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LETTER BY JOHN H. TUCKER, JR. ON THE 1969 REPRINT OF THE DE LA VERGNE VOLUME

INTRODUCTORY NOTE

The letter we publish in our Rediscovered Treasures of Louisiana Law section was written by Colonel John H. Tucker, jr. (1891-1984)¹ and dated December 20, 1969. The letter was identified on September 23, 2020, in the Rare-Book Room and Archives of the Law Library of the Louisiana State University Paul M. Hebert Law Center (LSU Law), by Seth S. Brostoff, at that time Foreign, Comparative & International Law Librarian.

Colonel Tucker was a fine juriconsult and ardent supporter of the civil law tradition of Louisiana, who fathered the Louisiana State Law Institute. The author of the letter thanks the three recipients for having sent a copy of the 1969 reprint of the de la Vergne Volume of the Digest of 1808,² with handwritten notes attributed to one of the drafters of that important *corpus* of the law, namely Louis Moreau-Lislet.³ A new reprint of the de la Vergne Volume was made in 2008, this time under the direction of the Center of Civil Law Studies (CCLS) of LSU Law, to commemorate the bicentennial of that *Digest of Civil Laws Now in Force in the Territory of Orleans*. That very same year, and as part of the bicentennial celebrations,⁴ the CCLS published the de la Vergne Volume on a dedicated website, with images of the manuscript notes and a typed transcription of the notes pertaining to the Preliminary Title and Book 1 of the Digest

1. On the life and work of Colonel John H. Tucker, jr., see the memorial papers published in 45 LA L. REV. 997-1031 (1985), particularly A.N. Yiannopoulos, *John H. Tucker, Jr, The Juriconsult*, at 1011.

2. See generally A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS, WITH ALTERATIONS AND AMENDMENTS ADAPTED TO ITS PRESENT SYSTEM OF GOVERNMENT (Bradford & Anderson 1808).

3. On the life and work of Louis Moreau-Lislet, see ALAIN A. LEVASSEUR, LOUIS CASIMIR ELISABETH MOREAU-LISLET: FOSTER FATHER OF LOUISIANA CIVIL LAW (1996).

4. Olivier Moréteau and Agustín Parise, *The Bicentennial of the Louisiana Civil Code (1808-2008)*, 2 J. CIV. L. STUD. 195 (2009).

of 1808.⁵ That online resource made the text of the Digest of 1808 available in open access to scholars from across the globe.⁶

The letter is much more than a thank you note to Paul M. Hebert (1907-1977), then Dean of the LSU School of Law;⁷ Joseph M. Sweeney (1920-2000), then Dean of the Tulane University School of Law; and Louis V. de la Vergne (1938-2017), a New Orleans lawyer whose family treasured the manuscript that was eventually donated to the Tulane University School of Law.⁸ The letter offers valuable and well researched insights of the significance of the de la Vergne Volume of the Digest of 1808 and of the Civil Code of Louisiana of 1825.

A Tournament of Scholars—in words of Sweeney—took the stage a few years after the letter was drafted.⁹ It was ignited in 1971, it dealt with the sources of the Digest of 1808, and it involved Rodolfo Batiza (1917-2007)¹⁰ and Robert A. Pascal (1915-2018).¹¹ The

5. Center of Civil Law Studies, *Digest of 1808 Online*, available at <https://perma.cc/B6U2-DM6F>.

6. Agustín Parise, *The Digest Online Project: A Resource to Disseminate the Legal Heritage of Louisiana*, 12 J. CIV. L. STUD. 283 (2019).

7. On the life and work of Paul M. Hebert, see the supplement prepared by Robert A. Pascal to 37 LA. LAW REV. (1977), particularly Francis C. Sullivan, *Paul Macarius Hebert*, at i.

8. On the life and work of Louis V. de la Vergne, see Agustín Parise, *Louis Victor de la Vergne (1938-2017)*, 10 J. CIV. L. STUD. 3 (2017). The CCLS is indebted to Louis de la Vergne for the following publications: *Digest of 1808 Online*; Thomas J. Semmes, *History of the Laws of Louisiana and of the Civil Law*, 5 J. CIV. L. STUD. 313 (2012), which inaugurated our Rediscovered Treasures feature; Kjell A. Modeer, *Transatlantic Intercultural Legal Communication in the 19th Century: K.J.A. Mittermaier and the Schmidt Brothers, Carl and Gustavus*, 8 J. CIV. L. STUD. 409 (2015).

