



1983

The Arkansas Colonial Legal System, 1686-1766

Morris S. Arnold

Follow this and additional works at: <https://lawrepository.ualr.edu/lawreview>



Part of the [Legal History Commons](#)

Recommended Citation

Morris S. Arnold, *The Arkansas Colonial Legal System, 1686-1766*, 6 U. ARK. LITTLE ROCK L. REV. 391 (1983).

Available at: <https://lawrepository.ualr.edu/lawreview/vol6/iss3/2>

This Article is brought to you for free and open access by Bowen Law Repository: Scholarship & Archives. It has been accepted for inclusion in University of Arkansas at Little Rock Law Review by an authorized editor of Bowen Law Repository: Scholarship & Archives. For more information, please contact mmserfass@ualr.edu.

THE ARKANSAS COLONIAL LEGAL SYSTEM, 1686-1766

*Morris S. Arnold**

Except for the silence of its final letter, there is nowadays nothing very French about Arkansas. Yet before the American takeover in 1804 the great majority of the European inhabitants of the area presently occupied by the state were of French origin. There is some visible proof of this in the names, many now mangled beyond easy recognition, which eighteenth-century *voyageurs* and *coureurs de bois* gave to a good many Arkansas places and streams;¹ and there are, as well, a number of Arkansas townships which bear the names of their early French *habitants*.²

While these faint traces of a remote European past survive, absolutely nothing remains of the laws and customs which the ancient residents of Arkansas observed. This is no accident. It was a favorite object of Jefferson to introduce the common law of England into the vast Louisiana Territory as quickly as he could. In the lower territory he waited too late. New Orleans had had a large French population and a somewhat professionalized legal system for some time, and the civilian opposition, given time to congeal, proved to

* Ben J. Altheimer Distinguished Professor of Law, University of Arkansas at Little Rock. B.S.E.E. 1965, LL.B. 1968, University of Arkansas; LL.M. 1969, S.J.D. 1971, Harvard Law School.

This article is the first chapter of Professor Arnold's book, *UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836*, which will be published later this year.

1. See generally Branner, *Some Old French Place Names in the State of Arkansas*, 19 *ARK. HIST. Q.* 191 (1960). The etymology of some of these names is difficult and interesting. Who would guess very quickly, for instance, that Smackover in Union County is *Chemin Couvert* (covered road) in disguise? *Id.* at 206. Tchemanihaut Creek (pronounced "Shamanahaw") in Ashley County is a good deal easier: *Chemin à haut* (high road) must have been its original name. Its initial letter, one local historian has plausibly suggested, is probably attributable to "a misguided attempt to derive the name from the Indian language." Y. ETHERIDGE, *HISTORY OF ASHLEY COUNTY, ARKANSAS* 17, 18 (1959). Other names should on sight be instantly intelligible to a modern Parisian, though their current pronunciation might cause him consternation: Examples are the *Terre Rouge* (red earth) and *Terre Noire* (black earth) Creeks in Clark County, the *L'Anguille* (eel) River in north-east Arkansas, and *La Gru* (crane) township in Arkansas county.

2. Vaugine and Bogy Townships in Jefferson County, Darysaw (Desruisseaux) Township in Grant County, and Fourche La Fave (Lefevre) Township in Perry County are good examples.

have sufficient muscle to win a partial victory.³ As a result, as to substantive civil matters the state of Louisiana is today a thoroughly civilian jurisdiction. In the upper territory, however, by a piecemeal process beginning in 1804, the English common law was insinuated into the legal system, until, in 1816, it was at last adopted virtually wholesale by the General Assembly of the Missouri Territory.⁴ The purpose of this article is to explain why civilian legal institutions proved so weak in Upper Louisiana and especially in Arkansas. It turns out that the smallness and character of the European population in Arkansas was the main cause for the vulnerability of European legal norms there. The reception of the common law in Arkansas was simply one element in a more general exchange of cultures which occurred following the Louisiana Purchase.

I

At ten o'clock on the morning of March 12, 1682, Robert Cavalier, sieur de la Salle, having been commissioned four years earlier by Louis XIV of France to explore and take possession of the Mississippi and its tributaries, drew near the Quapaw Village of Kappa. The village was located on the right bank of the Mississippi River about twenty miles north of the mouth of the Arkansas. From the war chants emanating from the Indian town, La Salle judged that he was in for a hostile reception; so he hastily constructed a "fort" on an island opposite the village and awaited developments. Soon, however, the Quapaw chief sent the calumet of peace, and La Salle and his men went to Kappa where they were received with every possible demonstration of affection both public and private. Asked by the Quapaws for help against their enemies, La Salle promised that they could thenceforth look for protection to the greatest prince of the world, in whose behalf he had come to them and to all the other nations who lived along and around the river. In return, La Salle said, the Quapaws had to consent expressly to the erection in their village of a column on which His Majesty's arms were to be painted, symbolizing their recognition that he was the master of their lands.

The Indians agreed and Henry de Tonti, La Salle's lieutenant

3. *See generally* G. DARGO, *JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS* (1975).

4. *1 LAWS OF A PUBLIC AND GENERAL NATURE, OF THE DISTRICT OF LOUISIANA, OF THE TERRITORY OF LOUISIANA, OF THE TERRITORY OF MISSOURI, AND OF THE STATE OF MISSOURI, UP TO THE YEAR 1824*, ch. 154 (1842).

and commandant of one of the two brigades in the company, immediately caused the column to be fashioned. On it was painted a cross and the arms of France, and it bore these words:

Louis the Great, King of France and of Navarre, rules. 13th of March, 1682.

Tonti then conducted the column with all the French men-at-arms to the plaza of the village, and, La Salle taking up a position at the head of his brigade and Tonti at the head of his, the Reverend Father Zénobe Membré sang the hymn *O crux, ave, spes unica*. The company then went three times around the plaza, each time singing the psalm *Exaudiat te Dominus* and shouting *vive le roy* to the discharge of their muskets. They then planted the column while repeating the cries of *vive le roy*, and La Salle, standing near the column and holding the king's commission in his hand, spoke in a loud voice the following words in French:

On behalf of the very high, very invincible, and victorious prince Louis the Great, by the grace of God, King of France and of Navarre, the fourteenth of this name, today, the 13th of March, 1682, with the consent of the nation of the Arkansas assembled at the village of Kappa and present at this place, in the name of the king and his allies, I, by virtue of the commission of His Majesty of which I am bearer and which I hold presently in my hand . . . , have taken possession in the name of His majesty, his heirs, and the successors to his crown, of the country of Louisiana and of all the nations, mines, minerals, ports, harbors, seas, straits, and roadsteads, and of everything contained within the same

After more musket-firing and the giving of presents the Indians celebrated their new alliance throughout the night, pressing their hands to the column and then rubbing their bodies in testimony to the joy which they felt in having made so advantageous a connection. Thus did France gain sovereignty over and ownership of Arkansas.

The reason that we know all these details and more about La Salle's activities in Arkansas is that he had requested, and received, from Jacques de la Metairie, the notary who was in his company, a lengthy *procès-verbal* describing the events at Kappa and officially attesting their occurrence.⁵ This was Arkansas's first exposure to civilian legal processes. It would be almost 150 years before the influence of the civil law ceased to make itself felt there.

5. 2 P. MARGRY, DÉCOUVERTES ET ÉTABLISSEMENT DES FRANÇAIS DANS L'OUËST ET DANS LE SUD DE L'AMÉRIQUE SEPTENTRIONALE, 1614-1754 (1881).

II

Arkansas Post was the first European establishment in the lower Mississippi valley. It was first located about twenty-seven miles by river from the mouth of the Arkansas on the edge of Little Prairie at what is now called the Menard Site. (See Figure 2). Settled in 1686 by six tenants of Henry de Tonti to whom La Salle in 1682 had granted the lower Arkansas as a seignory,⁶ it was to serve as an Indian trading post and as an intermediate station between the Illinois country and the Gulf of Mexico.⁷ Tonti's plans for the place had been large indeed. In 1689 he promised the Jesuits to build a house and chapel at the Arkansas and to grant a resident priest a sizeable amount of land; while there, Tonti confidently asserted, the priest could "come and say mass in the French quarter near our fort."⁸

No priest in fact established himself during Tonti's ownership of the Arkansas and his French quarter and fort never materialized. When in an undated grant of land to Jacques Cardinal, one of his men at the Post, Tonti styled himself *seigneur de ville de Tonti* (lord of the town of Tonti),⁹ he was in the grips of an excessive enthusiasm. There is no evidence that the European population of the place ever exceeded six. In fact, when Joutel arrived there in 1687 there were only two Frenchmen remaining in residence;¹⁰ and the single log house he described is apparently the only structure ever erected at Tonti's Post. Joutel remarked of Tonti's two traders that "if I was joyous to find them, they participated in the joy since we left them the wherewithal to maintain themselves for some time." Indeed, he said, "they were almost as much in need of our help as we of theirs." He ridiculed the whole idea of a post at that location. "The said house," Joutel noted sarcastically, "was to serve as an

6. See Faye, *The Arkansas Post of Louisiana: French Domination*, 26 LA. HIST. Q. 633, 635-36 (1943).

7. Such was the view of Father Douay, a Jesuit who described Tonti's post in 1687. See M. THOMAS, *THE ARKANSAS POST OF LOUISIANA, 1682-1783* (M.A. Thesis, University of California, 1948).

