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Blackstone's Commentaries: Foothold or Footnote in Louisiana's Antebellum Legal History

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Blackstone's Commentaries:
Foothold or Footnote in Louisiana's Antebellum Legal History

A Thesis

Submitted to the Graduate Faculty of the
University of New Orleans
in partial fulfillment of the
requirements for the degree of

Master of Arts
in
History

by

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Abstract

The judges of the Supreme Court of Louisiana issued a court order, in the year 1840, mandating a required reading course of legal materials for prospective bar applicants. Included in the list of materials was Sir William Blackstone's *Commentaries on the Laws of England*. Louisiana's legal system has, from its inception, been based on the civil law, a system tracing its roots back to Rome. The other organized system of law is the common law, which originated in the customs and judicial decisions of England, and is the legal system followed in the other forty-nine states. A question arises as to the reason the *Commentaries* was included in the "*Course of Studies*," since there exist fundamental differences between the two systems. This thesis explores the possible motive by examining the decisions of the Territorial Superior Court, and the Supreme Court of Louisiana between the years 1809 and 1875.

On November 24, 1840, the Louisiana Supreme Court promulgated a rule establishing a required course of study for candidates seeking admission to the bar. The rule required candidates to be knowledgeable of Louisiana codal, statutory and case law, as well as civilian authorities, such as Jean Domat, Robert Pothier, and the Institutes of Justinian. The rule also stated that prospective lawyers should be “well read” in the following common law treatises: Sir William Blackstone, *Commentaries on the Laws of England* (Oxford, 1765-1769), James Kent, *Commentaries on American Law* (Philadelphia, 1826), Joseph Chitty, *A Practical Treatise on Bills of Exchange, Checks on Banks, Promissory Notes, Bankers Cash Notes and Bank Notes*, first American ed. (Philadelphia, 1809), Sir John Bayley, *Summary of the Law of Bills of Exchange, Cash Bills and Promissory Notes* (London, 1789), Thomas Starkie, *A Practical Treatise on the Law of Evidence and Digest in Civil and Criminal Proceedings* (London, 1824), Samuel March Philipps, *A Treatise of the Law of Evidence* (London, 1814), and William Oldnall Russell, *A Treatise on Crimes and Misdemeanors* (London 1819). Prior to that rule, persons seeking membership to the legal profession had received no formal direction for legal study. Between 1813 and 1840, membership to the bar only required that an applicant had been admitted to the bar of another state, or had served an apprenticeship with a practicing Louisiana attorney for three years.¹

The question arises as to why the court included these texts in its syllabus. Did courts, prior to 1840, extensively rely on them in deciding cases? Did it reflect, as one legal historian has suggested, that the inclusion of common law authorities in the court’s rule meant that it was “implicitly clear English and American authorities were becoming more important to Louisiana’s legal traditions than civilian sources.”² To understand the importance of conducting an inquiry

into the reason the court included common law treatises in its rule, a brief synopsis of Louisiana's legal history would be required.

Louisiana's legal system was founded upon Spanish, French and Roman civil law, however it is acknowledged to be a mixed jurisdiction containing elements of both the civil and common law legal systems. That conclusion, while true, alone gives no hint of the degree that common law has intertwined with Louisiana's civil law principles. This paper is intended to accomplish what has been lacking in the historical literature, a study of Louisiana case law and legislation to determine the extent of that mixture.³ The writer selected Blackstone's *Commentaries* as the focus of this paper because of his universal acceptance in the eighteenth and nineteenth centuries, both in England and America, as the leading exponent of the common law.

Sir William Blackstone, law professor, barrister, judge and legal commentator, earned a place in history that few legal professionals would dare dream of attaining. His crowning achievement was his *Commentaries on the Laws of England*, published in four volumes between 1765 and 1769. An encyclopedic presentation of English law, Blackstone intended the *Commentaries*, not only for the purpose of training future barristers, but for the edification of "such other Gentlemen of the University, as are desirous to be in some Degree acquainted with the Constitution and legal Polity of their native country."⁴ Such was the impact of the book that it went through twenty-three editions by the mid nineteenth century.

A Londoner by birth, Blackstone attended Pembroke College, Cambridge, before he entered the Middle Temple Inn. He matriculated at All Souls College, Oxford, where he gained a bachelorship in Civil Law. Called to the Bar in 1746, he was unsuccessful in establishing a

practice, so he divided his time between attending court sessions in London and continuing studies at Oxford where he later earned a doctorate in civil law.⁵

In 1753, the Chair of Regius Professor of Civil law fell vacant at Oxford. Blackstone sought the place, but for political reasons the appointment went to someone less qualified. He was greatly disappointed in not receiving the appointment, but at the urgings of friends he became a “free lance” teacher of an introductory course on common law at Oxford. This marked the first time that common law was taught at Oxford, which for prior centuries, had offered only courses on civil law. Blackstone’s lectures were well received and in 1756 he printed them, *An Analysis of the Laws of England*, which became an outline for the *Commentaries*.

He became the first Vinerian Professor of Common Law at Oxford in 1758, a position that was created by legacy in the will of Charles Viner. Leaving a deputy to read his lectures at Oxford, Blackstone returned to London to practice law once more. His reputation, which now preceded him, afforded him greater success at the Bar than his first attempt. Now financially secure, he married, fathered nine children, published the *Commentaries* and sat for nine years in the House of Commons. Named to the Court of Common Pleas, he switched places with his friend Justice Joseph Yates for a judgeship on the Kings Bench.⁶ After Justice Yates died, Blackstone was reappointed to the Court of Common Pleas, and served until his death in 1780. Blackstone, at the time of his death, and for decades afterwards, was regarded as the foremost authority on English law. The *Commentaries*, his lasting achievement, is the reason today, he is still revered by legal scholars across the globe.

The *Commentaries* reception in America was as enthusiastic as it was in England. It was one of the primary works by which lawyers, not only learned their craft, but it inspired others to take up the law. Before 1771, the year in which the first American edition of the *Commentaries*

was printed, approximately one thousand copies of the British edition appeared in the Colonies, and could be found as the principal, if not the only law book in a lawyer's office.⁷

However, in the opinion of one Louisiana judge, writing some 200 years after the *Commentaries* was first published, Blackstone was undeserving of such adulation. In *Hightower v. Dr. Pepper Bottling Co of Shreveport, et al.*,⁸ a 1960 opinion by the Louisiana Court of Appeal for the Second Circuit, the plaintiff, a remarried widow, was attempting to recover damages for the wrongful death of her first husband. The defendant Bottling Company wanted to introduce evidence that the plaintiff had remarried, in order to reduce the amount of any damages it might be responsible for. The trial judge refused to admit the testimony, and a jury subsequently awarded judgment in favor of the plaintiff. The Bottling Company appealed the decision. An 1898 opinion, by the Louisiana Supreme Court, had contained a suggestion, based on a reference to the *Commentaries*, that a surviving wife was precluded from collecting damages if she remarried. However, the principle attributed to Blackstone in that case, did not involve an issue the court was required to decide. Additionally, the common law reference related only to a wife's right to seek damages when her husband was the victim of murder or manslaughter. Nevertheless, counsel for the Bottling Company submitted the earlier Supreme Court case, in his brief, as support for his client's position, prompting the following comment from one of the judges in his opinion:

It is noted that counsels' argument as to the effect of the Huberwald case is based, not upon the independent reasoning and opinion of the court, but upon a quotation contained therein, derived from Blackstone's *Commentaries*. We firmly deny any appropriate relationship between the quoted comment and the point which we have under consideration. Additionally, we would point out the fact, as above observed, that our codal article, which is the foundation of tort actions, has no relationship with common-law principles. Furthermore, it should be observed that the antiquated observations of Sir William Blackstone have been long regarded, even in common-law jurisdictions, as bearing little, if any, weight. The distinguished Barrister-at-Law, Frederick Sherwood, epitomizes the low esteem in which both Blackstone as an authority and his commentaries as precepts are held, in the following words: 'Blackstone was by no means a scientific jurist. He has only the vaguest possible grasp of the elementary concept of law. He evidently regards the law of gravitation, the law of nature, and the law of England, as different examples of the same principle -- as rules of action or conduct imposed by a superior power on its

subjects...Consequently Blackstone is seldom or never referred to as an authority. His Commentaries are recommended for their literary value.’⁹

Does Louisiana’s legal history bear out that judge’s epitaph of Blackstone? This paper will explore that question, nevertheless one would not expect a civil law jurisdiction, such as Louisiana, to have received the *Commentaries* with the same enthusiasm as the rest of the country. However, recent historical scholarship, aptly described as “the New Louisiana Legal History,” which focused on the unique position common law played in the state’s legal development, offers grounds for exploring the influence, if any, Blackstone had on the development of the state’s basic law.¹⁰ Much of that scholarship emanated from the University of New Orleans.¹¹ The emphasis of the “New *Louisiana Legal History*” differed from earlier scholarship which usually concentrated on explaining technical aspects of the law, or on such historical queries as, was French or Spanish law entitled to claim preeminence in the formation of Louisiana’s early civil codes.¹² Writings in the “New *Louisiana Legal History*” reflect that some principles of common law were mandated by legislation, and suggested that other concepts were introduced in court decisions.