9. Joseph Modeste Sweeney, *Louisiana Civil Code of 1808: Tournament of Scholars Over the Sources of the Civil Code of 1808*, 46 TUL. L. REV. 585 (1972).

10. Rodolfo Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TUL. L. REV. 4 (1971).

On the life and work of Rodolfo Batiza, see the contributions to issue 2 of 56 TUL. L. REV. (1982), particularly Paul R. Verkuil, *Rodolfo Batiza: Scholar and Gentleman*, at 457.

11. Robert A. Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TUL. L. REV. 603 (1972).

On the life and work of Robert A. Pascal, see ROBERT ANTHONY PASCAL: A PRIEST OF RIGHT ORDER (Olivier Moréteau ed, 2018).

Tournament of Scholars alerted readers that whether French, Spanish, or Roman, the laws were mainly taken from the continental European system, and that the Digest of 1808 was not a mere copy of the *Code Napoléon* or of a single text.¹² Above all, the *Tournament* showed that the inhabitants of Louisiana were, in 1808, able to protect their civil-law heritage from the incursions of the common law.¹³

The letter by Colonel Tucker may be read in the light of the *Tournament* that followed. It speaks for itself and is published as is, with minimal formatting. It will no doubt feed academic efforts to commemorate the forthcoming bicentennial of the Civil Code of Louisiana of 1825.

Olivier Moréteau & Agustín Parise

12. SHAEL HERMAN, THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES 32 (1993).

13. Agustín Parise, *A Constant Give and Take: Tracing Legal Borrowings in the Louisiana Civil Law Experience*, 35 SETON HALL LEGIS. J. 1, 14 (2010). See also JOHN W. CAIRNS, CODIFICATION, TRANSPLANTS AND HISTORY: LAW REFORM IN LOUISIANA (1808) AND QUEBEC (1866) (2015).

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20 December 1969

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Gentlemen:

I thank you very much for sending me the 1814 reprint of Moreau Lislet's copy of "A Digest of Civil Laws Now in Force in the Territory of Orleans, Containing Manuscript References to its Sources and Other Civil Laws on the Same Subjects." This will be a valuable tool for historical research in Louisiana law. Perhaps there are extant other notes, studies or reports made or participated in by Moreau, relating to the Civil Codes of 1808 and 1825, that have not yet come to light.

I am inclined to the belief that the proper place to be assigned to these annotations of Moreau's should be determined by the circumstances at the time, and what Moreau himself said at other times and places about them.

The territorial resolution of June 7, 1806, appointed "James Brown and Moreau Lislet, lawyers... to compile and prepare, jointly, a Civil Code for the use of the territory... (and to) make the civil law by which this territory is now governed, the ground work of said code."

For this work these commissioners undoubtedly relied overwhelmingly on the Code Napoleon, adopted in France March 21, 1804, because:

- (a) There was some confusion about the laws in force in Louisiana resulting from the changes of sovereign in a short space of time.
- (b) The Spanish laws were contained in a multiplicity of ancient codes or enactments, the relative precedence of which were sometimes in question. The principal codification of Spanish law was written in the thirteenth century and established in the fourteenth century.
- (c) The antecedents, culture, customs and aspirations of the great majority of Louisiana residents derived out of their French ancestry and inheritance. French was their language, and not many were conversant with Spanish.
- (d) There was a scarcity of the works of foreign jurists (see Preface to 1 Mart. O.S.), particularly Spanish (Bernard's Heirs v. Goldenbow, 18 La. 95, 96).
- (e) It was generally believed that there was little difference between French and Spanish law because of their common origins, namely Roman law and the customs. This was particularly so where the common source was Roman law (*Bernard's Heirs v. Goldenbow*, 18 La. 95). In that case the court did not hesitate to quote approvingly from French jurists, although the disposition in a will had become operative while Spanish law prevailed.