8. Tonti's grant to the Jesuits is quoted in I M. GIRAUD, *A HISTORY OF FRENCH LOUISIANA* 8 (*J. Lambert trans.*, 1974).

9. The grant is translated in *THE FRENCH FOUNDATIONS* 396 (T. Pease & R. Werner eds., 1934).

10. Faye, *supra* note 6, at 735.



Henry de Tonti, lieutenant of La Salle. He founded Arkansas Post in 1686 and in the late seventeenth century styled himself *seigneur de ville de Tonti*. He was the first European to possess judicial authority in Arkansas.

(Courtesy of the Museum of the History of Mobile).

entrepôt [way-station] for the French who travelled in these parts, but we were the only ones whom it so served."¹¹

Short of supplies and virtually inaccessible, the tiny outpost never prospered. The war with the Iroquois closed the route to Canada and made trade to and from Arkansas impossible much of the time until 1693.¹² By 1696, Jean Couture, Tonti's lieutenant and commandant at the Post, had deserted to the English,¹³ and in 1699 Jesuit missionaries to the Quapaws found no trace of a French settlement.¹⁴ By then the French had evidently abandoned the Arkansas, though there may have remained behind a "few white savages thereabouts as wild as red savages."¹⁵

However grandiose and ambitious had been the schemes of Tonti, they would soon come to seem tame. In 1717 the *Mercure de France*, a Paris newspaper, began advertising the riches of Louisiana to its readers: Gold and silver could be mined there "with almost no labor." The mountains situated on the Arkansas River would be explored, and there, one correspondent exuded, "we shall gather, believe me, specimens from silver mines, since others already have gathered such there without trouble." When Cadillac sensibly protested that "the mines of the Arkansas were a dream" he was promptly committed to the Bastille "on suspicion of having spoken with scant propriety against the Government of France."¹⁶

The man behind the propaganda campaign was John Law, a Scot, who owned a bank in Paris and who had in 1717 succeeded in securing for his *Compagnie d'Occident* a monopoly on Louisiana trade. Law's company recruited thousands of colonists to settle in Louisiana and the king granted it authority to grant land from the

11. Joutel, *Remarques sur l'Ouvrage de Tonti Relatif à la Louisiane* (1703), Archives Service Hydrographique (Paris), vol. 115-9, no. 12 (Typescript in Little Rock Public Library). The translation in the text is mine.

12. Faye, *supra* note 6, at 638.

13. IBERVILLE'S GULF JOURNALS 144 at n.98 (R. McWilliams ed. 1950).

14. 18 COLLECTIONS OF THE WISCONSIN HISTORICAL SOCIETY 427, at n.37 (1908).

15. Faye, *supra* note 6, at 646. See also 1 M. GIRAUD, *supra* note 8, at 8: "When d'Iberville reached the Mississippi [*i.e.*, in 1699] the post had been abandoned." Some writers are reluctant to say that the Arkansas was completely devoid of Europeans at this time. See, e.g., P. HOLDER, ARCHAEOLOGICAL FIELD RESEARCH ON THE PROBLEM OF THE LOCATIONS OF ARKANSAS POST ARKANSAS 4 (1957): "The French occupation of the general area along the lower courses of the Arkansas and White Rivers was virtually continuous from the 1680's onward." The truth is that the sources simply fail to mention any Europeans in Arkansas, except Jesuit missionaries, between 1699 and 1721. It is, however, hard to resist believing that a few hunters and trappers ventured from time to time into the area and established temporary camps there. Almost certainly no real settlement existed however.

16. Faye, *supra* note 6, at 653.

Royal domain. Proprietors of the company's land grants (*concessionnaires*) were given considerable latitude in choosing the spots for their settlements, since the interior of Louisiana was not well known; and they therefore exercised much discretion in locating their colonists on arrival.¹⁷ However, the company early on had recognized the Arkansas River as an important spot, since it was thought that it might well be the best route to the Spanish mines of Mexico. Thus the company specifically directed where the Arkansas concession should be located and ordered that it be the first occupied.¹⁸ It granted this concession to Law himself.

In August of 1721, a group of Law's French *engagés* (perhaps as many as eighty) took possession of land on Little Prairie at or near the site of Tonti's abandoned trading post.¹⁹ (See Figure 2). Although Law was by then bankrupt and had fled France, the news did not reach Louisiana until after Jacques Levens, Law's director in Louisiana, had caused the Arkansas colony to be established under the command of some of his subordinates.²⁰ By December of that year Bertrand Dufresne, sieur du Demaine, replaced Levens as director for Arkansas, and in March of 1722 he took possession of the concession and began an inventory of its effects and papers.²¹ On his arrival he found only twenty cabins and three arpents (about 2.5 acres) of cleared ground. He reported a total of about fifty men and women resident,²² *tristes débris*, Father Charlevoix called them,²³ of Mr. Law's concession. They had produced only an insignificant harvest. Lieutenant la Boulaye was nearby with a military detachment of seventeen men.²⁴ (See Figure 1).

Despite the existence of a company store at the Arkansas concession, both the colony and the military establishment were in considerable difficulty.²⁵ Dufresne therefore immediately released twenty of the *engagés* from service and gave them lots to cultivate in the hopes that a better harvest of corn and wheat would be realized in 1722. In February of the following year there were only forty-one colonists remaining, divided now into two small farming communi-

17. 4 M. GIRAUD, HISTOIRE DE LA LOUISIANE FRANÇAISE 198 (1974).

18. *Id.*

19. *Id.*

20. *Id.* at 199.

21. *Id.* at 271.

22. *Id.* at 272.

23. 6 P. CHARLEVOIX, JOURNAL D'UN VOYAGE FAIT PAR ORDRE DU ROI DANS L'AMERIQUE SEPTENTRIONNALE 164 (1744).

24. 4 M. GIRAUD, *supra* note 17, at 273.

25. The following paragraph is based on *Id.* at 273-74.

ties: Fourteen men and one woman at Law's concession under Dufresne, and sixteen men, some with families, two leagues down the river with the troops. Among this latter group there lived six black slaves.²⁶ Bénard la Harpe, while exploring the river in 1721, had predicted, or at least hoped for, a turn in the fortunes of the struggling colony, but that hope proved false and in 1727 Father Paul du Poisson, the Jesuit missionary to the Arkansas, reported that only about thirty Frenchmen remained behind.²⁷ The military post had been abandoned two years previous.²⁸

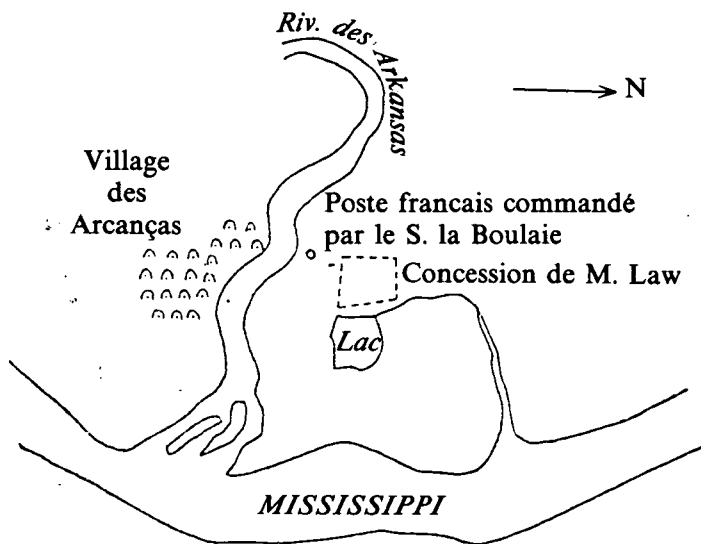


Figure 1 Sketch of the location of Law's colony by Du-mont de Montigny, *Archives Nationales*, Paris, 6 JJ-75, Piece 254.

All this seemed worth recounting in some detail because for generations historians of Arkansas have believed that a colony of Germans once occupied their river. Law did recruit many Germans for settlement in Louisiana, and they were destined for the Arkansas, but as soon as the news of Law's bankruptcy reached the colony

26. *Recensement General des Habitans Establys Sotebouy Arkansas et des Ouvriers de la Concession cy devant Apartenant a M. Law*, 18 February, 1723. (Transcript at Louisiana History Center, Louisiana State Museum, New Orleans).

27. Du Poisson to Father _____, translated in Falconer, *Arkansas and the Jesuits in 1727—A Translation*, 4 PUBLICATIONS OF THE ARKANSAS HISTORICAL ASSOCIATION 352, at 375 (1917).

28. Faye, *supra* note 6, at 670.

in June of 1721, the *Compagnie des Indes* took over the direction of his concession;²⁹ and when the time arrived to transport the German immigrants to Arkansas, the company, in an economy move, decided instead to send them to Delaire's grant in Lower Louisiana.³⁰ In short, none of Law's Germans ever reached Arkansas. This is a pity, as the prospect of discussing, or at least imagining, a group of German immigrants living under French law on the Arkansas River was an intriguing one—one of which the facts have now unfortunately deprived us.

III

Before 1712, the colony of Louisiana, with a population of only a few hundred, had been entirely under military rule and regular civil regulation was altogether lacking. On September 19, 1712, the Crown granted a trade monopoly to Antoine Crozat but he was given no governmental authority: As Henry Dart noted, the charter was "only an operating contract with the duties of government retained in the Crown."³¹ However, the charter did adopt as law for the colony "*nos Edits, Ordonnances Et Coutumes Et les usages de la Prevosté Et Vicomté de Paris*—our edicts, ordinances, and customs, and the usages of the Provostry and Viscounty of Paris."³² The *Coutume*, despite its name, was actually a small code of some 362 titles first reduced to writing in 1510,³³ and treating both substantive and adjective law. It was itself terse, indeed epigrammatic; but the commentary on it by the time of its adoption in Louisiana was voluminous.³⁴ Annotated versions of the *Coutume* were therefore very popular in France and in time they found their way to Louisiana.³⁵

Also in 1712, by a separate instrument, a new and important institution was created for the colony, the Superior Council of Louisiana.³⁶ Modelled on the governmental arrangements already in

29. 4 M. GIRAUD, *supra* note 17, at 216.

