Kentucky Law Journal

Volume 5 | Issue 2 Article 6

1916

Is Texas a Common Law State?

Basil Duke Sartin

*IS TEXAS A COMMON LAW STATE?

Is Texas a common law state? Should this question be propounded to the Bar of Texas, the answer would be almost unanimous in the negative, that Texas is a civil law state in every way, except as to the innovation of the trial by jury seems to be opinion of the Bar of this state. The explanation given is that Texas while under Spanish rule became so infused with the civil law that her judiciary and procedure are formulated thereon. This influence, it is declared, has been impossible for the state of Texas to overcome in the abandonment of the Spanish and Mexican control.

It will be the purpose of this article to show that the state of Texas is no longer a civil law state, but is in every particular a thorough common law state, subject only to the statutory changes of her legislative assemblies, and that idea prevalent among the lawyers and courts that Texas is a civil law state, is erroneous. In making this assertion, I mean not to deny that at one time the civil law had its effect and influence upon the law of this state, but that this influence has been thrown off by legislative enactments and Anglo-American dominion. In this short treatise it will only be possible to review briefly the history of Texas and to note the evolution from Spanish and Mexican control to Anglo-American domination, and likewise the consequent abandonment of the civil law for the common law which was introduced by the conquerors of the Spanish and Mexican governments. It is admitted that the struggle between the civil law and the common law was waged with more duration than the fight for political supremacy, but with no less certainty as to its ultimate triumph and victory

Texas Under Spanish Dominion.

Before one can understand the correct position of Texas relative to her substantive and remedial law, it will be necessary to know her history, and the consequent evolution brought about as a result of the change of government. Hence let us review briefly the history of

*The fact that many of the graduates of the Law Department have gone from Kentucky to Texas to practice, and that many who are in college now are considered going to the West to locate, Mr. Sartin was asked to write an article on procedure in Texas.—Editor.

Texas while under Spanish rule and domination, and note her status relative to law and government.

It will be remembered that while England was planting her colonies along the seaboard of the Atlantic, and forcing her traditions and customs upon the settlers of the New World, that Spain and France were settling and exploring the regions along the Gulf of Mexico, aroused by the stories of fabulous cities of gold which were told by the adventurers to the New World. As a result of the Spanish control of Texas and Mexico, the Roman civil law, which was the basic law of France and Spain, was riveted upon the settlers along the Gulf. It is needless to narrate how Great Britain gained control of the entire Atlantic coast and of Canada, and how that Spain continued to rule Mexico, which at that time included Texas and much of the western part of the United States. As the English colonies prospered, their advance in colonization was extended westward, which in due course of time came in contact with Spanish colonization in Texas and Mexico. The result of the contact of these two different institutions is told by Mr. Townes in his book on Texas Pleading, in the following words:

> "Texas furnished a meeting place and a battle ground for these two peoples and their institutions. The Spanish-American and the Spanish civil law were in possession of the territory. The invasion was by the Anglo-American and the common law. Between the people the struggle was sharp, short, and decisive. The Anglo-American was victorious. Between the systems of jurisprudence, the contest was protracted, and the result a compromise. The common law ultimately prevailed."

Texas Under the Republic of Mexico.

As has been stated, prior to the year of 1824, Mexico and Texas were under Spanish control, and that their system of jurisprudence, the civil law, was fighting against the innovation of the common law and was losing ground in about the same proportion as Spanish political supremacy was being overshadowed by the political supremacy of Great Britian. The oppression was galling to the people of Mexico, and especially to that part which was inhabited by English immi-

grants. Hence in the year of 1824, Mexico rebelled against Spain and succeeded in gaining her independence.

Here was the first material triumph of the common law and the first material departure from the civil law. The Republic of Mexico was desirous of forming a new form of government, modeled after that form of democracy then being used so successfully by the United States as a feasible and practical experiment. Immediately after the over throw of the usurper, Iturbide, the Mexican congress reassembled and adopted the "Constitutive Act of Federation" as a plan of government for the Mexican nation until a more stable form of rule could be devised. This corresponded very much to our Articles of Confederation and served somewhat of the same purpose for the Mexican Republic. These articles declared that the judicial power should be unchanged for the present, and should govern Mexico so far as not inconsistent with the form of government adopted. This provision as yet made the civil law, the law of Texas and Mexico at that time, as the judicial power was founded upon the civil law introduced by Spain. But the following extract from Townes' Texas Pleading will show that the judicial system of the Constitutive Act of Federation was only a temporary structure:

