University of Arkansas at Little Rock Law Review

Volume 8 | Issue 2 Article 5

1985

Unequal Laws Unto a Savage Race: European Legal Traditions in Arkansas, 1686-1836

Robert R. Wright

BOOK REVIEW

UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836. By Morris S. Arnold. Fayetteville, Arkansas: The University of Arkansas Press, 1985. 243 pp. with appendices, maps and photographs. $24.95.

*Reviewed by Robert R. Wright**

I. INTRODUCTION

The title to this book is excerpted from the poem, *Ulysses* by Alfred Lord Tennyson.[1] If one does not fully understand the reference in the beginning, the text itself demonstrates conclusively the accuracy of the description.

The obvious purpose of the book is to piece together from available sources reliable information as to the early legal system in Arkansas under the French and Spanish, each having a civil law background, and then to examine the early American legal system in Arkansas after the Louisiana Purchase. Such an undertaking is fraught with difficulty at the outset since many valuable records, such as notarial records, are largely missing. This requires the author at times to make inferences based on available information, the nature of the civilization of the *"habitants,"* the practices generally within Louisiana and its upland territory, and suggestions from customs of similar settlements.

Another service of this book is to answer something of a mystery. Why, after almost 150 years under the French and Spanish, did the civil law have practically no impact on the Arkansas legal system that developed in the years following the Louisiana Purchase? We know that the Louisiana civil law is based on the French Civil Code (or actually on a succession of such codes). Since the Arkansas uplands were under the control of France, then Spain, and then for a short time,

* B.A., University of Arkansas; M.A., Duke University; J.D., University of Arkansas, Fayetteville; S.J.D., University of Wisconsin. Donaghey Distinguished Professor of Law, University of Arkansas at Little Rock.

1. "It little profits that an idle king,
By this still hearth, among these barren crags,
Match'd with an aged wife, I mete and dole
Unequal laws unto a savage race,
That hoard and sleep, and feed, and know not me."

France again, and since theoretically the settlement at Arkansas Post was governed from New Orleans, then why should the outcome as to the selection of a legal system have been altogether different in Arkansas than in Louisiana?

It might have been desirable to delay the answer until the end of the book, but Professor Arnold provides the basic answer in the prologue:

> While these faint traces [place names] 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 Jefferson's desire 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. . . .* * * In the upper territory, however, by a piecemeal process beginning in 1804, the English common law was insinuated into the legal system until 1816, when it was at last adopted wholesale by the General Assembly of the Missouri Territory.[2]

There was another reason as well, which this book clearly reveals. The development or colonization of the Arkansas region on a permanent basis never took hold.

II. THE NATURE OF FRONTIER SOCIETY

The population of Arkansas Post at its height in 1798 numbered only 344 whites and 56 slaves. Moreover, the society which is described at Arkansas Post never really developed the permanence of an agrarian society. The mandated location of the outpost near the mouth of the Arkansas River (although it was some distance upstream from there) gave rise to periodic flooding which destroyed the crops and at times the settlement itself. Occasional Indian attacks from the Osage or Chickasaw tribes were not inclined to make settlers who were farmers feel very secure within much distance from the fort (or from their protectors, the Quapaw). The settlement remained during its existence

---

2. M. ARNOLD, UNEQUAL LAWS UNTO A SAVAGE RACE: EUROPEAN LEGAL TRADITIONS IN ARKANSAS, 1686-1836—Prologue xviii (1985). At the time of publication of this book, Morris S. Arnold was Dean and Professor of Law at Indiana University at Bloomington. He has since taken office as U.S. District Judge for the Western District of Arkansas. He previously served as Professor of Law and History at the University of Pennsylvania where he held the position of Vice President-Director of the Office of the President from 1979-81. From 1981-84, he was Ben J. Altheimer Distinguished Professor of Law at the University of Arkansas at Little Rock. A native of Texarkana, he holds the B.S.E.E. and LL.B. degrees from the University of Arkansas, Fayetteville, and the LL.M. and S.J.D. degrees from Harvard University School of Law.

largely a trading post to provide supplies to hunters and rivermen and a place to trade in furs and other commodities with the trappers and the Indians. Its small size, its endangered permanence and occasional movement to other nearby locations, its lack of a professional class in the sense of trained magistrates or notaries, and its rudimentary, unsophisticated legal system (if indeed it may be called that) left it little more than an undeveloped crossroads on the fringe of a frontier.