After the Louisiana Purchase in 1803, the United States government allowed Louisianans to retain their civil law heritage, but required that trial by jury be afforded in all causes.¹³ In 1805 the territorial legislature mandated that Louisiana’s criminal law and evidence be based on the “common law of England.”¹⁴ Congress also required the territory to provide the common law remedy of Habeas Corpus. Introduction of trial by jury, and the Writ of Habeas Corpus were distinct common law innovations to Louisiana’s legal system, and one could argue that the implementation of jury trials was the biggest catalyst for the adoption of English common law procedures, including court structuring.

In 1805 the Territorial Legislature authorized the Superior Court to issue writs of quo warranto, procedendo, mandamus and prohibition, which, will pursue the forms, and be conducted according to the rules and regulations of the common law.”¹⁵ That grant of authority has been used as to illustrate the adoption of other elements of English law by Louisiana,¹⁶ but that assumption is open to dispute. Early Louisiana case law reflects that those writs were previously recognized under Spanish law, but under different names. The Louisiana Supreme Court held that, the adoption of English common law names are to be considered as a translation of the Spanish remedies and not an adoption of the English practice itself. It also held that the reference to “common law” in the statute meant Spanish law, the common law of Louisiana, not the common law of England.¹⁷

In addition to those specific instances where common law was integrated with civil law by legislation, a theory has been advanced to explain the absorption of general common law precepts by Louisiana. It has been suggested that, the appointment of out-of-state common law judges to the state’s highest court, and the influx of a great number of American lawyers caused a further incursion of common law into Louisiana’s fledging legal system.¹⁸ No specific evidence has been furnished to support that theory, and early evidence does not reflect it to be true. American lawyers accounted for sixty percent of the number of lawyers admitted to the Louisiana Bar by the Supreme Court in 1813.¹⁹ The legal briefs filed by some of those attorneys, between 1809 and 1821, in matters before Louisiana’s highest court, were analyzed to discover any consistent trend, suggesting an attempt by American attorneys to supplant civil law principles with common law precepts. The results of that analysis do not support a theory that the great influx of American lawyers to Louisiana caused the adoption of common law principles.

William C. Claiborne, an American appointed by President Thomas Jefferson as first Governor of the Territory, was thwarted at every attempt to change Louisiana's basic law to the English common law. American trained lawyers frustrated by their attempts to assimilate the complexities of Spanish civil law, unsuccessfully brought an action before the Superior Court for the Territory of Orleans in November 1804 to require that judicial proceedings in the Territory be conducted according to principles of English common law. Their argument was based on a provision of the Northwest Ordinance of 1787, which required that all that all judicial proceedings [should be conducted] according to the common law.@ Judge John B. Prevost, sitting as the sole occupant of the Court, ruled that the use of the term "common law," in that statute, as it applied to the Orleans Territory, meant Roman, Spanish and French civil law. Judge Prevost, at the time of his appointment to the Superior Court was a judge in New York city.²⁰ A few years later, that issue was "reargued before Judge George Matthews, also an American trained lawyer, and he reached the same decision as Prevost."²¹

Based on the small number of references to the *Commentaries*, the evidence is scant, that American lawyers were much concerned with urging the Supreme Court substitute common law principles in place of civilian rules. References to Blackstone appeared in only nine briefs of counsel between 1809 and 1821.²² In none of the cases did the court refer to Blackstone in its opinion. All the attorneys who included references to Blackstone in their briefs were trained in American common law. They were James Brown, Alexander Porter, Alfred Hennen, James Workman, Samuel Livermore, James Turner, George Eustis, and Edward Livingston. Even though the latter was trained in common law, Livingston was a robust advocate of the civilian legal system. In five of those briefs the common law principles were no different than civilian precepts. In three other cases, counsel referred to Blackstone for such issues as the distinction

between damages, due for property damage, and for personal injury, rules for statutory construction, and legal procedure. One case required the court to determine the status of the common law of New York. The attorney had argued that New York law was relevant for the interpretation of a document, since it had been confected in that state. Attorneys had also based arguments, in the remaining five cases, on both Blackstone and such civilian authority as, *Las Siete Partidas*, Justinian's *Institutes*, and works by Robert Pothier, and Jean Domat.

Besides Blackstone, eight briefs contained citations to another common law authority, named in the court *Course of Study*, Joseph Chitty's treatise on negotiable instruments. No other common law authority listed in the 1840 rule was cited in any of the briefs, but that would be expected since none of them, with the exception of Samuel Philips on Evidence and William Russell on crimes, were published before 1820.²³ The briefs were devoid of any evidence which might suggest that American lawyers, by quoting common law, were attempting to circumvent or supplant established civilian principles. They were doing what lawyers have always done, choosing those legal principles which are more favorable to their client's case.

Considering that Louisiana's criminal and evidentiary law is based on English common law, it is not surprising to find works by Thomas Starkie, Samuel Philipps and William Russell in *Course of Studies*. The Louisiana courts adopted common law rules applicable to negotiation of commercial paper, such as promissory notes, bills of exchange and bills of lading. England's law in that field was derived from commercial customs, such as the *lex mercatoria* or law merchant, which was developed in nations where the civil law flourished.²⁴ The application by Louisiana courts of the common law rules relating to commercial paper provide a rationale for inclusion, in the *Course of Studies*, of works by Joseph Chitty and Sir John Bayley.

With the possible exception of volume four of Blackstone's *Commentaries*, which deals exclusively with criminal law, the reason for listing his work in the rule is not readily clear. Although it is generally known that judges consulted the *Commentaries* in crafting some of their opinions, as did the territorial legislature in the enactment of its criminal statute and some of its civil legislation, that information alone, is insufficient to reach a dependable conclusion for the court's reason for including Blackstone in its rule. Only an in depth analysis of the territory's early legislation, and the decisions of Louisiana's highest court can provide a reliable answer.

A few legal historians have concluded, that Louis Moreau Lislet and James Brown, commissioned in 1806 by the territorial legislature to prepare a digest of the Civil law in force in the territory, included language from the *Commentaries* in several articles of their finished product. Those codal articles related to certain persons who were entrusted with the care of minors, the duties between employers and employees, and corporation law.²⁵

One can assume, with a great deal of confidence, that the *Commentaries* were consulted in the drafting of the Crimes Act of 1805, although no similar study has been conducted to compare the language in that act with Blackstone's work. But there is indirect evidence that the drafters relied on Blackstone. The territorial legislature, apparently concerned with the local bar's unfamiliarity with English criminal law, required, in Section 48 of the Crimes Act, that the governor appoint a qualified person to prepare an exposition explaining the intricacies of English criminal law. Governor Claiborne appointed Lewis Kerr, a common law attorney, to prepare the treatise.²⁶ In his *Exposition*, Kerr cited the *Commentaries* forty-five times, as well as other British authorities.

Louisiana's common law criminal system would have been justification by itself for the court to have included the *Commentaries* in its *Course of Studies*, but criminal law constituted

only one-fourth of Blackstone's work, and, if that had been the only reason for its inclusion in the rule, the court could have chosen only volume four of the *Commentaries*, for study, the volume which alone deals with criminal law. Nevertheless, it is still important to examine the court's criminal opinions, after it acquired criminal appellate jurisdiction, to determine what relevance Blackstone still had, some forty years after the Crimes Act was adopted. Of course, the analysis of opinions dealing with civil litigation is the only means to determine if Blackstone had any influence on that area of law.

