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<https://escholarship.org/uc/item/6d073144>

Journal

Journal of Civil Law Studies, 17

Author

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Publication Date

2025

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THE REJECTION AND REEMERGENCE OF THE 1825 LOUISIANA CIVIL CODE IN
CALIFORNIA

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THE REJECTION AND REEMERGENCE OF THE 1825 LOUISIANA CIVIL CODE IN CALIFORNIA

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ABSTRACT

This article explores the impact of the 1825 Louisiana Civil Code on California legislation and jurisprudence. In 1850, the California legislature rejected civil law, and the Louisiana Code specifically, as a model for the new state, and installed a common law system. However, in subsequent decades its courts and attorneys repeatedly cited Louisiana decisions on municipal land rights. During the Progressive Era, California adopted a public approach to water allocation that followed the centralized French pattern which had shaped the 1825 Code. The latter reappeared explicitly in 1975 when the California Supreme Court required comparative negligence (fault apportionment) to be applied in personal injury cases—an innovative feature of the Code which had long been abandoned

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in Louisiana. Ironically, the Louisiana Civil Code's original prioritization of the general good, not always recognized in that state itself, resonated in perennially reform-minded California.

Keywords: California, civil law, comparative law, legal history, Louisiana, municipal law, negligence, Roman law, water law

I. INTRODUCTION

Goethe, in Peter Stein's paraphrase, observed that "Roman law was like a duck," sometimes swimming on the water's surface and at other times hidden in its depths, but "always there."¹ So, too, can Louisiana law be seen as a local species of that same waterfowl, diving and resurfacing in a different jurisdiction. This article traces the 1825 Louisiana Civil Code's ducklike trajectory in California, beginning with the civil/common law adoption debate prior to statehood, and continuing with jurisprudence surrounding San Francisco's public lands. The Code's influence ebbed in the late nineteenth century, although its outline remained faintly visible in California's French-patterned administrative system governing water. Finally, the Code resurfaced fully in the California Supreme Court's landmark twentieth-century decision in favor of the comparative negligence doctrine, *Li v. Yellow Cab*.²

As the reader swims along with the duck, mention will be made of the Code's support of public rights; its underscoring the value of public order, common lands, and waters; as well as its innovative section on damage apportionment. Most of these concerns were transplanted in varying degrees from Roman, French, and Spanish law, although the last provision was arguably an original Louisiana perspective.

1. PETER STEIN, ROMAN LAW IN EUROPEAN HISTORY 116 (1999). *See also* CONVERSATIONS OF GOETHE WITH JOHANN PETER ECKERMANN 313 (J.K. Moorhead ed., 1998).

2. 13 Cal. 3d 804 (1975).

II. CIVIL OR COMMON LAW? THE ADOPTION DEBATE

During antebellum discussions in the United States about whether to codify the common law, legal scholars such as Peter S. Du Ponceau and John Rodman were inspired by the simplicity and organization of the Code Napoléon and its statutory successors.³ The French model also appealed to the new republic because it facilitated the commercial transmission of goods and services.⁴ In addition, American codifiers looked to Roman law, the writings of Jeremy Bentham, and those of Louisiana's Edward Livingston, whose ideas infused the 1825 Civil Code.⁵

The Code promoted general well-being, stating that its provisions for "the preservation of public order or good morals" were supreme over individuals' mere "conventions" (customs or practices).⁶ This language followed the Code Napoléon's design favoring social harmony serving the public good over parochial self-dealing and litigation.⁷ Further, Louisiana's codification was practically oriented, aiming to restate the law comprehensively and accessibly for laymen.⁸ And like the Code Napoléon, the 1825 Code encouraged commercial exchange by protecting freedom of contract and private property, while simultaneously protecting familial stability through community property and forced heirship.⁹

As southern attorneys migrated to Texas in the 1830s and to California after the Mexican Cession of 1848, they carried the model of the Louisiana Civil Code with them, and shaped legislation in these

3. CHARLES M. COOK, *THE AMERICAN CODIFICATION MOVEMENT* 71-74 (1981).

4. ANDRE-JEAN ARNAUD, *ESSAI D'ANALYSE STRUCTURALE DU CODE CIVIL FRANÇAIS : LA REGLE DU JEU DANS LA PAIX BOURGEOISE* 20 (Librairie générale de droit et de jurisprudence 1973) (explaining the Code Napoléon as constituting a system of economic exchange rather than of didactic communication).