30. *Id.* at 248.

31. Dart, *The Legal Institutions of Louisiana*, 3 SOUTHERN LAW Q. 247 (1918). This article also appears in 2 LA. HIST. Q. 72 (1919).

32. The charter is printed in 4 PUBLICATIONS LA. HIST. SOC. 13, at 17 (1909).

33. For a *précis* of its provisions, title by title, see Schmidt, *History of the Jurisprudence of Louisiana*, 1 LA. L. J., no. 1, 1 (1841).

34. The most useful eighteenth-century commentary is C. FERRIÈRE, COMMENTAIRE SUR LA COUTUME DE LA PREVOTÉ ET VICOMTÉ DE PARIS. It is available in several editions.

35. Dart, *The Law Library of a Louisiana Lawyer in the 18th Century*, 25 REPORTS OF THE LOUISIANA BAR ASSOCIATION 12, at 22 *et seq.* (1924).

36. See Dart, *supra* note 31, at 249 *et seq.* See also, for some discussion of the work of this body, Hardy, *The Superior Council in Colonial Louisiana*, in FRENCHMEN AND FRENCH

place in other French colonies, the Council had original and exclusive jurisdiction to decide disputes arising anywhere in Louisiana. It consisted of the Lieutenant General of New France; the Intendant of the same; the Governor of Louisiana; a first councilor of the king; two other councilors; the attorney general; and a clerk. Judgments in civil cases required the concurrence of at least three members and in criminal cases at least five. The Council was originally created to exist for three years, but on September 7, 1716, it became by virtue of a Royal Edict a permanent institution.³⁷

In 1717 a fundamental change occurred in the government of Louisiana. In that year Crozat, having lost an enormous sum under his operating charter, surrendered it, and John Law's *Compagnie d'Occident* was given a monopoly over trade in the colony. In addition, unlike Crozat's company, the *Compagnie d'Occident* was granted extensive governmental authority: It had the power to appoint the Superior Council, to name governors and military commandants, and to appoint and remove all judges. The charter also provided that "*Seront tous les juges Etablis en tous les d. Lieux tenus de juger suivant les Loix Et ordonnances du Royaume Et se Conformer a la Coutume de la prevoستé Et Vicomté de Paris. . . .*"; that is, that "all the judges established in all the said places shall be bound to judge according to the laws and ordinances of the realm, and [shall also be bound] to conform to the customs of the Prevostry and Viscounty of Paris."³⁸ This portion of the charter obviously provided for the reception of general French legislation and the Custom of Paris. In addition, it has been shown that subsequent French legislation, as soon as it was registered in the colony, and the legislation of the Superior Council itself, formed part of the body of colonial Louisiana law.³⁹ The subsequent French legislation was of three distinct sorts: (a) general legislation; (b) special colonial legislation; (c) colonial legislation passed specifically for Louisiana.⁴⁰

Two years later we hear for the first time about inferior courts for outlying portions of the colony. On September 12, 1719, the king noted the need to appoint persons to act as judges "to facilitate

WAYS IN THE MISSISSIPPI VALLEY 87 (J. McDemott ed., 1969); Micelle, *From Law Court to Local Government: Metamorphosis of the Superior Council of French Louisiana*, 9 LA. HIST. 85 (1968).

37. The edict is printed in 4 PUBLICATIONS LA. HIST. SOC. 21-23 (1903).

38. *Id.* at 48.

39. Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 53 TUL. L. REV. 3, 9 (1978).

40. *Id.*

the administration of justice in places distant from the place where the Superior Council holds its sessions."⁴¹ The "heads or directors" of concessions along with "other of our subjects, capable and of probity" were to "exercise both civil and criminal justice." The edict went on to provide that, even in these inferior courts, "three judges shall sit in civil matters and in criminal matters five judges" The plan, evidently, was to have a kind of provincial council at each settlement. The king further provided that an appeal from these local tribunals would lie in all cases to the Superior Council.⁴² All this was being done, of course, to make ready the way for Law's colonizing schemes.

In 1720 or 1721 Louisiana was for the first time divided into districts (or counties). Arkansas was one of the nine districts originally created, and a local commandant and a judge was assigned to each "to put justice with greater ease in reach of the colonists."⁴³ Presumably, and understandably, the plan to establish local councils outside New Orleans was abandoned at this time. The sources simply fail us on the question of whether more than one person was expected to sit on local courts, but it could not have proved workable in remote places like Arkansas to assemble a multi-member judicial body.

In May of 1722 the Regent issued an order creating a provincial council for Illinois, the jurisdiction of which supposedly extended from "all places on and above and Arkansas River . . . to the boundaries of the Wabash River." The commandant of the Illinois, Lieutenant de Boisbriant, was to serve as "chief and judge" of this so-called council, which in fact had only one other member.⁴⁴ It thus seems to have been the plan to abolish the Arkansas district and annex its territory to its nearest northern neighbor; and the Illinois provincial council was directed "to hold its sessions at the places where the principal factories of the company shall be estab-

41. The edict is printed in 4 PUBLICATIONS LA. HIST. SOC. 63 (1908).

42. The translation in the text is mine. The entire edict is translated and discussed in Dart, *supra* note 31, at 261 *et seq.* Further discussion of this edict can be found in Dart, *The Colonial Legal Systems of Arkansas, Louisiana, and Texas*, 27 REPORTS OF THE LOUISIANA BAR ASSOCIATION 43 at 52 (1926).

43. *Id.* at 267. The other districts were New Orleans, Biloxi, Mobile, Alibamous, Natchez, Yazoo, Natchitoches, and the Illinois.

44. Translated extracts from this order appear in 2 J. WHITE, A NEW COLLECTION OF LAWS, CHARTERS, AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE, AND SPAIN, RELATING TO THE CONCESSION OF LAND IN THEIR RESPECTIVE COLONIES. . . 439-40 (1837).

lished."⁴⁵ This language could have been construed to require the Illinois council to sit at the Arkansas. It is, however, very much to be doubted that such a session was ever held, and certainly it is not believable that anyone would repair from Arkansas to Illinois to settle a grievance in 1722.

It seems probable, then, that whatever judicial functions were exercised at the Arkansas were entrusted to its resident directors even after the supposed creation of the council of the Illinois. The only resident director that the Arkansas ever had was, as we saw, Bertrand Dufresne, sieur du Demaine, who arrived at the Post March 22, 1722, and he was evidently the judge from that point on. Prior to that, Jacques Levens had been director, but as he never took up residence in Arkansas we have to presume that if judicial functions were undertaken by anyone, it was by one or more of the three subordinates to whom Levens had entrusted the management of the struggling colony: Jean-Baptists Ménard, Martin Merrick, and Labro.⁴⁶ When Dufresne left the Arkansas around 1726 we can hardly guess the means resorted to for the settlement of disputes. Probably Father Paul du Poisson, the Jesuit missionary resident from 1727 to 1729, used his good offices to maintain order among the approximately thirty Frenchmen who had remained behind.⁴⁷

It seems probable, therefore, that Arkansas's first sustained exposure to European legal proceedings and principles occurred in the period during which Law's Company held sway in Louisiana. Tonti's seventeenth-century feudal seignory no doubt carried with it the right to render justice. Though his charter from La Salle has not as yet come to light,⁴⁸ other conveyances of La Salle's are extant; and in them he gave his grantees judicial power over small cases ("low justice" this is called) while specifically reserving important cases ("high justice") to himself. (Cases of the latter type he directed to be heard by the judge "who shall be established at Fort St.

45. *Id.* at 440.

46. 4 M. GIRAUD, *supra* note 17, at 272. Ménard left the Arkansas in 1722 (*id.*, 275) and was in New Orleans in 1720. *Index to the Records of the Superior Council of Louisiana*, 4 LA. HIST. Q. 349 (1921).

47. Dufresne appears in the Arkansas census of January 1, 1726; but on October 21, 1726, he is described as a "settler in Arkansas, but now domiciled with Mr. Traguidy [in New Orleans]." *Index to the Records of Superior Council of New Orleans*, 3 LA. HIST. Q. 420 (1920). In 1727 there was no director at the Arkansas, as Father Du Poisson tells us that he took up evidence in "the India Company's house, which is also that of the commandants when there are any here. . . ." See Falconer, *supra* note 27, at 371.

48. For a charter from Tonti to Jacques Cardinal, one of his men at the Arkansas, see THE FRENCH FOUNDATIONS, *supra* note 9, at 396. This is the only grant of Tonti's extant.

Louis.”)⁴⁹ We do not know whether Tonti’s charter contained identical provisions but it certainly would have contained similar ones. But during the fifteen years or so that Tonti held the right to dispose of certain cases arising in his seignory, it hardly seems credible that he or his deputies ever held anything resembling a court, or even executed many instruments or documents.⁵⁰

IV

In 1731 the *Compagnie d’Occident* surrendered its charter to Louis XV, and for the rest of the period of French dominion Louisiana was a Crown Colony. Late that same year a military garrison was re-established in Arkansas; it consisted of twelve men commanded by First Ensign de Coulange and was located again on the edge of Little Prairie.⁵¹ (See Figure 2). It was apparently during the reorganization of the colony in 1731 that civil and military authority at the outposts of Louisiana were combined in the commandant of the garrison—an arrangement that would survive into the Spanish period and even for a short time during the American regime.