A search was conducted using the internet's LexisNexis legal service to locate Supreme Court cases which contained citations to Blackstone.²⁷ From the service's Louisiana database, the keywords "Blackstone," and "Black and Comm. or Com." were entered to locate cases which were decided between the years 1809, when decisions of the territorial Superior Court were first reported, and 1875. It is suggested, that a time period embracing thirty-one years before, and thirty-five years after promulgation of the *Course of Studies*, is an appropriate period to obtain a representative sampling for judging the impact Blackstone may have had on Louisiana's civil and criminal law. Also the subject of analysis, were decisions rendered by Louisiana's Court of Errors and Appeals created in 1843, which was the first court in Louisiana authorized to handle criminal appeals.

The search produced a list of two hundred and three cases. In thirty-three, the name "Blackstone," referred to a party to the suit, some other individual, or, in a small number of cases, a principle from the *Commentaries* which had been considered by a lower court. In eighty-five cases, citations to the *Commentaries* appear only in the briefs or arguments of counsel and were not acknowledged in the court's opinion. In the remaining eighty-five cases, references to Blackstone appear in the court's opinion, however, in three of those cases, the citations appear

only in the dissenting opinions.²⁸ Dissenting opinions carry no value or weight as precedent, nor do the citation of authorities appearing in counsels' briefs. References to Blackstone in fifteen other opinions constituted "dicta," or "obiter dicta," legal terms of art which are used for a comment on the law, made by a judge in passing, which has no relation to, or is unnecessary to his decision.²⁹ Opinions containing dicta likewise carry no legal value. Those cases, having no relevancy to our inquiry, leaves only sixty-seven cases, out of the original two hundred and three, for discussion.

The greatest number of opinions which cited the *Commentaries*, twenty-six, involved the application of criminal law. The Supreme Court determined in 1813 that it lacked appellate criminal jurisdiction under the state's constitution, and it was not until 1845 when it obtained the authority to hear criminal appeals.³⁰ One would expect to find a greater number of criminal cases which relied on Blackstone in developing the state's criminal law, had the court been clothed with criminal jurisdiction during its first thirty-three years of its existence. Nevertheless, there is no doubt that volume four of the *Commentaries*, would have been daily cited in criminal matters, pending before the trial courts, and it would have been considered the Louisiana lawyers' "hornbook" for criminal law.

The first reported reference to the *Commentaries*, appeared in a criminal matter before the Superior Court for the Territory of Orleans in 1810. In *Territory v. Nugent*, Nugent had been charged with the crime of libel. When his case came up for trial, Nugent requested a continuance so that he could obtain the attendance of several material witnesses. Nugent filed an affidavit in support of his request which asserted that the absent witnesses would offer evidence to prove that the statement he made about the victim was true. The trial court denied Nugent's request on the grounds that the truth of a libelous statement was inadmissible as a defense in a criminal

prosecution. The Superior Court held that the trial judge's ruling was correct, citing both the *Commentaries*, and other English authorities. The case is significant for two reasons, it is the first recorded opinion of a Louisiana court to cite the *Commentaries*, and the court acknowledged that it was required to follow English, common law rules of evidence in criminal cases.³¹

The second opinion to cite Blackstone was decided in the same year and involved the same case. The court had postponed a decision, pending further consideration and research, on a second point of law raised by Nugent. That issue involved Nugent's complaint, that the indictment filed against him was defective for failing to identify the specific district, within the city of New Orleans, where the crime was allegedly committed. The indictment stated that the crime had occurred within the city of New Orleans, but failed to specify a particular district. The words "Territory of Orleans" and "First District" had been handwritten, presumably by either the clerk of court, or the prosecutor, in the margin of the indictment, but the court found that writing did not solve the indictment's defect. The law, stated the opinion, required the location of the crime to be contained within the body of the charge. The court ruled that the indictment was insufficient and overturned Nugent's conviction. It based its conclusion on specific English court decisions. The *Commentaries* provided justification for the court's reliance on the English decisions. Blackstone observed, that under common law, the reliance by judges on the studied and experience-based decisions of their predecessors, in other words, on precedents, is the "principal and most authoritative evidence that can be given of the existence of that, which forms the common law." This second opinion in Nugent's case was also significant, because the court had referred to reported English criminal cases as a basis for its decision.³²

The third and last criminal case in which the territorial court cited Blackstone was *Territory v. McFarland*. McFarland had been indicted for the crime of murder. He claimed that

the indictment was defective because it failed to include in its caption, the date or term when it was returned. The Superior Court determined that McFarland's claim did not have merit, noting that an indictment, and its caption are treated as distinct parts of the document, and it would not be defective for failure to have the date and term included in its caption. The court based its decision on comments by a noted seventeenth century English judge and commentator, Sir Matthew Hale, but noted that Blackstone held a similar view as Hale.³³

The Louisiana Supreme Court issued two opinions involving aspects of criminal law prior to the Constitution of 1845 which granted it appellate criminal jurisdiction. The first opinion was issued in *State v. Williams*. The case involved a conviction, based on an indictment which charged William H. Williams with transporting twenty-four slaves, from another state, into Louisiana. The only penalty for conviction of that offense was a fine of \$ 500.00, for each slave imported. Williams was convicted and fined \$ 12,000.00, which decision, he attempted to appeal to the Supreme Court. The trial judge refused to grant defendant's request for an appeal, asserting that the Supreme Court lacked jurisdiction. Williams then filed a writ with the Supreme Court to force the trial judge to sign his request for an appeal. Judge François-Xavier Martin, who wrote the opinion for the majority, determined that the action against Williams was not a criminal matter and the trial judge should have granted an appeal. Martin cited the *Commentaries* for the principle that a statute which imposed only a monetary penalty was an "action on debt" and therefore civil in nature. Judge Henry Adams Bullard, who dissented to Martin's opinion, also cited Blackstone to support his dissent. On rehearing, the court reversed itself, holding that the statute involved a criminal matter and dismissed defendant's case for lack of jurisdiction. Noteworthy, this case serves as an illustration of how one authority, Blackstone, was used to

support both sides of an issue. The court's majority, in its initial opinion, as well as the majority on rehearing referred to the *Commentaries* to support their respective decisions.³⁴

The second case involved a criminal contempt action, which the judges of the Supreme Court tried themselves. An attorney, Pierre Soulé, had filed a brief for a rehearing, after the court ruled against his client. In that brief, he accused the judges of unethical behavior in rendering its opinion, either by, misreading the law, or failing to apply it correctly. The concluding sentence in the brief warned, "your honors will deem it neither just nor safe to refuse the re-hearing demanded." Upon receiving Soulé's brief, the judges issued a warrant for his arrest, which directed the sheriff to bring him before the court to answer the contempt charges. Soulé objected to his arrest, and the summary manner in which the court conducted proceedings to punish him. After a brief hearing, the court found Soulé in contempt, and ordered that he serve twenty-four hours in jail, and pay a fine of \$ 100.00. Its decision to hold contempt proceedings against Soulé presented for the court with two, previously unresolved, legal issues. One was whether the court had the power to punish an attorney for contempt, and if so, the procedure which the court should follow in holding contempt proceedings. The court relied on the provisions of Articles 131 and 132 of the Louisiana Code of Practice of 1825 in solving the first issue. Article 131 clothed the court with general contempt power and Article 132 provided that, "attorneys and advocates, when guilty of contempt of the courts, before which they plead, are subject to punishment, pursuant to the provisions of special laws." The Code of Practice however, did not establish a procedure for conducting contempt matters and the court found itself turning to Blackstone to fill that gap. The Court noted that the *Commentaries* sanctioned both arrest, and summary punishment for individuals who are in contempt of a court.³⁵

The legislature created a Court of Errors and Appeals in 1843 to hear criminal appeals. Creation of that court provided the first occasion, since statehood, that a criminal defendant had the right to appeal his conviction. Appeals were conducted from July 1843 until February 1846, when the Constitution of 1845 transferred criminal jurisdiction to the Supreme Court. Merritt M. Robinson, official court reporter for the Court of Errors and Appeals, lists, in volume eight of his reports, the twenty-one cases decided by the court during its existence. But Sheridan Young, in an article on the history of that court, reveals that Robinson failed to include two other cases which had been considered by the court.³⁶ Sheridan's manuscript, additionally presents a comprehensive history of the court, as well as highlighting the respective legal philosophies of its judges, gleaned from their opinions. Blackstone's *Commentaries* was cited in three of the appellate court's opinions, *State v. Jones*³⁷, *State v. Brown*³⁸, and *State v. Hornsby*.³⁹ Joseph Chitty's work on criminal law and practice, listed in the *Course of Studies*, was also cited in nine cases.