5. COOK, *supra* note 3, at 74, 80.

6. LA. CIV. CODE ch. 1, art. 11 (1825).

7. Olivier Moréteau, *The Future of Civil Codes in France and Louisiana*, 2 J. CIV. L. STUD. 41 (2009).

8. RICHARD HOLCOMBE KILBOURNE, JR., *A HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839* (1987).

9. SHAEL HERMAN, *THE LOUISIANA CIVIL CODE: A EUROPEAN LEGACY FOR THE UNITED STATES* 37-55 (Louisiana Bar Foundation 1993).

new territories.¹⁰ For example, Virginian Archibald Peachy, who came to California to practice land grant law, owned a copy of Christian Roselius's *Introductory Lecture*, which had lauded the Code as "the repository of the modern Civil law" at Tulane University's predecessor institution in New Orleans.¹¹ Similarly, Louisiana practitioner James McHall Jones became a delegate to California's first constitutional convention and, due to his vast expertise and library, was frequently consulted by fellow representatives on civil law matters.¹²

California's legislature, meeting in late 1849 and early 1850, debated whether to adopt civil or common law for the new territory (which many correctly assumed would soon become a state)—a dispute in which the Louisiana Civil Code took center stage. The first salvo was fired by Governor Peter Burnett, who urged the representatives to adopt that code, which "for its simplicity, brevity, beauty, accuracy, and equity, is perhaps unequalled."¹³ Burnett also noted that since many cases arising in the lately-Mexican jurisdiction would have to be decided under civil law, copies of relevant statutes could be obtained easily and cheaply in New Orleans.¹⁴ Supporting

10. MARK F. FERNANDEZ, FROM CHAOS TO CONTINUITY: THE EVOLUTION OF LOUISIANA'S JUDICIAL SYSTEM, 1712-1862, 88 (LSU Press 2001); MICHAEL H. HOEFELICH, ROMAN AND CIVIL LAW AND THE DEVELOPMENT OF ANGLO-AMERICAN JURISPRUDENCE IN THE NINETEENTH CENTURY 72-73 (U. of Georgia Press 1997).

11. CHRISTIAN ROSELIUS, INTRODUCTORY LECTURE 13 (1854) (Copy in Special Collections Department, University of California, Irvine, with title page signed by "Mr. A.C. Peachy"). See also Mitchell Franklin, *The Influence of Savigny and Gans in the Development of the Legal and Constitutional Theory of Christian Roselius*, in Festschrift für Ernst Rabel 141, 143-44 (Hans Dolle et al. eds., 1954) (discussing Roselius's pedagogical theories of civil law explication).

12. JAMES MCHALL JONES, TWO LETTERS OF JAMES MCHALL JONES, DELEGATE TO THE CALIFORNIA CONSTITUTIONAL CONVENTION, 1849 (Grabhorn Press 1948). See also Peter L. Reich, *Siete Partidas in My Saddlebags: The Transmission of Hispanic Law from Antebellum Louisiana to Texas and California*, 22 TUL. EUR. & CIV. L. F. 79, 86 (2007) (discussing Louisiana codes and jurisprudence as vehicles for conveying Spanish and Mexican legal doctrines).

13. Peter H. Burnett, *Governor's Message*, Dec. 21, 1849, J. SEN. CAL., 1st Sess. 30-41, 33 (1850).

14. *Id.* at 34.

this proposal, seventeen members of the San Francisco Bar sent a memorandum to the legislature, maintaining that the local population would better understand the civil law than the “arbitrary” common law system, known for its “technicalities and worrisome delays.”¹⁵ Still, the petitioners acknowledged in a brief note delivered the following day that the majority of San Francisco attorneys opposed adopting civil law and favored codifying the common law.¹⁶

To settle the matter, the California Senate requested a report from its Judiciary Committee, which responded the following month with a critique of the civil law as a system fit for a “rough, fierce people.”¹⁷ The Committee endorsed common law because it prevailed nationwide except in Louisiana, a province possessing at its acquisition a legal regime “in full operation” and a large, established population compared to that of American settlers.¹⁸ Subsequently, the legislature passed “An Act adopting the Common Law,” which Governor Burnett signed on April 13, 1850¹⁹ This statute marked the formal rejection of civil law generally, and of the Louisiana Civil Code specifically, as models for California’s legal framework.