Part of a post commandant’s civil authority was to act as notary and judge. The exact scope of his judicial jurisdiction during the French period is obscure, there being no document of which I am aware which describes it specifically. Parkman, writing of conditions in the Illinois in 1764, says that the “military commandant whose station was at Fort Chartres on the Mississippi, ruled the Colony with a sway as absolute as that of the Pasha of Egypt, and judged civil and criminal cases without right of appeal.”⁵² Captain Phillip Pittman, an English engineer and Mississippi explorer who was writing at almost exactly the same time, gives a slightly different version. According to him, the Illinois commandant “was absolute

49. Concession in fee by La Salle to Pierre Prudhomme, in *id.* at 32.

50. When Tonti petitioned for confirmation of his charter, he was evidently refused. The petition is printed in E. MURPHEY, HENRY DE TONTI, FUR TRADER OF THE MISSISSIPPI 119 (1941). It is possible that La Salle did not have the power to make permanent grants and that may be the reason that Tonti needed confirmation. The Letters Patent of May 12, 1678, giving La Salle the right to explore “the western part of New France” in the king’s behalf, gave him the power to build forts wherever he deemed them necessary; and he was “to hold them on the same terms and conditions as Fort Frontenac.” See T. FALCONER, ON THE DISCOVERY OF THE MISSISSIPPI 19 (1844). La Salle said expressly in 1683 that this allowed him to “divide with the French and the Indians both the lands and the commerce of said country until it may please his majesty to command otherwise. . . .” See THE FRENCH FOUNDATION, *supra* note 9, at 43. The language is ambiguous, but on one permissible reading it indicates a specifically reserved power in the king to revoke grants made by La Salle.

51. Faye, *supra* note 6, at 673.

52. Quoted in Dart, *supra* note 31, at 249.

in authority, except in matters of life and death; capital offences were tried by the council at New Orleans."⁵³ Of course, the Arkansas commandant's judicial jurisdiction was not necessarily as extensive as that possessed by the commandant of the Illinois. He may very well have been subordinate to the Illinois commandant during most of the French period.

Some fitful light is thrown on the judicial authority of the Arkansas commandant by an interesting proceeding which took place at the Post in 1743.⁵⁴ In October of that year, Anne Catherine Chenalenne, the widow of Jean Francois Lepine, petitioned Lieutenant Jean-Francois Tisserant de Montcharvaux, whom she styled "Commandant for the King at the Fort of Arkansas," asking him to cause an inventory and appraisal to be made of the community property in her possession. The object in view was to make a distribution to the petitioner's son-in-law and daughter who had the previous May lost all their goods when attacked by Chickasaws on the Mississippi not far below the mouth of the Arkansas. They had narrowly escaped with their lives.⁵⁵ Widow Lepine had decided to make a distribution to "her poor children, at least to those who have run so much risk among the savages." She was preparing to marry Charles Lincto, a well-to-do resident of the Post, and she wished to dissolve the old community which by custom had continued after her husband's death in her and their children.

The commandant informed Madame Lepine that on 26 October, 1743, he would inventory the "real and personal property derived from the marital community" and would bring with him two persons to look after the widow's interest and two to represent the children. The idea was that each party in interest should have independent appraisers present to insure the impartiality of the inventory and evaluation. De Montcharvaux in the presence of these and other witnesses caused the inventory to be made on the appointed day. The estate was fairly sizeable, being valued at 14,530 *livres* and 10 *sols*. It contained a great deal of personalty, including four slaves, a number of animals, 1600 pounds of tobacco, and notes and accounts receivable; the realty noted was "an old house" with three small outbuildings. Interestingly, no land was mentioned.

There are two possible explanations for the absence of land in

53. P. PITTMAN, *THE PRESENT STATE OF THE EUROPEAN SETTLEMENT ON THE MISSISSIPPI* 53 (1770) (Reprinted with intro. by R. Rea 1973).

54. The relevant documents are translated in Core, *Arkansas through the Looking Glass of 1743 Documents*, 22 GRAND PRAIRIE HISTORICAL SOCIETY BULLETIN 16 (1979).

55. This incident is reported and discussed in Faye, *supra* note 6, at 677-78.

the inventory. One is that land may not have been actually granted to Arkansas settlers but only given over temporarily to their use. The other possibility is that the land on which the house was built had belonged to Lepine before the marriage and had remained his separate property under his marriage contract or under the general provisions of the *Coutume de Paris*. The *Coutume*, which, as we have seen, was in force in French Louisiana, provided that all movables (personalty), belonging to a husband or wife, whenever acquired, became part of the community; but only certain immovables (realty) acquired after the marriage were so treated.⁵⁶ This rule could be altered by contract, but in Louisiana, as in France, the *Coutume* was often specifically incorporated into marriage contracts by future spouses in defining the regime that would rule their property;⁵⁷ and if there was no contract provision creating a property regime, the *Coutume* of course automatically applied.

The inventory is said to have been made "*Pardevant nous Jean Francois Tisserant Ecuyer Sieur Demoncharvaus Commandant pour le Roy au Fort des Arkansas.*" The formula *pardevant nous* ("before us") is Parisian notarial boiler-plate and indicates that the commandant was acting in his surrogate notarial capacity. To an American common lawyer, the notary is not a member of the legal profession, not even a paralegal. But in seventeenth- and eighteenth-century France he enjoyed a much more elevated status, as indeed he still does in that country. Originally an official of the medieval European ecclesiastical courts, the notary developed into a noncontentious secular legal professional in France. In England, partly because the canon and secular laws were not on speaking terms, "the notarial system never took deep root."⁵⁸ For one thing, an important aspect of the notary's duties, his authority to "authenticate" documents, was of little use to the English. The whole notion of a state-sanctioned authenticator of private acts was entirely foreign to the common law: Whereas in France we see notaries "making" and "passing" contracts, the common law left that to the parties. The state was very much in the background in England, and was called upon only to enforce obligations that arose by force of nature.

The other aspect of the French notary's duties, the drafting of instruments, conveyancing, and the giving of legal advice, was per-

56. See Baade, *supra* note 39, at 7, 8.

57. *Id.* at 25.

58. 1 F. POLLOCK & F. MAITLAND, A HISTORY OF ENGLISH LAW 218 (2d ed., reissued with intro. by S. Milsom 1968).

formed by the regular legal profession in England. It is true that there was a scriveners' company organized in London in the sixteenth century which was granted a charter in the reign of James I.⁵⁹ Members were empowered to draft legal documents, especially obligations (or bonds), and they gave a certain amount of low-level legal advice particularly in commercial and banking matters.⁶⁰ The few secular notaries who practiced in London at that time concerned themselves mainly with drafting documents relevant to international trade, and they were members of this company.⁶¹ But in the eighteenth century the company lost its effort to keep common-law attorneys from competing, and in 1804 parliament made conveyancing the monopoly of the regular legal profession.⁶² In contrast, the French notary's duties by the eighteenth century had come to include not only the familiar ones of administering oaths, taking acknowledgements, and giving "authenticity" to "acts" of private persons by attesting them officially, but they also ran generally to the drafting of documents, conveyancing, and the giving of practical legal advice.⁶³ It is not surprising, therefore, that notaries would

59. See 12 W. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 70 (1938). See generally on the notary in England, Gutteridge, *The Origin and Development of the Profession of Notaries Public in England*, in *CAMBRIDGE LEGAL ESSAYS* 12 (1926).

60. 12 W. HOLDSWORTH, *supra* note 59, at *id.*

61. 5 W. HOLDSWORTH, *supra* note 59, at 115 (3d ed. 1945).

62. 12 W. HOLDSWORTH, *supra* note 59, at 71-72; T. PLUCKNETT, *A CONCISE HISTORY OF THE COMMON LAW* 227-28 (5th ed. 1956).

63. As draftman of wills, marriage contracts, and conveyances, *Mons. le Notaire* has survived in France as a much respected person, especially in the country villages. He is a general non-forensic legal practitioner, his part in the legal scheme "being confined to voluntary as distinct from contentious jurisdiction." Brown, *The office of Notary in France*, 2 *INT'L & COMP. L. Q.* 60, at 64 (1953). Indeed, the French notary is close to the equivalent of the English solicitor, except for the latter's participation in litigation. Thus one modern-day commentator opined that "a solicitor would feel much at home in the *étude* of the French notary, though he would be surprised, and perhaps disappointed, by the cordiality of the morning post." *Id.* at 71.