The resolution of *State v. Jones* is intriguing, because of the court's refusal to adopt the common law prevailing in England in favor of embracing a modification of the English rule by other American courts. Mathew Jones was indicted by a grand jury for assault with a dangerous weapon. Prior to trial, he filed a motion to dismiss the indictment on grounds that the grand jury was improperly selected. The court granted his motion and the state appealed the decision. Jones contested the state's appeal and claimed that the appeal had the effect of placing him in double jeopardy. The Court of Errors and Appeals, referring to Blackstone, noted that English law did not allow a criminal appeal by either the prosecution, or a defendant. However, the court discovered that the English rule had been modified by statute in other states by allowing a defendant to appeal his conviction. The court, by analogy, reasoned that, since double jeopardy

only attaches after a defendant is convicted or acquitted, according to Blackstone, it found no reason to prevent the state from appealing a lower court's dismissal of an indictment.

After the Supreme Court acquired appellate criminal jurisdiction in 1845 it issued, between that date and 1875, twenty opinions which cited the *Commentaries* for criminal law precepts. However, it would be three years after the court acquired criminal jurisdiction, before it heard its first criminal appeal. L. J. Sigur, the prosecutor in *State v. Howell*, furnished defendant, William A. Howell, prior to trial, a certified copy of the indictment returned against him, as was required by statute. The copy given Howell contained the notation "no true bill," which meant that the grand jury refused to indict him. That notation was apparently an error, since the original indictment, which was filed in the court record, was marked "true bill." Howell was convicted, and requested on appeal that he be granted a new trial because of state's failure to provide him a true copy of the indictment. The Supreme Court granted Howell a new trial, relying on Blackstone for the common law principle that an indictment, in order to be valid, must carry the notation "true bill,"⁴⁰

Criminal law principles attributed to Blackstone, in other decisions by the court, cannot be readily placed in any one grouping. The cases dealt with issues of contempt, evidence, double jeopardy, jury charges, bond forfeitures, sufficiency of indictments, identifying bailable offenses, the right to eliminate jury trials for minor offenses, and the legal effect of missing the date set for an execution because the defendant's case was on appeal.⁴¹

In one criminal case, *State v. Gates*, the court relied only indirectly on Blackstone for its decision. The opinion, in that matter, drew mainly from Joseph Chitty's work on criminal law, and decisions rendered by other state courts as a basis for the court's holding. The issue in *Gates* was whether his conviction was valid, where the record of the trial proceedings failed to reflect

that his jury had been sworn after being selected to try the case. The Supreme Court granted defendant a new trial because of that defect, relying on Chitty and opinions rendered by courts in Mississippi and Indiana. The court also, found a sample record of an old English criminal trial in the appendix of volume four of the *Commentaries* which reflected that jurors, after their selection, had been sworn. That example was taken as an illustration of the common law practice of placing jurors under oath before testimony is received.⁴²

In another case, the court was called upon determine whether the City of New Orleans had the constitutional authority to pass penal ordinances, which restricted the sale of food products to specific locations in the city. The court ruled in favor of the city, however in doing so, it acknowledged that the basis for its decision would be the same whether it applied civil or common law.⁴³

Invocation of the terms “common law” and “civil law” need not, in all instances, signify conflicting principles of law. Citations to Blackstone appeared in forty-one civil cases. In sixteen decisions, references to the *Commentaries* were chosen by the court solely to illustrate that the common law rule was identical to the civilian rule. A few of the cases are interesting, not only for the legal issues presented in them, but for the individuals who were involved in the litigation.

One of the parties to the earliest reported civil case was Edward Livingston, an American lawyer who moved from New York city to Louisiana in 1804. He had served as United States Attorney, and as mayor of New York before relocating to the Pelican State. As he began a new legal career in Louisiana, he became an instant convert to the merits of the territory’s civil law system. Livingston was also a party to some of the more important civil litigation of the day, particularly one case which involved the question of whether the bature, which formed along the shores of Mississippi River, were subject to public or private ownership. He was appointed by

the legislature in 1822, along with Louis Moreau Lislet and Pierre Derbigny, to draft a the revision of the code of 1808. Their revised code was adopted in 1825. After his appointment to revise the code, Livingston served Louisiana as a Congressman and a United States Senator, and he was appointed by President Andrew Jackson in 1831 to be his Secretary of State.

In 1812, Livingston sued Cornell, a former client, to recover a legal fee. The case involved the basic issue of whether an attorney could bring an action against his client to collect his fee. Cornell initially hired Livingston to file suit on his behalf to recover a debt of \$ 15,000.00. Livingston's efforts proved unsuccessful in the territorial courts, and he offered to apply for a review of the case by the United States Supreme Court. For representing Cornell before that court, Livingston requested a fee of ten percent of any money recovered in the appeal. Some factual dispute existed as to whether Cornell actually agreed to have Livingston handle the appeal, nevertheless the attorney successfully pursued an appeal before the Supreme Court. Cornell refused to pay Livingston a fee, and he filed suit to recover it.

Livingston was awarded his fee by the trial court, but that decision was overturned by the territorial Superior Court on a question of law. The court cited Roman and French law, as well as the *Commentaries*, for the principle which views a fee, paid to an attorney for handling a legal matter, as an honorarium or gratuity, and therefore, an attorney does not have the right to sue his client to recover it.⁴⁴

It should not be surprising, considering his litigious propensity, to discover Livingston was a party in the next case highlighting identical legal principles, which existed in the two legal systems, but in this second case, he appeared as the defendant. Livingston had taken physical possession of a strip of batture which fronted the Mississippi River. The rear boundary line of that strip of land abutted a tract of land belonging to Morgan. He had acquired his property, in

1816 from Pierre Bailly, who had purchased it from J. B. Poeyfarré in October, 1789. Poeyfarré had acquired the land in February, 1789 from Bertrand Gravier by a deed which transferred all land contained within a certain measured parameter, and which fronted the Mississippi River. At the time of the purchases by Poeyfarré, and Bailly, the batture, now claimed by Livingston, had not formed. Livingston argued that Morgan was prohibited from claiming any land beyond those physical boundaries which existed at the time he acquired the property. The Supreme Court refused to accept his argument and recognized Morgan, as owner of the batture land. In support of its opinion, the court referred to the laws of Rome, France, Spain, Italy, and England, (citing Blackstone), for the principle, derived from natural law, that any increase to riverfront property resulting from deposits made, or because of a change in the course of a river or stream, belongs to the owner of the land fronting the body of water.⁴⁵

One attorney found aid from both systems of law, after becoming a defendant in a libel action. During the trial of an unrelated case, Alfred Hennen accused William Stackpole, who was appearing as an adverse witness in the litigation, of having come to court for the purpose of committing perjury. The remark was made in response to a query by the judge to Hennen, questioning the manner in which he was cross examining Stackpole. Stackpole later sued Hennen for the comment he made to the judge. A jury found that Hennen's statement was false, and made with the intention of injuring Stackpole, and awarded the latter \$ 500.00 dollars. On appeal, the Supreme Court initially observed, that unlike appellate courts in common law jurisdictions, which only had power to rule on errors of law, it was authorized, under Louisiana's constitution, to review errors of both law and fact. The court found that errors of both law and fact had been committed, and ruled in favor of Hennen, overturning the jury's verdict.

In rendering its decision, the court relied on legal principles contained in the laws

of both France and England. The judges ascertained that an attorney could not be held responsible for anything spoken by him, which was pertinent to the client's case, if the client instructed him to do so. A provision from *Las Siete Partidas*, a leading thirteenth century repository of Spanish law, together with a precept taken from Roman law, supplied the court with a further related principal, which provides; when an attorney makes a statement in the presence of a client, who remains silent, the statement is presumed to be with the approval of the client. In Hennen's case, the dutiful client had said nothing after his attorney's comment.⁴⁶

Another noteworthy case, in the identical law category, illustrates how both systems of law maintained their hold on ancient rules, while ignoring the economic reality caused by the labor forces gradual shift from an agricultural to an industrial society. Modern jurisprudence recognizes the future economic worth of a laborer to his family, but under the ancient systems, a value could not be placed on the life of a "free man," therefore, neither his widow, nor children had a right to sue one who negligently caused his death.

In the case of *Hubgh v. New Orleans & Carrollton Railroad Co.*, Elizabeth Hubgh was widowed after her husband Philip was killed by an explosion of a locomotive boiler at work. She sued the New Orleans and Carrollton Railroad Co., her husband's employer, for allowing him to work on a locomotive, known to be dangerous. A jury awarded Mrs. Hubgh \$ 5,000.00 for the wrongful death of her husband, but that verdict was overturned by the Supreme Court.