> "The 'Constitutive Federal Government' was superseded by the adoption of the Federal Constitution of the United Mexican States, sanctioned by the general Constitutive Congress, on the 4th of October, 1824. This constitution was intended to be permanent. It was modeled to a large extent, on the Constitution of the United States, and, although the influence of the Spanish and civil law ideas is manifest throughout the instrument, it recognized practically the same division of powers between the national and state governments that existed in the Constitution of the United States. The division of the powers of each of these governments into legislative, executive, and judicial departments was declared, though the lines of separation are not identical with those obtaining in common law countries, the most noticeable difference being in regard to the right of construing the Constitution and statutes."
>
> "The permanent Constitution of the State of Coahuila and Texas was not promulgated until March 11, 1827. This instrument clearly shows the influence of the various forces then striving for mastery. It is neither civil nor common law, but is manifestly a compromise between the spirit of conservatism, holding to the

traditions and institutions of the past, and the spirit of innovation, insisting upon the adoption of a form of government similar to that of the United States of the North."

The Republic of Texas.

Space in this short treatise will not permit a long narration of the estrangement that was brought about between the Mexican nation and Texas by reason of the different ideas regarding justice. It will suffice for the purpose of this article to say that as Texas was further north, it was in closer contact with English ideas of justice and government as exercised in the United States, and consequently was more ready to accede to the customs of the north than the southern part of Mexico. This difference as to right and wrong, and the proper administration of justice, widened the breach between Texas and the Republic of Mexico, and in 1836, Texas declared her independence from Mexico.

This was the opportunity for which Texas had been longing She had now an opportunity to frame a system of government more like that of the United States, which had been impossible under the civil law of Spain and Mexico. Her admiration is shown for the United States from the fact that the delegation that formed the constitution for the New Republic met at Washington, D. C., in order that a better opportunity might present itself for the study of the practical working of our national political machinery Likewise in following the example of the United States in her former struggle for independence, Texas issued a proclamation declaring her right to be a sovereign, free, and independent nation.

To show the sentiment of the people of Texas at that time and her leaning to the common law, the following extract from Townes' Texas Pleading, will give much insight

> "In the new nation the Anglo-American element was overwhelmingly predominant, and its traditions, sympathies, and prejudices were all in favor of the common law One of the grievances of the people against the Mexican nation as set forth in the Declaration of Independence, is in these words 'It has failed and refused to secure on a firm basis the right of trial by jury, that palladium of civil liberty, and that only safe guarantee for life, liberty, and property of the citizen.'"

The Constitutional Convention at Washington, D. C., after creating the office of President and a Congress for the new Republic with powers similar to those departments of the United States government, made a provision for the judiciary of Texas of this nature; there were to be a Supreme Court with appellate jurisdiction only, composed of a chief justice, and several district judges as associate justices; second, districts courts which were to have exclusive original jurisdiction, in all admiralty and maritime cases, and in all cases against ambassadors, public ministers, and consuls, etc.; third, county courts, one in each county; and fourth, justices' courts for the small political subdivisions.

It is unneccesary to call any special attention to the striking similarity of this system of courts to that of the state and Federal governments, for much of the expression is identical to the judiciary article of the National Constitution.

The Constitutional Convention, after having created its judiciary article for the new Republic, and prescribed the jurisdiction of the courts therein, declared in section 13 of said article, that system of laws that should be adopted in Texas. The words are as follows:

> "Congress shall, as early as possible, introduce by statute the common law of England, with such modifications, as our circumstances, in their judgment, may require, and in all criminal cases the common law shall be the rule of decision."

In obedience to this direction of the Constitution, the First Congres of Texas incorporated in the judiciary legislation of its first session, the following article:

"The common law of England as now practiced and understood, shall, in its application to juries and evidence, be followed and practiced by the courts of this Republic, so far as same may not be inconsistent with this act or any law passed by this Congress."

It will be noticed that the Congress of Texas only intended by the above act to adopt that part of the common law relative to juries and evidence, and that other methods of procedure were not adopted by this act. On December 20, 1836, Congress of Texas passed an act relative to district courts, and the only section referring to pleading is as follows:

"It shall be the duty of the plaintiff or his attorney in taking out a writ or process to file his petition, with a full and clear statement of the names of the parties, whether plaintiff or defendant, with the causes and the nature of the relief that he requests of the court."