Today in Louisiana as well the notary enjoys considerable powers. See Burke & Fox, *The Notaire in North America: A Short Study of the Adaptation of a Civil Law Institution*, 50 *TUL. L. REV.* 318, at 328-32 (1975); Brosman, *Louisiana—An Accidental Experiment in Fusion*, 24 *TUL. L. REV.* 95, 98-99 (1949). The Louisiana notary has the power "to make inventories, appraisements, and petitions; to receive wills, make protests, matrimonial contracts, conveyances, and generally, all contracts and instruments of writing; to hold family meetings and meetings of creditors; . . . to affix the seals upon the effects of deceased persons and to raise the same." *LA. STAT. ANN.* § 35:2 (1964). When the Louisiana legislature defined the practice of law, and prohibited all but licensed attorneys from engaging in it, it therefore remembered to except acts performed by the notary which were "necessary or incidental to the exercise of the powers and functions of [his] office." *LA. STAT. ANN.* § 37:212(B) (1974). A walk through modern-day New Orleans will reveal a number of signs proclaiming the existence of "Law and Notarial Offices", a combination having an odd ring in the ears of an American common lawyer. The Louisiana notary is simply "a different and

make an appearance in eighteenth-century Louisiana. In New Orleans, of course, there was much work for them, but there were also provincial notaries operating in Biloxi, Mobile, Natchitoches, Pointe Coupée, and Kaskaskia.⁶⁴

Since De Montcharvaux acted as notary for the Lepine inventory, it is reasonably clear that there was no provincial notary resident at the Arkansas at that time. This comes as no surprise since in 1746 there were at the Post only twelve *habitant* families, ten slaves, and twenty men in the garrison,⁶⁵ hardly a sufficient European population to require or attract a law-trained scrivener. When it was time to have their marriage contract made, the widow Chenalenne and her future spouse executed it in New Orleans. No doubt there was available there legal advice on which they might more comfortably rely.⁶⁶ Besides, there was at that time no resident priest at the Post to perform the marriage.

V

On May 10, 1749, an event occurred that considerably reduced the European population of Arkansas and also made it difficult to attract settlers there for some time. On that day, the Post was attacked by a group of about 150 Chicaksaw and Abeka warriors. Their coming was undetected⁶⁷ and thus they caught the small *habitant* population altogether unaware. They burned the settlement, killed six male settlers, and took eight women and children as slaves.⁶⁸ The census taken later that year shows, not surprisingly, that the population had decreased since the previous census. Seven

more important official person than is the notary public in other jurisdictions of the United States." Brosman, *supra* at 98.

64. See Baade, *supra* note 39, at 12.

65. *Mémoire sur l'Etat de la Colonie de la Louisiane en 1746*. Archives des Colonies, Archives Nationales, Paris [hereinafter cited as ANC], C^{13A}, 30:242-281, at 249, (Typescript of original document available at Little Rock Public Library). As the average family size in Arkansas in the middle of the eighteenth century was about four, this would put the number of *habitant* whites at the Post at about forty-eight.

66. For an abstract of this marriage contract, see *Records of the Superior Council of Louisiana*, 13 LA. HIST. Q. 129 (1944).

67. However, the *habitants* may have had a warning that something was afoot, for on May 1, Francois Sarrazin had written from Arkansas that "two savages have killed a man and a woman and burnt a man in the frame." *Records of the Superior Court of Louisiana*, 20 LA. HIST. Q. 505 (1937). This incident may have been connected with the attack nine days later.

68. Vaudreuil to Rouille, September 22, 1749, calendared in THE VAUDREUIL PAPERS 59-60 (B. Barton ed., 1975). See also Faye, *supra* note 6, at 684 *et seq.* W. BAIRD, THE QUAPAW INDIANS: A HISTORY OF THE DOWNSTREAM PEOPLE 34 (1980), gives the number taken as slaves as thirteen.

men, eight women, eight boys, and eight girls remained, a total of only thirty-one white *habitants* at the *Poste des Akansa*.⁶⁹ Nor did all this mark an end to serious trouble. When in June of 1751 First Ensign Louis-Xavier-Martin de Lino de Chalmette, the commandant of the Post, went uninvited to New Orleans to consult with the governor, his entire garrison of six men took the opportunity to desert.⁷⁰ Things were obviously at a critical juncture.

When later in 1751 Lieutenant Paul Augustin le Pelletier de la Houssaye took command at Arkansas he found there a post recently rebuilt by its *habitants* and *voyaguers* and probably already relocated to a spot ten or twelve miles upriver at the edge of the Grand Prairie. (See Figure 2). It is clear that Governor Vaudreuil had determined to hold the Arkansas even if the cost proved high, for he assigned to De La Houssaye a large company of forty-five men.⁷¹ The lieutenant was also authorized to build a new fort; government funds being lacking, he undertook the construction at his own expense in return for a five-year Indian trade monopoly.⁷²

This new beginning could, in the nature of things, have given only a slight lift to the prospects for sustained settlement in the Arkansas country. Late in 1752 Governor Vaudreuil was informed that the Osages had attempted an attack on Arkansas Post but had failed.⁷³ While this indicates a stability of sorts for the Post, thanks no doubt to the size of the new garrison, still the perceived danger must have been so high as to discourage all but the most intrepid from taking up residence at the Arkansas. Mentions of Arkansas in the legal records tend to emphasize the dangerousness of the place. For instance, a couple from Pointe Coupée, on the verge of leaving for a hunting trip to the White River country, thought it best to deed their property to a relative, with the stipulation that the deed was to be void if they returned.⁷⁴ It is not surprising, therefore, that even as late as 1766, the last year of French dominion, only eight *habitant* families, consisting in all of forty white persons, were resident at Arkansas Post.⁷⁵

69. Arkansas Post Census, 1749, Loudon Papers 200, Huntington Library, San Marino, CA. There were also fourteen slaves resident at the post and sixteen *voyageurs* who had returned after their winter's work. There were five hunters on the White River and four on the St. Francis. Thirty-five hunters had failed to return from the Arkansas River.

70. Faye, *supra* note 6, at 708.

71. *Id.* at 211.

72. *Id.*

73. THE VAUDREUIL PAPERS, *supra* note 68, at 136.

74. *Index to the Records of the Superior Council of Louisiana*, 24 LA. HIST. Q. 75 (1941).

75. See Din, *Arkansas Post in the American Revolution*, 40 ARK. HIST. Q. 3, at 4 (1981).

All of these difficulties, and others, made for a place in which it might be regarded as too polite to expect the presence of much which corresponds to a legal system. In addition, political exigencies sometimes interfered to such an extent that the application of even-handed legal principle became inexpedient and thus entirely impracticable. For instance, the continued existence of the Arkansas settlement depended heavily on the loyalty of the Quapaws and their wishes were therefore relevant to any important decision made there. Their influence could extend even to the operation of the legal system as the following incident demonstrates.

On 12 September, 1756, a meeting was held in the Government House in New Orleans to hear an extraordinary request from Guedetonguay, the Medal Chief of the Quapaws.⁷⁶ His tribe had captured four deserters from the Arkansas garrison and had returned them; but the chief had come on behalf of his nation to ask Governor Kerlérac to pardon the soldiers. One of those captured, Jean Baptiste Bernard, in addition to having deserted, had killed his corporal Jean Nicolet within the precincts of the fort.

The chief, obviously a great orator, said that he had come a long distance to plead for the soldiers' lives despite the heat and the demands of the harvest; and in his peroration he said that his head hung low, his eyes were fixed to the ground, and his heart wept for these men. He knew, he explained, that if he had not come they would have been executed, and this was intolerable to him because he regarded them as his own children. He recited many friendly acts of the Quapaws to prove the fidelity of his people to the French. Among them was the release of six slaves (perhaps Chickasaws captured by the Quapaws) "who would have been burned" otherwise, and the recent capture of five Choctaws and two trespassing Englishmen. He himself, he noted, had recently lost one son and had had another wounded in the war against the Chickasaws; and he counted this "a mark of affection for the French." In recompense he asked for the pardon of the soldiers. The chief added that this was the only such pardon his nation had thus far requested, and he promised never to ask again. He did not doubt that Kerlérac, "the great chief of the French father of the red men," charged to govern them on behalf of "the great chief of all the French who lived in the

76. What follows is based on a memorandum entitled "*Harangues faites dans l'assemblée tenue à l'hôtel du gouvernement cejourdhui, 20 Juin 1756,*" found in ANC, C^{13A}, 39:177-180 (Transcript at Little Rock Public Library). The translations are mine.

great town on the other side of the great lake," would listen and do the just thing.

Guedetonguay left his best argument for last. He maintained vigorously that, under his law, any criminal who managed to reach the refuge of the *Cabanne de Valeur* where the Quapaws practiced their religious rites was regarded as having been absolved of his crime. It was their custom everywhere that the chief of the *Cabanne de Valeur* "would sooner lose his life than suffer the refugee to undergo punishment for his crime." Evidently the soldiers were claiming this right; and Ouyayonsas, the chief of the *Cabanne de Valeur*, was there to back them up. This last argument was an excellent one because it called upon the French to recognize an established Indian usage not dissimilar from the European custom of sanctuary. And the argument carried with it a threat of violent reaction if the custom were not allowed.

Kerlérac answered the chief that he was not unmindful of the past services of the Quapaws, nor was he ungrateful for them. "But," he said, "I cannot change the words declared by the great chief of all the French against such crimes, and . . . it would be a great abuse for the future" to pardon the soldiers. So, he continued, "despite all the friendship that the French have for you and your nation, these men deserve death."

The great chief stood for a long time with his head down and finally answered ominously that he could not be responsible for the revolutions which the chief of the privileged house might stir up—revolutions which he said "would not fail to occur." The argument continued and the governor offered to grant the chief "anything else except these four pardons." But Guedetonguay stubbornly maintained that "the sole purpose of his journey was to obtain the pardon of the four men." In the end the Governor extracted from the Quapaw chiefs "publicly and formally their word . . . that they would in the future deliver up all deserting soldiers as malefactors or other guilty persons without any restriction or condition whatsoever, and that . . . pardons would be accorded at the sole discretion of the French."