On appeal, Mrs. Hubgh contended, that Article 2294, of the Civil Code of 1825, which provided that, " every act whatever of man, that causes damage to another, obliges him, by whose fault it happened, to repair it," gave her a right to recover damages for her husband's death. The court noted that the identical language in Article 2294 was contained in the 1808 Digest, as well as in Article 1382 of the Code Napoleon. Mrs. Hubgh attorney cited an 1813

decision from France's highest court, the Court of Cassation, which allowed a widow damages for the negligent death of her husband. The Louisiana court did not accept the French court's conclusion as persuasive authority. Our justices acknowledged that, from time to time, they had consulted decisions of the Court of Cassation for assistance in interpreting articles of Louisiana's code, but did so only when the French articles and ours were drawn from the same system of laws. The court noted however, that the article in the Digest which formed the basis for Civil Code Article 2294, was based on Spanish law, while the corresponding article in the French code was based on Germanic law. After an extensive search of the ancient laws of Rome and Spain the court was unable to discover any rule which would allow a relative to recover for the wrongful death of a "free" man. The court also researched the common law of England, as well as the laws of the other states in the Union, and could find no principle that would allow an action by a wife to recover damages for her husband's wrongful death.⁴⁷

Next to the criminal law, knowledge of common law proved most useful to lawyers in cases which required, for their resolution, the application of the common law of another state. Those types of actions are known as "conflict of law cases." The term "conflict" refers to a situation where the law, on a particular issue, differs between two states, and special rules require a judge to select the law of one of those states in deciding the case.⁴⁸ An example of a set of facts giving rise to the doctrine would be where two individuals enter a written agreement which purports to transfer ownership of a tract of land. Part of the tract is located in one state, the other part in an adjoining state. One state where part of the property is located, would consider the terms of the agreement, under its law, as creating a mortgage, and the state where the other part of the property is located would treat the instrument as a sale. When the tract of land is resold to a third person, the new owner attempts to obtain possession of the property in the courts of the

state which considers the original transaction a sale. The original owner claims the initial transaction was only a mortgage. Should the judge hearing the case, apply the law of his state, where part of the property is located, and rule that the original transaction was a sale, or should he apply the law of the adjoining state and rule that it was a mortgage? One of the cases analyzed, as will appear, grapples with that very question.

An additional question, perhaps more germane, is how did the *Commentaries* fit into the equation of settling conflict of law issues, since it only reflected the common law as it existed in England, which may have been changed, or modified to meet local conditions, or the special needs of one, or more of the American states. Louisiana judges and attorneys did not have ready access to all statutes or case law of other states, although some private law libraries contained partial sets of reported cases of another state. It can be assumed that American attorneys brought those sets with them when they moved their practices to Louisiana.⁴⁹

In order to solve the problem of limited access to the laws of the other states, Louisiana judges relied on a presumption that the law of other states was identical to the common law principles contained in the *Commentaries*. That practice was confirmed by Justice Thomas Slidell, when he announced, in *Copley v. Sanford* that the court will take notice of the constituent elements, forming the common law of other states, from common law commentators, such as Blackstone and Kent.⁵⁰

The case of *Bernard v. Scott*, is a good illustration of the necessity for a court to sift through a complex set of facts in order to resolve conflict of law cases. *Bernard* deals with the law of a neighboring state, Mississippi, and is one of eleven conflict of law cases citing the *Commentaries*. Thomas Scott was owner of an interest in a tract of land, part of which was located in the State of Mississippi, and the remainder in the State of Louisiana. Three brothers

shared an interest in the property with him. Thomas, a resident of Vicksburg, Mississippi, entered into a written agreement with John Rubenstein, who resided in Cincinnati, Ohio, which purported to transfer his interest in the tract of land for the sum of \$ 6,000.00. The agreement contained a stipulation that declared the sale of Thomas' property interest would be null and void if he paid Rubenstein the sum of \$6,162.79. The parties had the agreement acknowledged before a justice of the peace in Warren County, Mississippi, and recorded it in the Parish of East Baton Rouge. Rubenstein sold his interest to a third party, who in turn, sold it to Joseph Bernard. Bernard instituted suit in East Baton Rouge Parish, against one of Thomas' brothers, to force a public sale of the parcel located in Louisiana, in order to recover the value of the one-fourth interest he had purchased. Thomas intervened in the suit and alleged that the transaction with Rubenstein was for the purpose of creating a mortgage, and not a sale. The trial judge found the original agreement was a sale and the Scott brothers appealed his decision.

On appeal, Bernard argued that, under Louisiana law, the language contained in the original transaction between Thomas and Rubenstein should be construed a sale of the property. He acknowledged that the document contained a condition which would have allowed Thomas to nullify the sale, but that condition had not been satisfied.. The Supreme Court however, refused to limit its consideration of the issues solely on the language of the agreement, and considered a number of factors in order to determine the original intent of Thomas and Rubenstein in executing the agreement. To reach its conclusion, the court weighed the following facts: both Scott and Rubenstein were domiciled in common law states, part of the property transferred was located in a common law state, Mississippi, where the agreement was executed. Lastly, the terms of the document, besides inferring a sale under Louisiana law, resembled, according to

Blackstone, terms of a common law mortgage. Those facts convinced the court that Scott and Rubenstein intended to confect a mortgage and not a sale of the property.⁵¹

In the other ten conflict of law cases, the court referred to the *Commentaries* to discern the common law of following jurisdictions: Scotland, Pennsylvania, South Carolina, Mississippi, Alabama, District of Columbia, Arkansas, and Tennessee.⁵²

There were fourteen civil cases where Blackstone supplied the legal principle, upon which the Supreme Court's rested its decision. In those decisions however, the court's adoption of common law did not change, or modify Louisiana's constituted civil law, nor did the court attempt to supplant civilian precepts in favor of alleged, wiser common law solutions. The court discovered that the *Commentaries* was an apt reservoir of legal principles that could be applied to fill gaps in the law cause by inefficient legislation, or which existed in civil common law. The adoption of common law principles proved significant in a few cases, in others, less so. A brief analysis of some of the cases in which the *Commentaries* left an impact will serve as an illustration of the simple melding of common and civil law.

Henderson v. Lynd, decided in 1811, was the first occasion where the Superior Court for the Territory of Orleans relied on Blackstone in a civil case. Brown, a debtor of Henderson, was arrested by the sheriff, at Henderson's request, when suit was filed against him for failing to pay a debt. Brown was released from jail, pending litigation against him, after Lynd agreed to be his surety or bail. As a condition of the bail, Lynn obligated himself to produce the person of Brown to Henderson when judgment was obtained against him. If Lynd did not fulfill his obligation, he would be responsible for the amount of the judgment against Brown.

At some stage in the litigation the trial judge granted a request by Brown to stay further proceedings. The case was later allowed to proceed, and Henderson obtained a monetary

judgment against Brown. Lynd was unable to produce Brown after judgment, and Henderson sued him for the amount Brown owed him. Lynd claimed that Brown, by causing his case to be continued, legally discharged him from his obligation to Henderson. The Superior Court did not accept that argument, and noted, referring to Blackstone, that the nature of bail in civil cases is the same as that in criminal cases. The person imprisoned is allowed his freedom but remains, in a fictional sense, in the custody of the sheriff, or in civil matters, his bail. A stay of legal proceedings by a defendant would not operate as a discharge of the obligations of his bail.⁵³

Another bail related issue arose in the court ten years after *Henderson*, but in a much different factual context. James Armitage had obtained a monetary judgment in the Orleans Parish District Court against Louis Sere. After judgment issued he filed an application with Samuel Brownjohn, Justice of the Peace, for the arrest and commitment of Sere, pending payment of the judgment. The justice issued an arrest warrant for Sere, however, several weeks earlier, Sere had obtained an order, from the district judge in his case, prohibiting Brownjohn, or any of his constables, from taking any legal action in connection with the case. Sere filed suit against Armitage, and the arresting constable, George H. Henry, for false arrest and imprisonment, and a jury awarded him \$ 500.00. Armitage appealed, claiming that the order issued by the district court was only directed to the justice of the peace and his constable, and not to him. That jury verdict was upheld by the Supreme Court on appeal. In affirming the judgment, it relied on the principle contained in the *Commentaries*, which states, that both the judge of an inferior court, as well as a party to the action, should be liable for damages which result from a violation, by them, of a higher court's writ of prohibition.⁵⁴