- (f) Although ante-code law in France was a jurisdictional crazy-quilt, originating in the early theory of the personality of laws (i.e., that a man was regulated by the laws of the country of his origin), and depended upon its historical origins in Roman and customary laws, France had a wealth of legal literature dealing with both Roman law and the customs. By its charters Louisiana, as a French colony, was regulated by the customs of Paris until revoked by O'Reilly, Spanish governor, in 1769.

On the other hand, there were few commentaries in Spain on either great division of Spanish law; perhaps because of the coalescence of these two systems of law, first in the primitive Forum Judicum, sometimes called Fuero Juzgo, (Scott's translation is called Visigothic Code). This related principally to the Theodosian Code of Imperial Decrees for Roman law and the Code of Euric, or Codex de Tolsa, for the law of the Visigoths. The Forum Judicum was the forerunner of Las Siete Partidas, into which was infused a considerable body of Roman law from the Justinian Digest.

I feel sure Moreau thought the antiquity of these Spanish codes prevented their adoption to nineteenth century Louisiana without extensive and thorough research and discussion. The fact that the Civil Code of 1825 was ordered about two years after publication of the translation of Las Siete Partidas would indicate as much.

The so-called Civil Code of 1808 was actually entitled "A Digest of the Civil Laws now in Force in the Territory of Orleans."

Concerning this code, Moreau, himself, said: "But it is easy to perceive, that a work of that nature, however excellent it may be, can only contain general rules and abstract maxims, still leaving many points doubtful in the application of the law; hence the necessity of going back to the original source, in order to obtain new and additional light. It was moreover perceived that the Civil Code did not contain many and important provisions of the Spanish laws in force, nor any rules of judicial proceedings; that the statutes regulating these proceedings had proved insufficient; and that the Superior

Court had in divers instances, and particularly in the case of Cottin vs. Cottin, Martin's Rep. vol. 5, p. 93, determined that the Spanish laws 'must be considered as untouched, whenever the alterations and amendments introduced in the digest do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.' It thus appeared that a much greater portion of the Spanish laws remained in force than had been at first supposed. It was then doubtless the desire of the legislature to spread generally the knowledge of such of these laws, as are not to be found in the Civil Code, or in the digest of our statutes, that induced them to make provisions for the printing of this statute." (The Laws of Las Siete Partidas, which are still in Force in the State of Louisiana. Translated from the Spanish by L. Moreau Lislet and Henry Carleton, Counsellors at Law. 1820 p. xxii.)

The plan of the translation pursued was simple. "Each title of the Partidas, is preceded by a list of the titles of the Roman and Spanish laws, and of the Civil Code, relative to the subject it treats of, together with an index of the articles therein contained. (Translation Las Siete Partidas, p. xxiii.)

This is somewhat similar to the situation in the Moreau notes of 1814 relating to the articles of the Civil Code of 1808 which point to Spanish and Roman, or civil law, sources.

Cottin v. Cottin, 5 Martin O.S. 93, generally considered as having caused the revival of Spanish law, was decided in July, 1817. Even before that case, there was some premonitory hints to that effect in a decision of the Supreme Court (Hayes v. Berwick, 2 Mart. O.S. 138,140; 1812). In Cottin v. Cottin, supra, Moreau was the successful advocate for the defendant; Livingston (with Mazureau), the unsuccessful counsel for the plaintiff; and Derbigny, the judge who wrote the opinion. They were the commissioners who drafted the Code of 1825.

It is not too much to assume that Moreau, in preparing the notes of 1814, wanted to show that his Code of 1808 was in large measure, a statement of the Civil Laws in force in the territory at the date of

the adoption of the code; perhaps induced by his position in Cottin v. Cottin.

In any event, the report of the Commissioners to draft the Code of 1825, in their preliminary report to the Legislature, February 13, 1823, reprinted in Louisiana Legal Archives, Vol. 1, p. LXXXVII, says that the Commissioners (Livingston, Moreau and Derbigny) “consider the principal Object the Legislature had in view, was to provide a remedy for the existing evil, of being obliged in many Cases to seek for our Laws in an undigested mass of ancient edicts and Statutes, decisions imperfectly recorded, and the contradictory opinions of Jurists; the whole rendered more obscure, by the heavy attempts of commentators to explain them; and evil magnified by the circumstance, that many of these Laws must be studied in Languages not generally understood by the people, who are governed by their provisions. The Legislative assembly of the Territory made one step toward the removal of this Evil, by adopting the Digest of the Civil Law, which is now in force: This was an extremely important measure; because it was an advance towards the establishment of system and order, in the several points of Jurisprudence, which are contained in its provisions; because it took away on those subjects, the necessity of a reference to the Spanish and Roman authorities, and because it demonstrated the practicability of a more extensive reform. - - But it was necessarily imperfect; not purporting to be a Legislation on the whole body of the Law; a reference to that which existed before, became inevitable, in all those cases (and they were many) which it did not embrace.”