No immediate decision was reached by the Governor, but later that day some of his advisors, having reflected on what they had heard, reckoned "that a refusal of the obstinate demands of these chiefs . . . the faithful allies of the French would only involve the colony in troublesome upheavals on the part of the said nations who have otherwise up to the present served very faithfully." They con-

cluded that "saving a better idea by Monsieur le Gouverneur it would be dangerous, under all the present circumstances, not to satisfy the Indians with the pardons which they demanded."

The governor took the advice but evidently did not write to Berryet, the French Minister of the Marine, for some time to tell him about it. From the comfort of Versailles it was easy for Berryet to pick at Kerlérac's decision.⁷⁷ In responding to Kerlérac, Berryet first made the point that Bernard's case was different from that of the other captured soldiers since he was accused of homicide in addition to desertion. Then, too, the minister had a lot of questions. Could not the difference in Bernard's case have been urged on the Arkansas chiefs to get them to relent in his case? Where was the record of the legal proceedings which should have been conducted relative to the killing? If this was a wilfull murder the pardon had been conceded too easily. "It would be dangerous," the minister warned, "to leave such a subject in the colony, not only because he would be an example of impunity but also because of new crimes that he might commit." (The arguments of general and specific deterrence are not very recent inventions.) Finally, the governor was sternly admonished "not to surrender easily to demands of this sort on the part of the savages . . . If on the one hand it is necessary, considering all the present circumstances, to humor the savages, it is also necessary to be careful of letting them set a tone that accords neither with the king's authority nor the good of the colony."

Nevertheless, the minister talked to the king and he ratified the governor's decision. Writs of pardon were therefore issued under the king's name for each of the Arkansas soldiers. Because the homicide committed by Bernard was not a military crime and was cognizable therefore by the Superior Council of Louisiana, his pardon was directed to the Council. Interestingly, though Berryet admitted knowing nothing of the circumstances surrounding the killing, the pardon recited that a quarrel had arisen between Bernard and Nicolet, that they had beaten each other, that Bernard "had had the misfortune to kill the said Nicolet," and that the death "had occurred without premeditated murder."⁷⁸ Thus Louis XV pardoned Jean Baptiste Bernard for killing by mischance when there was no evidence adduced as to the facts resulting in Nicolet's

77. What follows is based in Berryet's letter to Kerlérac and Bobé Descloseaux dated July 14, 1769. ANC, B, 109:487-88 (Transcript at Little Rock Public Library). The translation is mine.

78. The pardon (*brevet de grâce*) was enclosed in the letter and is ANC, B, 109:489 (Transcript at Little Rock Public Library). The translation is mine.

death. The decision was generated simply by a desire to accommodate an important ally. Faithful adherence to legal principle sometimes had to take a back seat to the more compelling demands of politics.

VI

Father Louis Carette, the Jesuit missionary who came to the Post of Arkansas in 1750, nevertheless attempted to bring some order to the legal affairs of the place. As he noted in a *procuration* (power of attorney) dated at Arkansas in 1753, he was "authorized by the king to make in every post where there is not a Notary Royal all contracts and acts . . ." ⁷⁹ There is no evidence that he had any formal legal training, but he was a Jesuit, and thus a learned man, one of a handful of such who would make their residence in eighteenth-century Arkansas.

The 1753 *procuration* is itself of some interest, as it sheds light on how litigants whose cases were technically beyond the jurisdiction exercised by the Arkansas commandant (whatever that was) might have had their cases heard if they wanted to resort to regular methods of dispute settlement. As incredible as it seems, it is probable that the only court of general jurisdiction in the entire colony was the Superior Council of Louisiana. Now, in 1763 La Harpe said that it was a two-week boat trip from the Arkansas to New Orleans, and six to eight weeks back.⁸⁰ Obviously, the *procuration* was an important device for people in remote posts like Arkansas, for it enabled them through their attorneys, in the language of the document under discussion, "to act . . . as though they were personally present."⁸¹ Convoys or individual vessels travelled down the Mississippi frequently enough to make this means of tending to legal affairs more tolerable than it might otherwise have been. In this case, the attorney chosen was Commandant de la Houssaye, and he was deputed to act in a probate matter at Pointe Coupée for Etienne de Vaugine de Nuysement and his wife Antoinette Pelagie Petit de Divilliers. An interesting feature of *procurations* which increased their utility and flexibility was that they were assignable. This feature came in handy in this instance since De La Houssaye, having

79. *Index to the Records of the Superior Council of Louisiana*, 22 LA. HIST. Q. 255 (1939).

80. La Harpe to Chosseul, August 8, 1763, ANC, C^{13B}, 1 (Typescript in Little Rock Public Library).

81. *Records, supra* note 79, at *id.*

been detained at the Arkansas due to illness, simply transferred the power of attorney to a member of the Superior Council "to act in my place as myself."⁸²

Perhaps one of the reasons that Carette had acted as notary in this instance was that the only other person in the little community authorized so to act, the commandant, was a party to the instrument. But in the French period priests were given general notarial powers and could act even in the absence of circumstances disabling the commandant. For instance, Carette acted as notary, and thus probably draftsman, for a marriage contract in which the commandant was not interested. This was the marriage contract of Francois Sarrazin and Françoise Lepine, executed at Arkansas Post on January 6, 1752.

Marriage contracts have no exact parallel in common-law practice, and it thus seems worthwhile, before discussing the particulars of the Sarrazin-Lepine contract, to devote some time to their explanation and description. In a recent seminal study, Professor Hans Baade has outlined the provisions which one typically finds in marriage contracts executed in accordance with eighteenth-century Parisian notarial practice.⁸³ The first and invariable undertaking by the future spouses was a promise to celebrate their marriage *in facie ecclesiae*. The parties would then choose the regime which would govern their property during the marriage. Next would come a declaration that the ante-nuptial debts of the parties were to remain their separate obligations; this was followed by a disclosure of the parties' assets, a requirement for the validity of the previous provision. The dowry brought to the marriage by the wife was next recited; and delineating *préciput*, the right of the spouse to specific property in the event of dissolution of the community, frequently followed. Finally came the donation clause, usually a reciprocal grant of all or part of the predeceasing spouse's estate. In Louisiana, this donation, in order to be valid, had to be registered with the Superior Council in New Orleans.

An inspection of the Sarrazin-Lepine marriage contract reveals that it very clearly drew on these French notarial precedents, and it reflects, moreover, an awareness of the practical requirements of the Louisiana registration provisions. It contained a promise to celebrate the marriage in regular fashion, the creation of a community property regime, a clause stating the amount of the wife's dowry, a

82. *Id.*

83. What follows is taken from Baade, *supra* note 39, at 15-18.

mutual donation to the survivor of all property owned at death, and an undertaking to have the contract registered in New Orleans.⁸⁴ While there was no clause dealing with ante-nuptial debts and no mention of *préciput*, it is quite obvious that the good Jesuit knew more than a little about French notarial practice, and may well have had at his disposal a form book on which he could draw. He was, for all practical purposes, for a time the "lawyer" of the post as well as its *curé*.

Before we leave this interesting document there is an aspect of it which bears detailed attention. The property regime chosen by the parties included in the community "all property, movable and immovable"⁸⁵—as common lawyers would say, all property, both personal and real. In this respect the contract departs from the Custom of Paris which included in the community all movables but only certain immovables (*conquêts*) acquired after marriage.⁸⁶ Parties were allowed in Louisiana to contract almost any property arrangement they wanted,⁸⁷ and Sarrazin and Lepine had elected a somewhat unusual variety of community. Curiously, however, the contract reckoned that this regime was "in accordance with the custom received in the colony of Louisiana."

A few months after the execution of this contract Commandant de la Houssaye wrote to the governor to say that Monsieur Etienne Vaugine, a French officer, was of a mind to marry Madame de Gouyon, the commandant's sister-in-law, and he sent along "the proposed conditions for the contract of marriage."⁸⁸ This was a draft of the contract, as De La Houssaye asked the governor to pass "*l'exemplair du contrat*" along to the New Orleans notary Chantaloux if the governor decided to give his permission for the marriage. Chantaloux was "to make it as it should be."⁸⁹ Three weeks later the governor wrote to say that the contract would be sent back soon and that Chantaloux had left it intact except for one reasonably minor alteration.⁹⁰

In 1758 Father Carette, dismayed by the irreligious inclination of his flock, left the Arkansas and no replacement was sent. In 1764,

84. *Records of the Superior Council of Louisiana*, 25 LA. HIST. Q. 856-57 (1942).

85. *Id.* at 856.

86. Baade, *supra* note 39, at 15.

87. *Id.*

88. La Houssaye to Vaudreuil, Dec. 1, 1752, LO 410, Huntington Library, San Marino, CA.

89. *Id.*

90. THE VAUDREUIL PAPERS, *supra* note 68, at 152.

Captain Pierre Marie Cabaret Detrépi, commandant at the Arkansas, after Madame Sarrazin had found herself widowed, passed a second marriage contract for her which was extremely unsophisticated and rudimentary.⁹¹ It contained only a promise to marry regularly and a mutual donation. Perhaps the good widow had by this time tired of long-winded formalities. Just as likely, the Post was feeling the absence of Carette's drafting skills.

VII

As tiny, remote, and inconsequential as the Arkansas settlement was, then, it is nevertheless clear that at least some of its people were part of the time adherents to French legal culture. Of course almost everyone who lived at the Post during the period of French domination was either a native of France or French Canadian; and by the end of the French period a substantial number of native Louisianans were there. It is most interesting to find the survival of civilian legal form in so remote an outpost of empire. Obviously, not all of Arkansas's residents lapsed into a kind of legal barbarism.