The decision in next case, *Henry v. Cuvillier*, is an illustration of the venerated position that jurors' qualifications were held, under common law. In January 1824, a jury had awarded a verdict in favor of Rose Henry in an action against P. A. Cuvillier. After verdict, the trial judge granted Cuvillier a new trial, which was rescheduled a year later. A juror, who served on the jury during the first trial, was selected as a juror for the retrial. Neither Cuvillier, nor his attorney, remembered the juror as having served on the first panel. After trial began, Cuvillier realized that the juror had served on his previous case, and requested the judge to discharge the jury and empanel another. The judge refused, and judgment was subsequently entered a second time against Cuvillier. On appeal, Cuvillier requested the Supreme Court to order a new trial. The court granted his request for a new trial, and in doing so, noted, referring to Blackstone, the highest regard that the common law placed on the qualifications and integrity of jurors.⁵⁵

In *LeBreton v. Morgan*, the court relied on Blackstone, together with two decisions rendered by the United States Supreme Court, to explain, that the constitutional prohibition against the passage of ex post facto laws, which was contained in both the national and Louisiana constitutions, applied only to penal and criminal laws, and not civil laws.⁵⁶

The Supreme Court, in *Tourne, et al., v. Lee, et al.*, relied on the *Commentaries* in its decision to approve the action, by a city official, in abating a public nuisance. Jacques Tourne and Rene Caillou had moored a raft, laden with 300 cords of wood, at a port, opposite faubourg St. Mary, in the city of New Orleans. A city ordinance prohibited mooring at that location for a period in excess of forty-eight hours. The raft remained moored for a longer period of time, which prompted Mayor Denis Prieur to order, James A. Lee and John Taylor, both city employees, to release the raft from its mooring. The employees followed the mayor's order, with the predictable result, that the raft drifted down the river and was lost. Tourne and Caillou filed

suit, against the two city employees, to recover damages for the loss of their property. The trial court ruled in favor of the two city employees, and Tourne appealed. He complained that the city denied him due process, by not first instituting legal proceedings to remedy the nuisance. The Supreme Court held that that the mayor was authorized to summarily terminate the nuisance, and quoted the following passage from Blackstone in support of its conclusion.

Injuries of this kind, which obstruct or annoy such things as are of daily convenience and use, require an immediate remedy; and cannot wait for the slow progress of the ordinary forms of justice.⁵⁷

The next significant civil case invoking Blackstone was decided in 1840. Henry Ware, a free man of color, was paddling his skiff, loaded with oysters, on the Barataria waterway. As his skiff approached a canal lock, which enters into the Mississippi River, the lock operator, Joseph Meyer, seized him without cause, and proceeded to beat him, had him placed in a wooden stock, and confiscated his oysters. Meyer was employed by the Barataria and Lafourche Canal Company, owner of the lock. Ware sued the Canal company for damages suffered at the hands of its employee, and won a judgment in the amount of \$ 150.00. On appeal, the Supreme Court held that the Canal Company was not liable for the actions of Meyer, and reversed the lower court decision. It acknowledged, in its opinion, that ordinarily an employer is liable for the wrongful acts committed by an employee in the performance of his duties, and Article 2299 of the Civil Code of 1825 provided such a remedy, however the court relied on language in the *Commentaries*, which inferred, that Meyer's actions could not be considered as falling within his assigned duties.⁵⁸

In the last significant example, the court based its decision on an English principle in equity.⁵⁹ John Smith, a New Orleans broker, was in the business of purchasing commercial paper at a discount. In November 1850, a person unknown to Smith, came to his Canal Street office with an offer to sell him a bill of exchange. The bill of exchange reflected that it had been

issued by W. C. Ventriss of Donaldsonville, and made payable to Payne and Harrison, a prominent mercantile partnership located approximately three blocks from Smith's office. The bill also bore an endorsed acceptance by Payne and Harrison, which allowed any owner of the instrument to collect its face value from Ventriss. Smith issued his check, drawn on his account at the Mechanics' and Traders Bank, in payment for the bill of exchange. He made the check payable to the firm of Payne and Harrison, and gave it to the unknown individual. After receiving the check, the unknown seller forged the endorsement of Payne and Harrison, and immediately cashed it at Smith's bank, which was located across the street from his office. A short time afterwards, Smith attempted to cash the bill of exchange and discovered that the document was a counterfeit. As it developed, Ventriss was a fictitious person, and the signature of Payne and Harrison on the instrument had been forged.

Smith sued his bank to recover the funds paid on his check to the stranger. He claimed that its teller was grossly negligent in making payment on a check with an endorsement which was obviously forged. The check was endorsed "Payne and Horrins," instead of "Payne and Harrison." The trial judge ruled that Smith was entitled to be reimbursed, and the bank appealed the decision. The Supreme Court overturned the judgment in favor of Smith and held, that despite the negligence of the bank clerk in cashing a check which bore an obvious, irregular endorsement, Smith was equally negligent in setting in motion, events that made it possible for a stranger to obtain his funds.

The court noted that the partnership of Payne and Harrison did not do business with Smith's bank, therefore there was no reason to assume that employees of the bank were familiar with that firm's signature. Smith was unaware of the identity of the person who sold him the bill of exchange and should have exercised caution when dealing with him. Besides he could have

easily checked the validity of Payne and Harrison's acceptance of the bill since its business was only located a few blocks from his. The check which Smith wrote was a legitimate order to his bank to pay an amount from his account. Based on those set of facts, the court was able to rely on an equitable principle, drawn from the *Commentaries*, which states that, "where two parties are equally guilty of negligence, he who suffers loss, must bear it, and neither can recover from the other," in denying Smith recovery.⁶⁰

The Justices of the Louisiana Court surely had a purpose in mind when they instituted a *Course of Study* that included familiarity with Blackstone's *Commentaries*, and other common law treatises. One can glean their intent from some of the titles of those specialized works. Louisiana's criminal law and evidence, were by statute, based on English common law. The negotiation of bills of exchange and promissory notes were objects of almost daily interstate trade, which dictated a need for uniform rules governing their transfer. By the time the Supreme Court issued its *Course of Study*, Louisiana courts had, for decades, recognized this need for uniformity in that field of law, and had applied common law rules to interpret the legal effects of negotiable paper. The court's application of the common law would explain the inclusion, in the rule, of works by Chitty and Bayley.

Blackstone's *Commentaries*, on the other hand, was encyclopedic in design, covering all aspects of English civil and criminal law. His treatise was most useful in those areas of law where Louisiana adopted common law, but the *Commentaries* also included principles irreconcilable with Louisiana law. The value for a Louisiana attorney being acquainted with Blackstone, cannot be disputed in the areas of criminal law, evidence, and commercial law, but what worth was he to the average attorney in his daily, nineteenth century civil practice? Based on the research, it is hard to conclude that the value was other than minimal. That is not to say

that a study of Blackstone was valueless, but its role in resolving civil disputes in the state was limited.

The *Commentaries* was cited, one or more times, in eighty-five opinions. In fifteen of those opinions, citations constituted either dicta, or had no relevance to the court's decision. Sixteen opinions, referenced Blackstone, solely to illustrate, that the cited common law principle was either similar, or identical to the civil law doctrine followed by the court. Eleven, involved conflict of law issues, for which the court was called upon to rely on the *Commentaries* to ascertain the common law rule of a sister state. It was in this latter category of civil matters, that knowledge of Blackstone proved indispensable. The court relied on the *Commentaries*, in the remaining forty opinions, to furnish the legal principle which formed the basis for its decisions. Twenty-six of them, or about two-thirds, involved criminal proceedings, and the remaining fourteen, various areas of civil law.

One would suspect, that there would have been a significant increase in the number of cases in which the court relied on the *Commentaries*, if it had appellate criminal jurisdiction from its inception. Nevertheless, there is little doubt that the *Commentaries* played an important role in the development of the state's criminal law in Louisiana's trial courts. Regrettably, the same cannot be said of Blackstone regarding civil matters. Considering the thousands of cases which the court decided within the sixty-six year period, the *Commentaries* had an impact in only twenty-five civil cases, and eleven of those were concerned with conflict of law issues.