III. EARLY EXPLORERS AND SETTLERS

Life on the Arkansas was, to paraphrase Thomas Hobbes' description of man's existence in a state of nature, nasty, brutish and short. Indeed, as one reads the narrative, the question arises as to why anyone would have gone to Arkansas at all. The first European who did go, La Salle, went as an explorer in 1682. About twenty miles north of the mouth of the Arkansas River, he encountered a tribe of Quapaw Indians. After some fear of hostilities was dispelled, La Salle and his men smoked the pipe of peace, and La Salle assured the Quapaw leaders that they could henceforth look for help against their enemies to the greatest prince in the world. But in return, they had to consent to construction of a column with the French king's coat of arms painted thereon and accept him as master of their lands. The column was erected, and with La Salle and his lieutenant, Henri de Tonti, at the head, the French paraded three times around the column singing a psalm and discharging their muskets. La Salle then accepted the land in the name of Louis the Great. Presents were then distributed, and the Indians celebrated the event by pressing their hands to the column and then rubbing their bodies in joy at such a fine alliance. Thus began the first European establishment in the lower Mississippi Valley north of New Orleans.[3]

Tonti was granted the land as a seignory by La Salle and sought to settle it. Although he was quite enthusiastic, there is no evidence that the population under Tonti ever exceeded six. By 1699, there was no evidence of any settlement at all.[4] Shortly after this, in 1717, a Paris newspaper began advertising the glories of Louisiana to its readers and stated that gold and silver could be mined there almost without effort. This campaign was the brainchild of John Law, a Scotsman who owned a Paris bank and who had obtained a monopoly on Louisiana trade for his trading company. In 1721, a group of these settlers took up resi-

3. *Id.* at 1-5.
4. *Id.* at 6.

dence near Law's abandoned trading post. In 1722, there were about fifty men and women residents along with a nearby military detachment of seventeen men. However, by 1727, the military post had been abandoned and there were only about thirty Frenchmen remaining.[5]

IV. DEVELOPMENT OF A LEGAL FRAMEWORK

In terms of the legal order within Louisiana, there had been created in 1712 a Superior Council of Louisiana which had original and exclusive jurisdiction over all disputes. Moreover, Louisiana had a small code called the *Coutume*, of which there are a number of annotated versions. The charter given Law's company provided for the reception of general French legislation and also the *Coutume de Paris*. A few years later, Louisiana was divided into districts, and Arkansas was one of nine which were created.[6] However, after the surrender of Law's company's charter in 1731, Louisiana became a crown colony, and a military garrison was returned to Arkansas with the post commandant having judicial authority over all but the most important civil and criminal cases. He also took the place of a notary, a person who under French law was much more important than we perceive today in that he performed a variety of minor legal duties.[7]

The fact that the settlement was protected somewhat by the Quapaws did not always insulate it from Indian attack. In 1749, for example, it was attacked by Chickasaw and Abeka warriors, who killed six men and took eight women and children as slaves. The Osage were also hostile.[8] Except for the Quapaw protection, the little settlement would surely have never survived, and fear of hostile Indians obviously increased the difficulty of populating the area. The importance of the Quapaw presence is indicated by the interesting story of how the Quapaw chief intervened with the French governor at New Orleans to save two soldiers who had deserted, one of whom had killed his corporal. This decision ultimately was reviewed by the King, who ratified the Governor's actions.[9]

Another factor other than the Indians which made for the small population at Arkansas Post was periodic flooding of both farmland and dwellings. There were actually several different sites of the settlement over the period of its existence due in large measure to attempts

5. *Id.* at 7-10.
6. *Id.* at 11-13.
7. *Id.* at 16-17.
8. *Id.* at 22-23.
9. *Id.* at 24-28.

to escape the flooding, while at the same time the settlement was located close enough to the mouth of the Arkansas River to satisfy the people in charge in New Orleans.[10]

A further factor which increased the difficulty of settling the area was that there were apparently a great many outlaws up the river. These people had committed vicious, heinous crimes in many instances. One, named Brindamur, had made himself a petty king of sorts. When he was ultimately murdered by one of his men, it was said that his end came "though tardily" through "divine justice."[11]

No records of litigation survived the French period, and so the author is left to speculate on this somewhat by using records of the Superior Council and other sources.[12]

France ceded Louisiana to Spain secretly in 1762, but two years elapsed before word reached Louisiana and another two years went by before the Spanish governor arrived. For a few years, French law and practice remained in place, but in 1769, the Spanish Governor O'Reilly issued two documents known as "O'Reilly's Laws," one of which created the Secular Cabildo of New Orleans as a substitute for the Superior Council and the other of which was a set of *Instructions* relative to civil and criminal procedure, crimes, and testate and intestate succession.[13] Eventually, these laws filtered up to the Post. Although the commandant had considerably less authority under the Spanish law than under the French, apparently he continued to exercise a great deal of judicial authority because Post commandants were authorized to adjudicate "verbally" civil matters within their competence.[14] By the end of the Spanish period, Arkansas Post had become something of a stable, although still small, settlement. The book's discussion of cases in the Spanish period is rather interesting because some of the cases involved undesirables such as Indians and outlaws. There is also an interesting account of the procedure for obtaining and perfecting land grants. Not many land grants were ultimately confirmed by the United States, however. By 1812, only twenty-nine claims involving slightly over 8,000 acres had been confirmed.[15] Some of the practices of the Post commandants actually provided no title at all.