There were, however, circumstances at work which would make it impossible for some time to establish a community which could be expected to value the observance of legal niceties very highly. As we have already seen, the Post could not have been very attractive to the more civilized settler owing to its dangerous location. Arkansas Post, moreover, over the years experienced an extreme physical instability since it was necessary to relocate it several times due partly to flooding. (*See* Figure 2). The Arkansas River was in the eighteenth century "a turbulent, silt-laden stream, subject to frequent floods which were disastrous along its lower course."⁹² This proved to be a considerable disincentive to settlement. Add to that the enormous expanse occupied by the alluvial plain of the Mississippi and the difficulty becomes plain enough.

Almost any site within thirty miles of the mouth of the Arkansas carried with it a considerable risk of floods. Law's colony, on the Arkansas twenty-seven miles or so from its mouth, was said in 1721 to be "in a fertile sector but subject to floods."⁹³ The success of the attack by the Chickasaws in 1749, when the Post was at the same

91. Records of the Superior Council of Louisiana, Feb. 11, 1764, Louisiana History Center, Louisiana State Museum, New Orleans.

92. P. HOLDER, *supra* note 15, at 152.

93. 4 M. GIRAUD, *supra* note 17, at 273 (1974).

location, was made possible by the absence from the neighborhood of the Quapaws: Because of recent floods they had abandoned their old fields for a more promising place upstream.⁹⁴ This place, called *Ecores Rouges* (Red Bluffs) by the French, was about thirty-six miles from the mouth of the Arkansas and was at the present location of the Arkansas Post Memorial.⁹⁵ After the attack, the Post was moved to join the Indians at *Ecores Rouges* so as to provide for mutual protection.⁹⁶

The new spot was free from floods but proved unsatisfactory from a strategic standpoint because of its distance from the Mississippi. The location delayed convoys and Governor Vaudreuil expressed the view that "a post on the Mississippi would be more practical."⁹⁷ Therefore in 1756 the Post was moved back downriver to about ten miles above the mouth. But the inevitable soon occurred. In 1758 heavy flooding, graphically described in a letter of Etienne Maurafet Layssard the *garde magasin* (storekeeper) of the Post, caused heavy damage, almost undoing the work of builders and architects who had been at work for the better part of a year. The houses were saved by virtue of being raised on stakes against such a day as this; but the *habitants'* fields, everything but Laysard's garden for which he had providently provided a levee, were entirely inundated.⁹⁸

It was in fact a small enough loss. From the beginning, and understandably, the attempt to make a stable agricultural community of the Arkansas had failed miserably. There is no doubt that the European population of Arkansas during the French period consisted almost entirely of hunters and Indian traders. In 1726 the reporter of the Louisiana census remarked of the Arkansas that "all the *habitants* were poor and lived only from the hunting of the Indians."⁹⁹ A 1746 report said of the twelve Arkansas *habitant* families

94. Faye, *supra* note 6, at 717-19.

95. See figure 2.

96. For details, see Appendix II to my forthcoming book, UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836.

97. THE VAUDREUIL PAPERS, *supra* note 68, at 118.

98. Faye, *supra* note 6, at 718-19. A detailed description of the repairs made in the summer of 1758, evidently necessitated by these floods, is in ANC, C^{13A}, 40:349-50 (Typescript in Little Rock Public Library). In addition to making repairs, the builders constructed a house 26 feet long and 19 wide just outside the fort for the Indians who came there on business. It was of *poteaux en terre* construction, was covered with shingles, and was enclosed with stakes. The report describing the renovation and construction work of 1758 is signed by Denis Nicolaus Foucault, chief engineer of the Province of Louisiana.

99. ANC, G¹, 464 (Transcript at Little Rock Public Library).

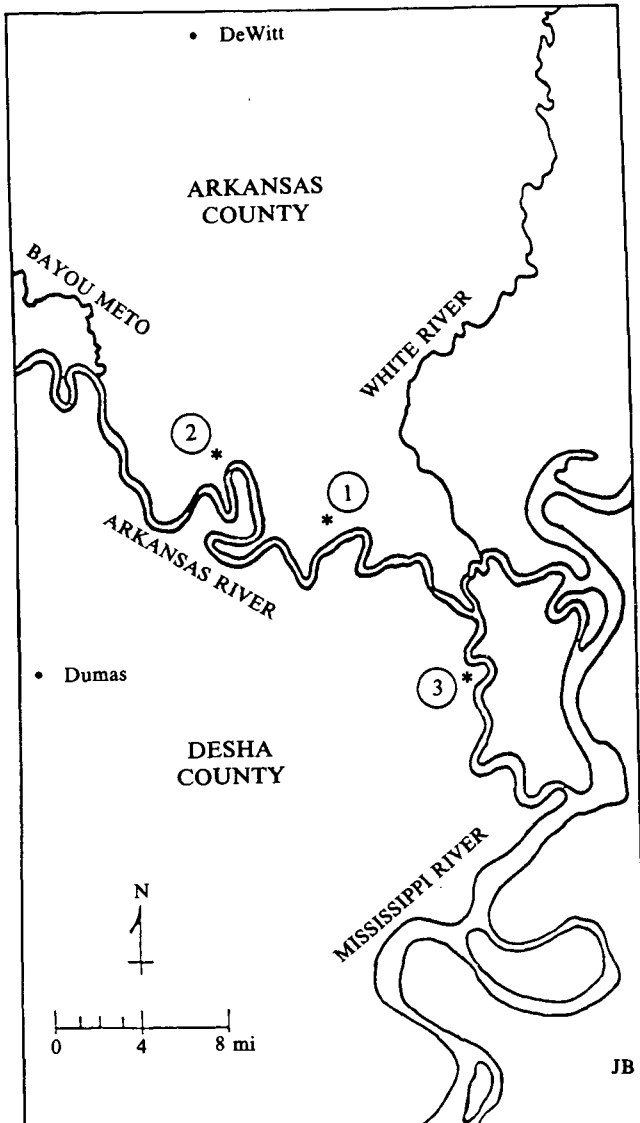


Figure 2 Locations of
Arkansas Post, 1686-1983

1. 1686-1699; 2. 1749-1756; 3. 1756-1779
1721-1749 1779-1983

Based on a map drawn by John Baldwin which appeared in Arnold, *The Relocation of Arkansas Post to Ecores Rouges in 1779*, 42 *ARK. HIST. Q.* 317 (1983). Used with permission of the Arkansas Historical Association.

that "their principal occupation is hunting, curing meat, and commerce in tallow and bear oil." As for cultivating the soil, the same source reported that the *habitants* grew "some tobacco for their own use and for that of the savages and *voyageurs*."¹⁰⁰ In 1765 Captain Phillip Pittman, an Englishman, said that there were eight families living outside the fort who had cleared the land about nine hundred yards in depth. But, according to him "on account of the sandiness of the soil, and the lowness of the situation, which makes it subject to be overflowed," their harvest was not enough even to supply them with their necessary provisions. Pittman noted that "when the Mississippi is at its utmost height the Lands are overflow'd upwards of five feet; for this reason all the buildings are rais'd six feet from the ground." Thus the residents of the Arkansas, he said, subsisted mainly by hunting and every season sent to New Orleans "great quantities of bear's oil, tallow, salted buffalo meat, and a few skins."¹⁰¹

Both Layssard¹⁰² and Father Watrin¹⁰³ hint that the discouragement produced by the frequent flooding contributed to Father Carette's decision to leave. However that may be, it must be clear that during the period of French dominion the Post did not provide fertile soil for either crops or religion. Would regular *bourgeois* legal procedures have generally been afforded a more cordial acceptance? Even absent direct evidence, this would in the abstract seem most unlikely. Unsafe, unstable, and uncomfortable, the Arkansas Post of Louisiana during the period of French dominion must surely also have been largely unmindful of *bourgeois* legal values.

It is true, as we have seen, that some of the Post's residents tried to maintain a connection between their remote outpost and European legal culture. But the few legal records that chance has allowed to come down to us from the French period are remarkable not only for their small number but also for the social and economic characteristics they reveal of the people who figured in them. They were an elite, related by marriage and blood, struggling under the difficult circumstances of their situation to participate in regular le-

100. *Memoire, supra* note 65 (Transcript at Little Rock Public Library).

101. P. PITTMAN, *supra* note 53, at xlv, 40-41.

102. See ANC, C^{13A}, 40:357 (Transcript in Little Rock Public Library). Layssard there remarks that the inhabitants at Arkansas were too poor to build a levee, and that "the Father would rather leave than go to such an expense. He is very poor."

103. See J. DELANGLEZ, THE FRENCH JESUITS IN LOWER LOUISIANA 444, where Watrin is quoted as saying that, despite there being little hope for conversion of the Quapaws, Father Carette "nevertheless followed both the French and the savages in their various changes of place, occasioned by the overflowing of the Mississippi near which the post is situated."

gal processes. The probate proceeding of 1743 was instituted by one of the most well-to-do residents of Arkansas in the person of Anne Catherine Chenalenne, widow of Jean Francois Lepine. The community property inventoried included four slaves.¹⁰⁴ Her future husband Charles Lincto became the most substantial civilian resident of the Post. The 1749 census, if one excludes from it for the moment the commandant and his household, reveals that Lincto's household accounted for eight of the twenty-nine white *habitants* and seven of the eleven slaves at the Arkansas.¹⁰⁵ Etienne de Vaugine de Nuysement who executed the *procuracion* of 1753 was a member of one of the most distinguished French families of Louisiana;¹⁰⁶ and he granted the power to Commandant de la Houssaye who would soon become a Major of New Orleans and a Knight of the Royal and Military Order of St. Louis.¹⁰⁷ Vaugine and De la Houssaye married sisters. The marriage contract executed at the Arkansas in 1752 was entered into by the Post's *garde magasin* and Françoise Lepine, a daughter of Anne Catherine Chenalenne the petitioner in the probate proceeding of 1743; and the bride's dowry had resulted from the dissolution of the community which had been the aim of that proceeding. Finally, Françoise Lepine's second marriage contract, passed by Detrèpi in 1764, was prelude to her marriage to Jean Baptiste Tisserant de Montcharvaux, officer and interpreter at the Post and son of the commandant who executed the 1743 inventory. We are dealing with a propertied and interconnected gentry here, a tiny portion of what was anyway a very small population.