Is it time then to abandon Blackstone to the antiquity of Louisiana's legal lore? Referring again to the comments of the judge in *Hightower v. Dr. Pepper Bottling Co of Shreveport, et al.*, mentioned on page four, one would answer that question in the affirmative. It should be obvious, that his gratuitous comments about Blackstone, was

unnecessary for a resolution of that case, and would rate the highest legal appellation for irrelevancy, obiter dicta. Besides, the evidence shown during Louisiana's antebellum period, and afterwards does not bear out the appellate judge's sentiment. Since 1875, Blackstone has been cited one hundred, twenty-five times in Louisiana Supreme Court cases and in thirty appellate cases. Ninety-eight of those cases involved criminal law, thirteen of which were decided since 1992. The other thirty-six cases, which dealt with civil matters, reflected little, or no impact on Louisiana's civil law system. Blackstone, apparently still has a small role to play in Louisiana jurisprudence, at least in the field of criminal law.

NOTES

¹ Warren Billings, ed., *The Historic Rules of the Supreme Court of Louisiana* (Lafayette, University of Southwestern 1985), 2-3, and 9-11.

² Mark F. Fernandez, *From Chaos to Continuity* (Baton Rouge, Louisiana State University 2001), 53.

³ The Civil law system is based on Roman law, as developed through the centuries in continental Europe, especially in the countries of France, Spain and Italy. The common law of England developed from customs, and the decisions of judges, as distinguished from acts by a legislature. The different rootage from which the two systems evolved is not the only thing that distinguishes them. Significant variation exists in such basic principles of law as the definition and division of property, elements of ownership, effects of mortgages, the development of *delicts* (torts), and the manner of proceeding in civil and criminal trials.

⁴ H.C.G. Mathew, Brian Harrison, editors, *Oxford Dictionary of National Biography*, (Oxford, Oxford University Press 2004) vol. 6, 12 (quoting William Blackstone, *Proposals for a Course of Lectures*, 1754: Bodl. Oxford, G.A. Oxon. b. 111 (50).

⁵ Sources on the life of Sir William Blackstone: Mathew and Harrison, *Oxford Dictionary of National Biography*; Gareth Jones, editor, *Sovereignty of the Law*. Toronto, (Canada: University of Toronto Press 1973) ix-iv; David A. Lockmiller, *Sir William Blackstone* (Gloucester, Mass. Peter Smith, 1970), John V. Orth, "Sir William Blackstone: Hero of the Common law" *American Bar Association Journal* 66 (1980) 155.

⁶ The King's Bench was England's highest law court. Its jurisdiction embraced, among other matters, criminal issues, and civil actions for personal damages which contained elements of criminal activity, i.e. assault, battery, theft and fraud. The Court of Common Pleas had jurisdiction over all other civil actions between citizens. See, William Carey Jones, ed., *Commentaries on the Laws of England by Sir William Blackstone* (San Francisco, Bancroft-Whitney 1916) Reprint, (Baton Rouge, Claitor's Publishing 1976), Book III 37-43. Justice Yates, who was ill at the time, asked Blackstone, as a personal favor to allow him to take a seat on the Court of Common Pleas, a court having a less burdensome docket.

⁷ Lockmiller, 170. The *Commentaries* were first printed in the American Colonies in 1771 by Robert Bell of Philadelphia.

⁸ 117 So. 2d 642 (1960).

⁹ *Huberwald v. Orleans Railroad Company*, 50 La. Ann. 477 (1898).

¹⁰ Warren M. Billings, and Mark F. Fernandez, Eds., *A Law Unto Itself?* (Baton Rouge, Louisiana State University Press 2001), 1.

¹¹ Billings, and Fernandez, *A Law Unto Itself?* Billings, and Edward F. Haas, Eds., *In Search of Fundamental Law*, (Lafayette, University of Southwestern Louisiana 1993), Billings, *Historic Rules of the Supreme Court of Louisiana*, Fernandez, *From Chaos to Continuity*, Billings and Fernandez, *A Law Unto Itself?* Sheridan E. Young, "Louisiana's Court of Errors and Appeals, 1843-1846," Fernandez, "From Chaos to Continuity" (master's thesis, University of New Orleans 1985), Rosemarie Davis Plasse, "Tools of the Profession: New Orleans Attorneys and their Libraries from Statehood to Secession (1813-1861)" (master's thesis, University of New Orleans 2000), and Robert Feikema Karachuk, "A Workman's Tools: The Law Library of Henry Adams Bullard" (master's thesis, University of New Orleans 1989).

¹² See: Rodolfo Batiza, "The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance." *Tulane Law Review*, 46 (1971) and Robert A Pascal, "Sources of the Digest of 1808: A Reply to Professor Batiza." *Tulane Law Review* 46 (1972).

¹³ An Act erecting Louisiana into two territories, and providing for the temporary government thereof, Act of Congress March 26, 1804, c. 38, 2 U.S. Stat. 283, Secs. 5 and 11, (popularly known as the Breckinridge Act); However, when Congress passed an enabling Act in 1811 to allow the citizens of the Territory of Orleans to form a constitution and state government, it only mandated that the proposed Louisiana constitution provide jury trials only in criminal cases. Act of Congress February 220, 1811 c. 21, 2 U.S. Stat. 641, Sec. 3. None of the three antebellum Louisiana Constitutions, the Constitutions of 1812, 1845 and 1852 preserves the right to a jury trial in civil cases, however, the right to a civil jury trial has always been preserved by legislation.

¹⁴ Act for the Punishment of Crimes and Misdemeanors, First Session of the Legislative Council of the Territory of Orleans 1805. Se. 33, p.440.

¹⁵ An Act for dividing the Territory of Orleans into counties and establishing courts of Inferior jurisdiction therein. Acts of the First Session of the Legislative Council, Chapter XXVI, Sec. 22. April 10, 1805.

¹⁶ Fernandez, *From Chaos to Continuity* 35.

¹⁷ *Agnes v. Judice*, 3 Mart. (o.s.) 182 (1813)

¹⁸ Fernandez, *From Chaos to Continuity* 17.

¹⁹ Judith Kelleher Schafer, Warren M. Billings, Eds.. *The Louisiana Purchase Bicentennial Series in Louisiana History*, Vol. XIII, AAn Uncommon Experience, Law and Judicial Institutions in Louisiana 1803-2003. (Lafayette, Center for Louisiana Studies University of Southwestern Louisiana 1997), Elizabeth Gaspard, "The Rise of the Louisiana Bar: The Early Years," 633.

²⁰ Schafer and Billings, *The Louisiana Purchase Series*, A. N. Yiannopoulos, "Early Sources of Louisiana Law," 95; (citing both, George Drago, *Jefferson's Louisiana: Politics and the Clash of Legal Traditions*, (Mass., Harvard University Press 1975) 132, n.16, and, William B. Hatcher, *Edward Livingston: Jeffersonian Republican and Jacksonian Democrat*, Reprint. (Gloucester, P. Smith 1970) 118-19. Schafer and Billings, *The Louisiana Purchase Series*, Samuel B. Groner, "Louisiana Law: Its Development," 148; (citing the following article by Dart). Id. Henry P. Dart, "History of the Supreme Court of Louisiana," 570

²¹ Groner, 148, citing *Cottin v. Cottin* 5 Mart. (o.s.) 93 (1817).

²² *Folk v. Solis*, 1 Mart. (o.s.) 64 (1809), *Norris v. Mumford*, 4 Mart. (o.s.) 1815, *Renthorp v. Bourg*, 4 Mart. (o.s.) 97 (1816), *Prevot v. Hennen*, 5 Mart. (o.s.) 221 (1816), *Lynch v. Postlethwaite*, 7 Mart. (o.s.) 69 (1819), *Dunn v. Vail*, 7 Mart. (o.s.) 416 (1820). *Breedlove v. Fletcher*, 7 Mart. (o.s.) 524 (1820), *Chedoteau's Heirs v. Dominguez*, 7 Mart. 490 (1820), and *MccNeil, et al. v. Coleman*, 8 Mart. (o.s.) 373 (1820).

²³ Russell on Crimes was published in 1819 but since the Supreme Court did not have appellate criminal jurisdiction at the time, no citations to his work would likewise be expected.

²⁴ The *lex mercatoria* developed in Europe in the Middle Ages from the usages and customs of merchants. *Blacks Law Dictionary*, 893, *verbo* law merchant.