The third chapter of the book discusses the influence of the

10. *Id.* at 33-35.
11. *Id.* at 37-38.
12. *Id.* at 38.
13. *Id.* at 43-44.
14. *Id.* at 53.
15. *Id.* at 105.

Church in Arkansas. It may be summarized quite easily, in that while there was extensive church involvement in Louisiana, there was very little religious activity in Arkansas. Because of the lack of resident priests, in fact, the parties executed marriage contracts and were married "before witnesses," one of whom would presumably be the commandant. When a priest came to the Post, they would then go through the religious ceremony.[16]

Spain ceded Louisiana back to France under the secret Treaty of St. Ildefonso on October 1, 1800.[17] But the French did not reoccupy it until late in 1803 when they took possession for three weeks to transfer it to the United States pursuant to the Treaty of Paris. On the eve of the transfer, Arkansas Post was still a small trading community with little productive farmland, inhabited largely by people of French extraction.[18]

V. CONVERSION TO AMERICAN COMMON LAW

From a legal standpoint, this brings us to the most interesting part of the book to many of us—the question of the "Americanization" of the legal system.

When W.C.C. Claiborne was appointed by President Jefferson to exercise the powers held by the Spanish governor, he found the legal situation in Louisiana in bad shape. There was a large backlog of old cases and a great accumulation of depositions taken in Spanish, which he could not read. He appointed magistrates, giving them the same powers in civil matters which had been exercised by the commandants. Claiborne did not care for his legal duties and attempted to leave decisions up to the local magistrates. In Arkansas, for some time, the people submitted their disputes to the Post commander, Lt. James B. Many. In 1804, Congress separated the Territory of Orleans (present-day Louisiana) from the District of Louisiana (which included present-day Arkansas). Congress provided that most of the laws previously in force in the Territory of Orleans would continue in effect, although they introduced such common law features as jury trial, habeas corpus, reasonable bail, and the prohibition against cruel and unusual punishment.[19]

In the Orleans Territory, dissatisfaction over legal changes was a

16. *Id.* at 113, 122-125.
17. *Id.* at 126.
18. *Id.* at 128-129.
19. *Id.* at 130-139.

grievance. The people did not like the use of English in the courts, and they preferred written depositions to in-court testimony. When Congress required in 1805 that judicial proceedings be conducted "according to the course of the common law,"[20] the territorial court held that this meant the common law of that area, which was the civil law. Yet, the legislature of the territory had in that same year adopted the English common law as to crimes and had provided that indictment, trial methods, the rules of evidence and all proceedings be according to the common law.[21] The legislature had also provided for jury trials in civil cases, spoken testimony in court, and compulsory attendance of witnesses. In this manner, the territory had gone a long way toward becoming a common law jurisdiction, but there was a great deal of discontent and hardening opposition which was brought home to the legislators. Thus, in 1806, the territorial legislature passed a bill which would have established the civil law in Louisiana as to substantive civil matters.[22] Claiborne vetoed the bill, but it was clear by then that the legislature and local leaders would not retreat from the position that private law in the territory must remain as it had been. Successions (decedents' estates), wills, domestic relations, contracts, property and conveyancing had to remain as before. Finally, in 1808, the Orleans legislature passed an act promulgating a digest of civil laws in force in the territory. Claiborne did not veto it, and thus a civil law basis for the private law of Louisiana was set in place.[23]

But the area north of present-day Louisiana was under the government of the Indiana Territory, and in 1804, its legislature (which was composed of the governor and judges) promulgated the basic common law of crimes and set up an elaborate court system but made no attempt to alter the private law which had existed under Spain. Moreover, many of the inhabitants of upper Louisiana, as in Orleans, wanted to retain the old Spanish form of judicial determination by the local commandant. But when they petitioned the legislature, they were much more restrained and requested only that judges be selected from the district, that they be able to speak both French and English, and that records be kept in both languages.[24]

Professor Arnold poses the question of why opposition to the common law was more fainthearted in the upper region. He speculates that

20. *Id.* at 140.
21. *Id.*
22. *Id.* at 141.
23. *Id.* at 142.
24. *Id.* at 143-146.

the absence of a professional lawyer class may have helped because they might have had an interest in preserving the old system. But he concludes that it is due to the people who resided there. In the lower territory, the French outnumbered Americans seven to one at the time of the takeover, but there were many more Americans in the upland areas. Half of the delegates to the 1804 convention were Americans. In addition, the upstream settlers were more akin to others across the Mississippi whereas the lower Louisiana French were attached to the civil law and its institutions.[25] From the standpoint of Arkansas, it might be added that its exposure to the civil law was so slight and its population so small that very little tradition had ever had a chance to take hold.

