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A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808)

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Essay Review

A DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808)

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This volume is a photolithographic reproduction of a distinctive copy of the Louisiana Digest or Civil Code of 1808.¹ It includes, in handwritten French, a title page,² an Avant-Propos or foreword, extensive citations to other civil laws and a substantial index, in addition to the text of the law as printed pursuant to an act of the legislature. Also, it bears the name of Louis Moreau Lislet, one of the redactors of the Digest, imprinted in gold on its cover, and it appears quite likely that the volume was once owned by him and that he was involved in the drafting of its Avant-Propos and the collection of the citations it contains.³ Of particular significance are the first three paragraphs of the Avant-Propos:

A Digest of the Civil Laws Now in Force in the Territory of Orleans (1808) including the handwritten notes of Moreau Lislet. The de la Vergne volume. (1808; repr. ed.; Baton Rouge: Claitors Publishing Division, 1971. Appendix, index, xxi, 535 pp. \$25.00.)

¹ The complete title of the enactment is "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."

² The handwritten title reads: "Loix de l'Etat de la Louisiane, avec des notes qui referent aux Loix civiles et Espagnoles qui y ont rapport. 1814." The presence of the date indicates that the handwritten additions to the volume were made after the admission of Louisiana to the Union.

³ In addition to the fact that Moreau Lislet's name is printed in gold on its cover, the book for generations has been owned by the de la Vergne family of New Orleans and has been regarded traditionally as once having belonged to him. See Joseph Dainow, "Moreau Lislet's Notes on Sources of Louisiana Civil Code of 1808," *Louisiana Law Review*, XIX (1958), 43. That Lislet had a part in the collection of the book's citations is supported by two principal reasons. First, there is another copy of the Digest of 1808 in the possession of the Louisiana State University Library with similar marginal citations which appear to be written in the hand of Moreau Lislet. See Robert A. Pascal, "A Recent Dis-

The purpose of this work is to make known, by written notes on the blank pages attached to the Digest of the laws of this state, the texts of civil and Spanish laws having some relation to them.

For this purpose, there will be found, beside the English text, a general list of all the titles of the Roman and Spanish laws, which relate to the materials treated in each chapter of the Digest, *and beside the French text, article by article, the citation of the principal laws of the various codes from which the dispositions of our local statute are drawn.*

In citing the laws which have some relation to the various articles of the Digest, indications have not been limited to those which only contain similar dispositions; but those laws have been added which may present differences in prescription regarding the same matter, or which may contain exceptions to the general principle therein contained. (Emphasis supplied) (Franklin's translation)⁴

Until recently, the words translated as "local statute" in the second paragraph generally were believed to refer to the Digest itself. Thus, the citations to the laws described as those "from which the dispositions

covery: A Copy of the 'Digest of the Civil Laws' of 1808 with Marginal Source References in Moreau Lislet's Hand," *Louisiana Law Review*, XXVI (1965), 25, reprinted in *Louisiana History*, VII (1966), 249. Also, Moreau Lislet, along with Henry Carleton, once translated portions of the Siete Partidas in a project funded by the Louisiana legislature. The translation, published in 1820, employs in its foreword language and format much like that found in the Avant-Propos.

⁴ "Le but de cet ouvrage est de faire connaitre par des notes écrites sur des pages en blanc attachées au Digeste des Loix de cet Etat, quels sont les textes des loix civiles et Espagnoles, qui y ont quelque rapport.

"A cet effet on trouvera à coté du texte anglais, une liste générale de tous les titres des loix Romaines et Espagnoles, qui sont relatifs aux matières traitées dans chaque chapitre du Digeste, et à coté du texte français et article par article, la citation des principales loix des divers codes, d'où sont tirées les dispositions de notre statut local.

"On ne s'est pas borné en citant les loix qui ont quelque rapport avec les divers articles du Digeste, de marquer seulement celles qui contiennent des dispositions semblables; mais on y a ajouté celles que, sur la même matière, offrent des différences dans ce qu'elles prescrivent ou qui contiennent des exceptions au principe général que y est énoncé."

Mitchell Franklin, "An Important Document in the History of American Roman and Civil Law: The de la Vergne Manuscript," *Tulane Law Review*, XXXIII (1958), 39. Another translation is found in the *Louisiana Law Review*. See Dainow, "Moreau Lislet's Notes on the Sources of Louisiana Civil Code of 1808," *Louisiana Law Review*, XIX (1958), 43.

of our local statute are drawn" were thought to have been said to identify the sources of the 1808 enactment. Dean Joseph Modeste Sweeney of the Tulane University School of Law, however, has contended recently that "local statute" is an improper translation of the term "statut local" as it appears in context. He notes that the first three paragraphs of the Avant-Propos as well as the title⁵ of the work reveal an objective of identifying laws "which have some relation to the digest." He then observes that the Avant-Propos describes citations from which the "statut local" and not the "Digest" is drawn and contends that a construction which equates "Digest" with "statut local" would be inconsistent with the purpose of identifying laws having "some relation" to the Digest. Dean Sweeney offers as a proper translation of "statut" the expressions "condition or status" or "state of affairs" and concludes that the citations in question were described as identifying the laws by which the local "state of affairs" was regulated prior to the 1808 enactment.⁶ It is the reviewer's opinion, however, that "statut local" logically may be translated as "local statute" and construed to mean Digest.

If "statut local" is construed to mean "Digest" and the citations in question are considered to identify laws from which the articles of the Digest are drawn, it is certainly true that such an identification is a much more specific undertaking than the identification of laws which merely have some relation to the Digest. Nonetheless, this specific undertaking reasonably can be a part of a more general plan to identify laws which relate to that enactment. Additionally, there is no need to conclude that the "statut local" in question is not the one which existed at the time of the drafting of the Avant-Propos but one which existed prior to 1808.⁷ Thus, there appears no reason in chronology to prevent construing the term to mean "Digest."