²⁵ Batiza suggests that language from Blackstone is almost verbatim or substantially influenced the wording of a number of articles in the Digest. The following is a list, according to Batiza, of the number of articles and their location in the Digest: "Preliminary Title" 4, "Master and Servant" 7, "Father and Child" 3, and "Communities or Corporations" 7. See also, Thomas W. Tucker, Sources of Louisiana's Law of Persons: Blackstone, Domat, and the French Codes," *Tulane Law Review* 4 (1970) 264-95, and Fernandez, *From Chaos to Continuity* 33.

²⁶ Lewis Kerr, *An Exposition of the Criminal Laws of the Territory of Orleans*, (New Orleans, Bradford and Anderson, Printers 1806), reprint (Holmes Beach, Florida, Wm. W. Gaunt & Sons, Inc. 1986).

²⁷ A citation to a reported decision, after the name of the case is given, begins with the volume number, then the abbreviation of the name of its reporter, followed by a page number, then the year of decision. By example; *Henry v. Cuviller*, 3 Mart. (n.s.) 524 (1825), which when translated would read, “Henry verses Cuviller, appearing in volume 3 of Martin Reports, new series, page 524, which was decided in 1825.” The full names of the reporters involved in the research, and their abbreviations are as follows; Martin old series- “Mart. (o.s.)”; Martin new series- “Mart. (n.s.)”; Robertson- “Rob.”; Louisiana Reports-“La.”; and Louisiana Annual Reports-“La. Ann.”

²⁸ *New Orleans v. Heirs of Guillotte*, 12 La. Ann. 818 (1857), *Bernard v. Vignaud*, 10 Mart. (o.s.) 482 (1822), and *Succession of Morales*, 16 La. Ann. 267 (1861).

²⁹ *Laverty v. Duplessis*, 3 Mart. (o.s.) 42 (1813), *Barry v. Louisiana Insurance Co.*, 12 Mart. (o.s.) 493 (1822), *White, et al. v. Brown, et al.*, 3 Mart. (n.s.) 17 (1824), *DeArmas v. Mayor of New Orleans*, 5 La. 132 (1833), *Conrad v. Prieur*, 5 Rob. 49 (1843), *Succession of Whipple*, 2 La. Ann. 236 (1847), *Borgstede v. Clark*, 5 La. Ann. 733 (1850), *Citizens Bank of Louisiana v. Levee Steam Cotton Press Co.*, 7 La. Ann. 286 (1852), *Succession of Franklin*, 7 La. Ann. 395 (1852), *State v. Executors of McDonogh, et al.*, 8 La. Ann. 171 (1853), *Tresca v. Maddox*, 11 La. Ann. 206 (1856), *State v. Costello*, 11 La. An. 283 (1856) *Cockburn v. Union Bank of Louisiana*, 13 La. Ann. 289 (1858), *New Orleans v. Costello*, 14 La. Ann. 37 (1859), and *Abston, et al v. Abston, et al.*, 15 La. Ann. 137 (1860). Bryan A. Garner, ed., *Blacks Law Dictionary*, 7th Ed., (St. Paul, West Group 1999), *verbo*, obiter dicta, 1100.

³⁰ *Laverty v. Duplessis*, 3 Mart. (o. s.) 42 (1813).

³¹ *Territory v. Nugent*, 1 Mart. (o.s.) 108 (1810).

³² *Territory v. Nugent*, 1 Mart. (o.s.) 169, (1810); 1 *Commentaries* 71; 1 Mart. (o.s.) 172.

³³ *Territory v. McFarland*, 1 Mart. (o.s.) 221 (1811); Sir Matthew Hale was a Justice of the Court of Common Pleas from 1654 to 1648, later becoming Lord Chief Justice of England in 1671.

³⁴ 7 Rob. 252 (1844); *Williams*, on rehearing, 7 Rob. 279.

³⁵ *State v. Soulé*, 8 Rob. 500 (1844), Article 132, Code of Practice in Civil Cases for the State of Louisiana, Wheelock S. Upton, Annotator (New Orleans, E. Johns and Co. 1839) 23.

³⁶ Sheridan E. Young, “Louisiana’s Court of Errors and Appeals, 1843-1846, 100, n.3.

³⁷ 8 Rob. 573 (1845).

³⁸ 8 Rob. 566 (1844).

³⁹ 8 Rob. 583 (1845).

⁴⁰ 3 La. Ann. 50 (1848).

⁴¹ *State, ex rel. Van Orden v. Sauvinet*, 24 La. Ann. 119 (1872), *State v. Parker*, 7 La. Ann. 83 (1852), *State v. D’Angelo*, 9 La. Ann. 46 (1854), *State v. Benoit*, 16 la. Ann. 273 (1861), *State v. Levy et al.*, 5 La. Ann. 64 (1850), *State v. Upton*, 5 La. Ann. 438 (1850), *State v. Fuentes*, 5 La. Ann. 427 (1850), *State v. Leonard*, 6 La. Ann. 420 (1851), *State v. Wilson*, 14 la. Ann. 446 (1859), *State v. Read*, 6 La. Ann. 27 (1851), *State v. Cook*, 20 La. Ann. 145 (1868), *In re Longworth*, 7 La. Ann. 247 (1852), and *State v. Gutierrez*, 15 La. Ann. 190 (1860). In the last case the court noted that the English Parliament modified the right to jury for minor offenses.

⁴² 9 La. Ann. 94 (1854), Jones ed., Appendix, 4 *Commentaires* 2696

⁴³ The court cited both Blackstone and Jean Domat's *Le Droit Public* published in Paris in 1701. Domat was a French jurist during the reign of Louis XIV and one of the civil law commentators listed in the Supreme Court's 1840 order.

⁴⁴ *Livingston v. Cornell*, 2 Mart. (o.s.) 281 (1812).

⁴⁵ *Morgan v. Livingston, et al.* 6 Mart. (o.s.) 19 (1819).

⁴⁶ *Stackpole v. Hennen*, 6 Mart. (n.s.) 481 (1828).

⁴⁷ 6 La. Ann. 495 (1851).

⁴⁸ See *Blacks Law Dictionary*, 295, *verbo*, Conflict of laws.

⁴⁹ See, Rosemarie Davis Plasse, *Tools of the Profession*, which contains the names of the various sets of common law reports found in the succession inventories of attorneys who died in the antebellum period.

⁵⁰ 2 La. Ann. 335 (1847).

⁵¹ 12 La. Ann. 489 (1857).

⁵² *Morgan, et al. v. Their Creditors*, 6 Mart. (n.s.) 409 (1828), *Duke of Richmond, et al. v. Milne's Executors, et al.*, 17 La. 312 (1841), *Penny, et al. v. Christmas, et al.*, 7 Rob. 481 (1844), *Copley v. Sanford*, 2 La. Ann. 335 (1847), and *Quigly v. Muse*, 15 La. Ann. 197 (1860), *Duke v. Routh, et al.*, 2 La. Ann. 385 (1847), and *Murphy v. Executor of Cook*, 10 La. Ann. 572 (1855), *United States v. Smith, et al.*, 7 La. Ann. 185 (1852), *Morrill v. Carr*, 2 La. Ann. 807 (1847), and *Johnson v. Weld*, 8 La. Ann. 126 (1853).

⁵³ 2 Mart (o.s.) 57 (1811).

⁵⁴ *Sere v Armitage, et a.*, 9 Mart. (o.s.) 394 (1821).

⁵⁵ 3 Mart. (n.s.) 524 (1825).

⁵⁶ 4 Mart. (o.s.) 138 (1826).

⁵⁷ 8 Mart. (n.s.) 548 (1830), quoting 3 Blackstone 5, 216, and volume 4, 67.

⁵⁸ *Ware v. Barataria & Lafourche Canal Co.*, 14 La. 169 (1840).

⁵⁹ Equity courts, which developed their own separate precepts, arose in England to remedy harsh and unjust results that arose in litigation, for which the law courts were unable to provide a remedy.

⁶⁰ *Smith v. Mechanics' and Traders Bank*, 6 La. Ann. 610 (1851).

Vita

Ronald A. Fonseca, was born in New Orleans and attended Jesuit High School and Loyola University where he earned graduate degrees in law and in business administration. After receiving his Juris Doctor degree in 1962, he served two years in the United States Army, attaining the rank of 1st Lieutenant. His career included the private practice of law, service for 10 years as a federal prosecutor, and appointment as a United States Magistrate Judge in New Orleans. He retired from the court after serving 15 years as a judge.

He has been married 49 years to the former Mary Lynne Block, author of *Weekend Getaways in Louisiana*, and *Louisiana Gardens*, and they have five children and twelve grandchildren.