understands the system or not, that system is the law. A real estate transaction handled by a licensed real estate broker or salesman in this state is inextricably involved with Louisiana civil law and terminology.

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