How the other, the major part of the Arkansas populace regulated their lives during the French period will, in the nature of things, be difficult to document. But there is some evidence on this point and it indicates that there was a good deal of lawlessness on the Arkansas. According to Athanase de Mézières, the Lieutenant Governor at Natchitoches, the Arkansas River above the Post was inhabited largely by outlaws. "Most of those who live there," he claimed, "have either deserted from the troops and ships of the most Christian King and have committed robberies, rape, or homicide,

104. For a translation of this inventory, see Core, *supra* note 54, at 22.

105. *Resancement General des Habitants, Voyageurs, Femmes, Enfants, Esclaves, Chevaux, Beufs, Vaches, Cochons du Poste des Arkansas, 1749*. Lo. 200, Huntington Library, San Marino, CA.

106. On the Arkansas Vaugines, see Core, *The Vaugine Arkansas Connection*, 20 GRAND PRAIRIE HISTORICAL SOCIETY BULLETIN 6 (1978).

107. Faye, *supra* note 6, at 709.

that river being the asylum of the most wicked persons, without doubt, in all the Indies."¹⁰⁸ On another occasion, De Mézières singled out as a particularly heinous offender an Arkansas denizen nicknamed Brindamúr, a man "of gigantic frame and extraordinary strength." Brindamúr, De Mézières complained, "has made himself a petty king over those brigands and highwaymen, who, with contempt for law and subordination with equal insult to Christians, and the shame of the very heathen, up to now have maintained themselves on that river."¹⁰⁹ He had been resident on the Arkansas for a long time, as his name appears in the census of 1749. Interestingly, it is placed at the very head of a considerable list of "the *voyageurs* who have remained up the rivers despite the orders given them."¹¹⁰ All persons hunting on the rivers were supposed to return every year as passports were not issued for longer periods. But there were large numbers of hunters who lived for twenty years or more in their camps without ever reporting to the Post. They constituted a large proportion, indeed sometimes a majority, of the European population in Arkansas during the French period. The 1749 census, for instance, lists a *habitant* population of only thirty-one, including the commandant and his wife. But there were forty hunters on the Arkansas River whose passports had expired, and nine on the White and St. Francis Rivers. Sixteen hunters were said to be at the Post being outfitted to return to the hunt.

Brindamúr, the bandit King, was murdered by one of his men after the end of the French period, "though tardily" De Mézières reckoned, and "by divine justice."¹¹¹ In the Spanish period an effort was made to rid the river of these malefactors.

VII

Since no records of litigation initiated at the Arkansas during the French period have survived, if indeed any were ever kept, very little can be said directly on how lawsuits were conducted there. However, in 1747 Francois Jahan initiated a suit in the Superior Council in New Orleans against one Clermont, a resident of Arkansas Post, claiming damages for the conversion of a cask of rum at Arkansas.¹¹² The Superior Council, as we have shown, had jurisdic-

108. 1 ATHANASE DE MÉZIÈRES AND THE LOUISIANA-TEXAS FRONTIER, 1768-1780 166 (H. Bolton ed., 1914).

109. *Id.* at 168-69.

110. *Resancement*, *supra* note 105.

111. B. BOLTON, *supra* note 108, at 167.

112. *Index to the Records of the Superior Court of Louisiana*, 17 LA. HIST. Q. 569 (1934).

tion throughout Louisiana, and this case reveals how it was exercised against a defendant in the hinterlands. The summons was served on the Attorney General of Louisiana; thus, as Henry Dart pointed out, "it would seem . . . that a resident of the Post of Arkansas could be sued in New Orleans by serving the citation on the Procureur [Attorney] General."¹¹³ How the case would have, in the ordinary instance, proceeded from there is difficult to say. Probably the Arkansas commandant would have been asked to act as a master to gather facts and to report to the Superior Council. But it seems that the commandant had already ruled independently on the matter. Commandant de Moncharvaux's statement on this case, which is entered in the record a few days after the suit was initiated, indicates that he had held a hearing on the matter at the Arkansas, had taken testimony as to the rum, and had "sentenced Clermont to pay for it."¹¹⁴ Apparently he had kept no record of the proceeding, as none was offered: The good lieutenant bore his own record. It is interesting to note, however, that this case was evidently not brought to enforce the commandant's judgment but was an independent action.

How did the justice provided by the Post commandant during the French period measure up? In the absence of litigation records, this is the hardest kind of question to answer. We know, however, that whatever jurisdiction was exerciseable by the commandant, he acted alone, without official advisors and without, of course, a jury. To say that rule is autocratic is not to say necessarily that it is bad. But the possibilities for arbitrary action are large in such circumstances and much of course depends on the personality and character of the autocrat.

Parkman claimed that the Illinois commandant exercised his considerable power "in a patriarchal spirit and . . . usually commanded the respect and confidence of the people."¹¹⁵ But for the most part the eighteenth-century French commandants in Louisiana had a reputation for arbitrariness. Captain Phillip Pittman had a low opinion of them, and accused the Illinois commandants of extortion in matters of trade.¹¹⁶ He also once remarked generally on "the tyranny, which has been always exerted by officers of that nation commanding outposts."¹¹⁷ Another commentator has written

113. *Id.*

114. *Id.* at 571.

115. Quoted in Dart, *supra* note 31, at 279.

116. See P. PITTMAN, *supra* note 53, at 53.

117. *Id.* at 36.

of the French post commandants as "small tyrants who were oppressing all those living under their jurisdiction."¹¹⁸ At least one eighteenth-century Arkansan would have agreed with these assessments. That was Etienne Layssard, the storekeeper at the Post previously mentioned; he was, except for Father Carette and the various commandants already alluded to, the most visible member of the Arkansas settlement in the 1750s. He wrote long and rambling letters about conditions at the Post and complained constantly of his poverty and of his difficulties with his commandant, Captain de Gamon de la Rochette. In November of 1758 he wrote his superior in New Orleans that De Gamon claimed to be "sole master of all the commerce, of the garrison, as well as the *voyageurs*, and is paid preferentially by virtue of his office, saying that if anything is left over the others can have it." He went on to say that "not knowing any law which establishes such authority, . . . I believe that when the commandant sells to a private person he is a merchant like me and ought to collect only his proportionate share."¹¹⁹ On another occasion, according to Layssard, De Gamon had said that "no one had a right to go to the [Quapaw] village to trade but him . . . and that the trade belonged to him." Layssard complained bitterly that this deprived him of a living and he described his desperate circumstances: "My wife and I, four children, five slaves, a dog, a cat, and chickens live in a small house 25 feet long and 10 feet wide, with one little chimney to warm us all. . . ."¹²⁰

While there is reason to think that Layssard was cranky and litigious (he once wrote to New Orleans demanding the prosecution of the Post surgeon for an unnamed offense),¹²¹ there is no good reason to question his claims about the commandant's behavior. These incidents are good examples of the possibilities for the abuse of power when civilian and military authority are combined. When Layssard wrote his letters in 1758 Arkansas Post was virtually a garrison state. There were only six houses and thus a total resident white civilian population that could not have much exceeded thirty-five.¹²² On the other hand, there was a permanent garrison of fifty soldiers which in 1756, because of the difficulty with the Quapaws discussed above, was temporarily reinforced by an additional force

118. J. DELANGLEZ, *supra* note 103, at 445.

119. ANC, C^{13A} 40:328-29 (Calendar at Arkansas History Commission, Little Rock).

120. ANC, C^{13A} 40:306-12 (Calendar at Arkansas History Commission, Little Rock). The translation is mine and is made from a typescript in the Little Rock Public Library.

121. ANC, C^{13A} 40:323-26 (Calendar at Arkansas History Commission, Little Rock).

122. Faye, *supra* note 6, at 716.

of sixty men.¹²³ As we noted, in August of 1758 Father Carette, discouraged by the irredeemably bad character of the Post population, gave up his post.¹²⁴ The commandant would thereafter have no one with whom to share his authority and no near equal to challenge it.

Of the ten military officers who exercised judicial authority in Arkansas during French rule we know precious little of relevance.¹²⁵ Only De la Houssaye, the commandant from 1751 to 1753, has come down to us outfitted with any kind of clear indication of character, and he does not appear to have possessed much of a judicial temperament. Governor de Vaudreuil said that he had found it necessary to relieve De la Houssaye of his position at the Alibamous Post because of "his passion for drink . . . after giving him several charitable warnings on the subject, but without effect." The governor then delivered this ominous *coup de grâce*: "In addition, his character could not be worse or more dangerous."¹²⁶

123. *Id.* at 715.

124. J. DELANGLEZ, *supra* note 103, at 445.

125. For a list of these and the dates during which they commanded at the Arkansas, see Appendix III of ARNOLD, *UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836*, which will be published later this year.

126. Faye, *supra* note 6, at 709.