If the Avant-Propos does describe the laws in question as those from which the Digest is drawn, that description is perhaps significant in understanding the motives behind the 1808 enactment. The laws identified by the citations are predominantly Spanish and Roman. In this regard, it is important that a system of Spanish law was instituted in

⁵ See Note 2, *Supra*.

⁶ See Joseph M. Sweeney, "Tournament of Scholars Over the Sources of the Civil Code of 1808," *Tulane Law Review*, XLVI (1972), 596-601.

⁷ In this regard, the reviewer has been advised that the verb in the clause "*d'où sont tirées les dispositions de notre statut local*" is best translated "are drawn" and, in any event, that it gives no indication that the "statut local" described is not the one in existence at the time of the drafting of the Avant-Propos.

Louisiana in 1769 and remained in effect in 1806 when Moreau Lislet and James Brown were instructed by the legislature to make the "civil law" which then governed the territory the "ground work" of the proposed enactment.⁸ In this light, the predominance of these Spanish and Roman references seems as it should be.

Yet, as recently illustrated by Professor Rodolfo Batiza of the Tulane University School of Law, a very substantial percentage of the articles of the Digest, including many which have Spanish and Roman laws listed opposite them, are drafted verbatim in the language of the French Code Civil or its *Projet*.⁹ Citations to the French Code or its *Projet*, however, are not found anywhere in the volume. Assuming that the citations in question are described as those from which the Digest is drawn, the reference to Spanish and Roman laws in certain cases where articles are drafted in the exact language of French texts may indicate that the redactors believed that these laws embodied the substance of or were substantially similar to the Spanish laws which previously had prevailed. This hypothesis,¹⁰ advanced by Professor Robert A. Pascal of the Louisiana State University Law School, has become the subject of much debate.

As previously noted, Dean Sweeney doubts that the volume purports to identify the laws from which the Digest was drawn, and both he

⁸ For the propositions that Spanish laws were instituted by O'Reilly in 1769 and that the return of Louisiana to France in 1803 did not abrogate them, see 1 Moreau Lislet and Carleton, *Laws of the Siete Partidas Which Are Still in Force in the State of Louisiana* (New Orleans 1920), xviii-xxi and Cottin v. Cottin, 5 Mart. (O.S.) 93 (Louisiana 1817).

The redactors were instructed in 1806 "to make the civil law by which this territory is now governed, the ground work" of the enactment. Louisiana Act of 1806, p. 214.

⁹ Rodolfo Batiza, "The Louisiana Civil Code of 1808: Its actual Sources and Present Relevance," *Tulane Law Review*, XLVI (1971), 4. The Digest or Civil Code of 1808 contains 2160 articles. Professor Batiza concludes that 293 of these articles are written verbatim in the language of the French Civil Code, that 315 are written verbatim in the language of the *Projet* of the year VIII. In instances where the provision of the French Civil Code and the *Projet* is the same, the *Projet* is identified as the text from which the Louisiana provision is taken. Like numbers of Louisiana articles are described as being taken "almost verbatim" from these two works. Borrowings from Domat, Pothier, Custom of Paris, Fuero Real, Siete Partidas, Febrero, Blackstone and others are also identified.

¹⁰ See Robert A. Pascal, "A Recent Discovery: A Copy of the 'Digest Of the Civil Laws' of 1808 with Marginal Source References in Moreau Lislet's Hand," *Louisiana Law Review*, XXVI (1965), 25, reprinted in *Louisiana History*, VII (1966), 249, and "Sources of the Digest of 1808, A Reply to Professor Batiza," *Tulane Law Review*, XLVI (1972), 604-606.

and Professor Batiza question the extent to which the early nineteenth century law of Spain was like the French law utilized in drafting the 1808 enactment.¹¹ Much similarity of provision of course is inevitable in light of the Roman heritage of both Spanish and French law. Also, evidence indicates that some of the legislators, at least in 1806, were concerned about maintaining certain of the legal institutions then in existence.¹² Further, the fact that the Digest retained Spanish provision in certain instances where French and Spanish law clearly differed perhaps indicates an inclination to avoid significant departures from Spanish law in other areas. On the other hand, certain changes clearly were made, and it is true also that some refinements borrowed from France were not then a part of the law of Spain. A true test of the hypothesis, however, will require a substantial study of the laws identified by the citations to determine the extent to which they do embody principles like those expressed in the Louisiana enactment.

In any event, the noted volume has kindled great interest in the sources of Louisiana law and will itself play a major role in subsequent research of this subject.

¹¹ Sweeney, "Tournament of Scholars Over the Sources of the Civil Code of 1808," *Tulane Law Review*, XLVI (1972), 593-596; Batiza, "Sources of the Civil Code of 1808, Facts and Speculation: a Rejoinder," *Tulane Law Review*, XLVI (1972), 643-52.

¹² In 1806, the territorial legislature passed a bill which designated certain Spanish and Roman compilations as declaratory of the existing law. Governor W.C.C. Claiborne vetoed the measure, and in response to his veto, measures were introduced to dissolve the legislature and nearly were successful. A manifesto explaining this action was printed in two of the New Orleans newspapers. This publication extolled the merits of preserving the existing law and stressed in particular the desirability of maintaining certainty in areas of succession, matrimonial property, family and contract. See Mitchell Franklin, "The Eighteenth Brumaire in Louisiana: Talleyrand and the Spanish Medieval Legal System of 1806," *Tulane Law Review*, XVI (1942), 542-44. The manifesto appears in Clarence E. Carter, *The Territorial Papers of the United States*, IX, *Orleans Territory* (Washington, 1940), 650.