The Supreme Court of the state interpreting this section, declared that the petition referred to above, included both the petition and answer, and in light of the constitutional provision, that the old laws should continue in force until changed by Congress, that the civil law was then in force in the Republic of Texas as Congress had not adopted any part of the common law except that part pertaining to juries and evidence. This decision was given in the case of Winifred vs. Yates, Dallam, 364, in the year 1840.

The Fourth Congress of the Republic, early in the first part of its session, January 20, 1840, passed the following act, no doubt aroused by the decision of the Supreme Court that the civil law was then practically in effect in the state of Texas, notwithstanding the fact that Texas had rebelled in order to escape the evil influence of its injustice. The act reads as follows:

> "An Act to adopt the common law of England and to repeal certain Mexican laws, and to regulate marital rights of parties.
>
> "Section 1. Be it enacted by the Senate and the House of Representatives of the Republic of Texas, in Congress assembled, That the common law of England so far as not inconsistent with the Constitution or acts of Congress now in force, shall, together with such acts be the rule of decision in this Republic, and shall continue in force until altered or repealed by Congress.
>
> "Section 2. Be it further enacted that all laws in force in this Republic, prior to the first of September, 1836 (except the laws of the constitution and provisional government now in force; except such laws that relate exclusively to grants and to colonization of land in the states of Coahuila and Texas, also except to the reservation of islands and lands, and also salt lakes, licks and springs, and minerals of every description, made by the general and state goverments) be, and the same are hereby repealed."

The effect of this statute, without further qualification by other legislation, would have been to repeal all laws in force in Texas prior to the establishment of the Republic, and to make the common law of England without exception the law of the Republic of Texas,

and as Congress had not passed any general practice act, the common law pleading would have been the procedure for the new Republic by virtue of the above statute.

Is common law pleading the adopted procedure of Texas by reason of the adoption of the above statute? The Supreme Court of the Republic of Texas, in the January term, in construing this statute, declared that common law pleading would be the procedure of Texas by virtue of this act, if there were no further qualifications of the above enactment, But the court, continuing, said that the common law pleading was not in force in the Republic of Texas, and that civil law practice was the procedure. The court based its decision on the act of February 5, 1840, an act passed at the same session of Congress that the common law was adopted, which act is entitled and reads as follows:

> "An Act to regulate proceedings in civil suits.
> "Section 1. Be it enacted by the Senate and the House of Representatives of the Republic of Texas, in Congress assembled, That the adoption of the common law shall not be construed to adopt the common law pleading; but the proceedings, in all civil suits, shall, as heretofore, be conducted by petition and answers; but neither petition nor answer shall be necessary in a cause to recover money before a justice of the peace."

The Supreme Court, in construing that section, declared that the expression "shall be conducted by petition and answer" meant to incorporate the civil law system instead of the common law system of pleading which would have been the procedure without the above qualification. I submit this question to the students of Texas history: Was it the intention of the legislature in the above act, when it used the expression "petition and answer" to define a system of pleading or to limit the manner of pleading at common law to the petition and answer? PETITION AND ANSWER could not define the civil law system of procedure, as such system was not limited to such stages, but the "duplica" and "replica" were in use in the Republic.

At the time of the enactment of the above statute, there were no states of the north whose systems of pleading, although based upon the common law practice, retained the common law pleading unqualified and unrestricted. Nearly every state of the Union had abol-

ished forms of action, and moreover had declared it to be unnecessary to designate any action by the common law name. For instance, the State of Kentucky had abolished the forms of action, but had retained according to the construction of the Court of Appeals of that state every particular allegation necessary for such action at common law. And I submit that it was the intention of the Republic of Texas in keeping in harmony with the progressive legislation of the north to enact the common law pleading for the Republic of Texas, subject to the restriction that the manner of pleading was to be limited to the *petition and answer*. The Congress of the new Republic did not desire to rivet upon the people of the state the common law pleading with its many technicalities and formalities necessary by retaining all the stages of common law practice, nor did they intend that the people should be bound by all the names of common law pleading, as petition, answer, replication, rejoinder, surrejoinder, rebutter, and surrebutter, etc., but to limit the stages of pleading to *petition and answer*. Moreover, the subsequent construction and limitation of the *petition and answer* and the rules governing their sufficiency as to stating a cause of action according to later legislation and interpretation of the courts, bear out the idea that *petition and answer* refer to the manner of common law pleading and not to the incorporation of the civil law system.