This very important preparatory declaration preceding the Code of 1825 is interesting and of considerable importance, as may be judged from the above quotation, but to comment further about it is quite beyond the purport of this letter.

Suffice it to say that the Civil Code of 1825 reproduces literally, in most of its content, the text of the Code Napoleon, often amplified

by the intercalation, as articles of the Code of 1825, of concise quotations from the French commentaries on particular articles of the Code Napoleon.

The projet of the Code of 1825 (republished by the state as Louisiana Legal Archives, Vol. 1) has an abundance of references to sources in Roman law and French commentaries, but references to Spanish sources are rare.

All Spanish, French and Roman laws in force in Louisiana at the time of the cession to the United States, and all anterior legislation for which special provision had been made in the code, were repealed by Article 3521 of the code itself.

However, decisions of the Supreme Court cast serious doubt upon the efficacy of this repeal in some particular cases. The legislature then passed Act 40 of 1828 repealing the Code of 1808, and Act 83 of 1828 which abrogated the civil laws in effect before the promulgation of the Code of 1825. But these laws still have some vestigial vitality according to the Supreme Court. (Reynolds v. Swain, 13 La. 193, 199 (1839); Hubgh v. New Orleans and Carrollton Ry., 6 La. Ann. 495 (1851); and Moulin v. Monteleone, 165 La. 169, 165 So. 447 (1923).

I have recounted these things not in disparagement of, but in great admiration for Moreau Lislet. I think he meant exactly what he said in the prefatory remarks he made to the volume of the Code of 1808 with his notes - - that he was citing civil laws, meaning Roman laws and Spanish laws “with which the laws in the Louisiana Code had some connection.” (Emphasis mine.)

I have read a great deal of what Moreau had to say about his own works - - in the translation of the Partidas, in the February, 1823, report of the Code Commissioners to the legislature, his Digest of Statutes, 1828, and in the projet of the Code of 1825. I compiled a list of the cases he had with Livingston as his opponent - - there were approximately thirty - - Moreau lost only eight as I remember. You can learn a whole lot about what Moreau thought from these cases.

Moreau was a Frenchman, and when he wrote the Codes of 1808 and 1825 he did so as a Frenchman.

I therefore view the notes in this volume you have sent me as a striking example of Moreau's great scholarship, and certainly the earliest, and probably the best ever, demonstration of comparative law in action in the history of this state.

It would be well if someone would make a descriptive list of these citations, although I expect some of the works cited will be very hard to come by. If they were difficult to find in 1808 and 1825, what would the situation be now?

I am profoundly grateful to you for sending me this volume reflecting the scholarly industry of one for whom I had a profound admiration for all of my professional life.

Please accept my sentiments of respect and gratitude.

Faithfully,

JHTjr:al

P.S. I spoke to the Tulane Law Review dinner more than thirty years ago on the subject of Moreau Lislet. In discussing it with my good friend, Gaston Porterie, then attorney general, I said that he had perished in the cholera epidemic of 1832 and that it was not known where he was buried. Shortly afterwards, Gaston told me that had been walking in St. Louis Cemetery No. 1, and found his grave. I visited it myself and found it covered with a flat black stone marker - - as I remember it, his son was included in the inscription on the stone. I remarked to someone of the law faculty at Tulane that some annual ceremony ought to be instituted in honor of the greatest law writer we had ever had in Louisiana. Sad to relate, when I visited the cemetery after World War II, I found that a tree or something had fallen on the stone marker and broken it up pretty badly, although you still could make out the names. If you ever visit St. Louis No. 1, immediately after entering, turn right on the first alley or path

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until you reach the last alley or path near the wall, turn left not very far and you will see it on your right on the ground.

JHTjr