VI. THE EARLY ARKANSAS LEGAL SYSTEM

The first cases of much note in the Arkansas Post area were those heard by a Board of Land Commissioners set up to hear the validity of French and Spanish land claims.[26] These commissioners found the people in Arkansas to have little knowledge of legal matters. As the civil organization of the district developed, lay judges of little experience were appointed to judicial positions. As the author states, "Arkansas's first American court . . . consisted of a Dutchman, a native Louisianian of French background, and an Anglo-American, all without legal training."[27]

Introduction of a professional lawyer class to Arkansas was late in coming.[28] Apparently, the first person to appear as a lawyer was one Perly Wallis in 1808. However, he probably was not admitted to practice until 1809.[29] The "first truly regular practitioner" appeared in 1811.[30] He was Anthony Haden, who had earlier appeared in court in Cape Girardeau. A few others appeared during those early years.

In 1812, the Missouri Territory took the place of the Louisiana Territory, and Arkansas became a county within the territory. Subsequently, in 1814, a judgeship was created for Arkansas, and George Bullitt was appointed.[31] Gradually, during this same period of time, the legislature of the territory was adopting more and more of the non-

25. *Id.* at 148-149.
26. *Id.* at 152.
27. *Id.* at 158.
28. *Id.* at 165.
29. *Id.* at 166-168.
30. *Id.* at 169.
31. *Id.* at 175.

criminal common law, such as statutes pertaining to dower and to descent and distribution.[32] Eventually, in 1816, the territorial legislature adopted a statute which is almost identical to Arkansas Statutes Annotated section 1-101 (Repl. 1976), which received the common law of England and statutes of Parliament as they existed in 1607.[33] The French who lived in Arkansas during these years gradually became alienated from the legal system in that few of them sat on juries and very little litigation concerned them. There is evidence that they were deliberately excluded from jury service.[34]

In terms of the common law, Professor Arnold notes that in a territorial decision, Judge Edward Cross of the Arkansas Superior Court held that common law actions had been available as early as 1807.[35] In a subsequent case in 1838,[36] in an opinion by Chief Justice Ringo, the Arkansas Supreme Court also demonstrated a preference for the common law. Professor Arnold observes that these cases "expose to view a determination by the Arkansas professional lawyer class to extirpate the civil law entirely from their legal system."[37]

The professional lawyer class in Arkansas began to grow in the twenty years or so prior to statehood. These lawyers had not attended law school, but that is understandable since Litchfield in Connecticut and chairs in law at several leading universities were the closest approximations to a modern law school in the early days of the Republic.[38] These Arkansas professionals had read law as law clerks or apprentices in existing law offices. Thus, they were generally better equipped than those lawyers who were in Arkansas at the time of the Louisiana Purchase.

The book contains an appendix which includes an opinion in a case decided in 1824 by Judge Thomas P. Eskridge.[39] It is an interesting opinion in that the judge chastized at least one of the lawyers relative to his competence. Also in the appendix are the 18th century legal records of the Post, information on the location of the Post, a list of the judges of Arkansas up to 1808, and information on the number of "habitants" at Arkansas Post from 1686 to 1798.

---

32. *Id.* at 179.
33. *Id.* at 180.
34. *Id.* at 181.
35. *Id.* at 193. The case is Grande v. Foy, Hempstead's Reports 105 (1831).
36. M. ARNOLD, *supra* note 2, at 196. Small v. Strong, 2 Ark. 198 (1838).
37. M. ARNOLD, *supra* note 2, at 197.
38. B. SCHWARTZ, THE LAW IN AMERICA 109-110 (1974).
39. M. ARNOLD, *supra* note 2, at 225.

VII. CONCLUSION

Unequal Laws Unto a Savage Race is well-researched. It became, upon publication, the definitive source of information about the early legal, social and economic history of Arkansas. It will likely remain so for all time. As such, it will occupy an important place in research and writing relating to the historical development of the American frontier in general and the Louisiana Territory in particular.

Another question which the book inferentially raises is whether the vast areas of the Louisiana Purchase could ever have been settled by the French or Spanish. Before the purchase of Louisiana, Arkansas Post was simply a small trading post and there were very few people of any kind, other than the Indians, in what we now call Arkansas. But in only a little over thirty years after the United States acquired it, Arkansas was ready for statehood. The lesson apparently is that to settle an area, it is necessary to have people take permanent residence there in substantial numbers as farmers, businessmen and professional men. These people who came to the Arkansas Territory also brought with them their own ways, and their own ways included the common law. Thus did the civil law disappear in a matter of a few years and with scarcely a trace left to remind us of its presence here for a period of time as long as Arkansas has been a state.