Texas As a State.

It shall not be the purpose of this article to notice further the laws of Texas while under the name of the Republic of Texas. Granting that the Supreme Court took the correct view and made the proper construction of the practice act under the Republic, it is evident that otherwise the Republic of Texas was a thorough common law state. Let us notice some of the decisions of the Supreme Court of Texas since her admission into the Union, as to the construction of the petition and answer that are now being used by reason of the act of Congress of the Republic in 1840.

In 1845 the Republic of Texas was admitted into the Union as the state of Texas. Although there was a state constitution adopted which was a nearer copy of the governments of the states of the north,

yet there was no change in the system of pleading, nor in adopting the common law as the basic law of the state; nor was there any material change of this provision at any time during the Constitutional Conventions of 1869, 1876, or in the amendment of 1891, although the scope and jurisdiction of the courts were changed and new courts were created.

Notice the requisites of the *petition and answer* according to the rulings of the Supreme Court of today, and see if the *petition and answer* are characteristic of common law pleading or of the civil law, although the manner of pleading is limited to the *petition and answer.*

Article 1819 of Vernon Sayles' Civil Statutes, 1914, declares that:

> "The pleading shall consist of a statement, in logical and legal form, of the facts constituting the plaintiff's cause of action or of the defendant's ground of defense."

Again article 1827 of the above statutes, declares that:

> "The petition shall set forth clearly the names of the parties and their residences, if known, with a clear statement of the cause of action and such other allegations pertinent to the cause as the plaintiff may deem necessary to sustain his suit, and without any distinction between suits at law and in equity, and each fact going to make up such cause of action and other allegations shall be pleaded by separate paragraph and each paragraph numbered consecutively. The petition shall also state the nature of the relief which he requests of the court."

I submit it that there is only one method known to man whereby the above requirements can be accomplished, namely, that set of rules established by custom and experience as embodied in common law pleading. The courts of this state have likewise realized that such rules of procedure are necessary to accomplish the above requirement, and have consequently adopted all the common law rules of practice. Whether it be called by the courts common law pleading or not, the rules are the same from the justice of the peace to the Supreme Court at Austin. Likewise the demurrer, both general and special, are in common use in all the courts, and are observed by the courts with the same common law requirement and technicality.

Again we hear the Supreme Court of the State saying that the petition must state facts and not legal conclusions. Millican vs. Mc-

Neil, 92 Tex., 400, 49 S. W., 219; Blaisdell, Jr. vs. Citizens Nat. Bank, 75 S. W., 292. Matters of evidence should not be alleged and should be stricken from the pleading. Anglin vs. Barlow, 45 S. W., 827, etc. The petition must not be ambiguous, but must be clear, certain and consistent. Orange Lumber Co. vs. Thompson, 126 S. W., 604. The petition must not contain any irrelevant or surplus matter. Tandy vs. Fowler, 150 S. W., 181; Tex. N. O. R. R. Co. vs. Barber, 71 S. W., 393, etc.

Thus we see that common law pleading is used every day, whether under that name or not, and that the highest courts of the state are enforcing all the requirements and requisites of common law practice, although the manner of pleading is limited to the petition and answer. Hence I submit it to any one that the state of Texas is a thorough common law state, subject only to statutory enactments of her legislative assemblies, and that the effect of the civil law system has been swallowed up in the glorious triumph and victory of the common law.

BASIL DUKE SARTIN (''14''-''15''),
Wichita Falls, Texas Bar.

IMPORTANT CASES DECIDED BY THE COURT OF APPEALS OF KENTUCKY.

Wheeler, By et al. v. Cincinnati, New Orleans & Texas Pacific Railway Company.

(Decided October 11, 1916.)

Appeal from Grant Circuit Court.

1. Appeal and Error—Law of the Case.—The rule is thoroughly established that the opinion of the Court of Appeals delivered on a first appeal, is the law of the case, and that all questions of law then presented are conclusively settled.

2. Appeal and Error—Former Appeal.—The judgment of the Court of Appeals on a former appeal is equally binding on that court, as well as upon the parties to the appeal.