Nevertheless, when the state of California issued its own civil code in 1872, its sections reflected influences from Roman, French, Spanish, Mexican, and Louisiana law, as well as from New York, a common law jurisdiction.²⁰ It should be noted that a significant nineteenth-century view of the California Civil Code, articulated by John Norton Pomeroy, was that it was not itself a source of law as in civil jurisdictions, but a secondary, explanatory statute to supplement caselaw.²¹

15. Petition “To the Honorable the Legislature of the State of California,” January 29, 1850, in RICHARD R. POWELL, *COMPROMISES OF CONFLICTING CLAIMS* 283, 284-85 (1977) (facsimile reproduction).

16. *Id.* at 283; J. ASSEMBLY CAL., 1st Sess. 735-36 (1850).

17. “Report of Mr. Crosby on Civil and Common Law,” Feb. 27, 1850, in J. ASSEMBLY CAL., 1st Sess. 459, 464 (1850).

18. *Id.* at 475-76.

19. 1850 CAL. STAT 219.

20. JULIE ROCHETON, *THE GENESIS OF NINETEENTH-CENTURY CIVIL CODES IN THE UNITED STATES* 181 (Brill 2024).

21. *Id.* at 247 (paraphrasing Pomeroy). See also Arthur Rolston, *An Uncommon Common Law: Codification and the Development of California Law, 1849-*

III. THE SAN FRANCISCO PUEBLO LANDS CONTROVERSY, 1850s-1870s

Despite California's unwillingness to adopt civil law formally, the state's courts and attorneys readily cited Louisiana judicial decisions over the next two decades, finding them a useful repository of Hispanic legal doctrine. These references were facilitated by the presence of Louisiana case reports and digests in California law libraries assembled during the 1850s and 1860s.²² In the San Francisco "pueblo lands" controversy from the 1850s to the 1870s, such sources became fundamental in arguments based on Spanish and Mexican law.

This prolonged dispute, fought out in the state courts, centered on whether San Francisco, as a successor to a former Mexican municipality, had the right to sell "pueblo" (town-owned) land parcels to private real estate speculators.²³ Validating San Francisco's right to sell off pueblo lands, the California Supreme Court, in *Welch v. Sullivan* (1857), cited Louisiana cases holding that Hispanic law had allowed such alienations, and ruled that the American city had succeeded to the Mexican prerogative.²⁴ One of these cases supported the broad promotion of successor towns' property rights under the

1874, 2 CAL. LEGAL HIST. 143, 163-64 (2007) (arguing that the 1872 Code was a pragmatic compromise, favored by the legal and business communities, between civil law's uniformity and consistency, and common law's doctrines encouraging investment capital).

22. See JAMES WAINWRIGHT & CO., CATALOGUE OF A VALUABLE LAW LIBRARY, BEING THE ENTIRE LAW LIBRARY OF MESSRS. HALLECK, PEACHY & BILLINGS 4 (1861) (original in Bancroft Library, University of California, Berkeley, listing 47 volumes of Louisiana decisions); W.C. STRATTON, CATALOGUE OF THE CALIFORNIA STATE LAW LIBRARY 201 (1866) (listing two sets of Louisiana reports, and digests by Benjamin & Slidell, Deslix, and Hennen). See also FLORENCE M. JUMONVILLE, BIBLIOGRAPHY OF NEW ORLEANS IMPRINTS, 1764-1864, 193, 302-03, 333-34, 462 (Historic New Orleans Collection 1989) (full citations for the Louisiana digests).

23. See Peter L. Reich, *Dismantling the Pueblo: Hispanic Municipal Land Rights in California Since 1850*, 45 AMER. J. LEGAL HIST. 353 (2001) (discussing the pueblo controversy's genesis, decisional trajectory, and legacy).

24. *Id.* at 197 (citing *Woods v. Kimbal*, 5 Mart. (N.S.) 246 (1826); *Fenn v. Rils*, 9 La. 95 (1836); *Stokes v. Shackleford*, 12 La. 170 (1838); *Frierson v. Irwin*, 5 La. Ann. 531 (1850)).

1825 Louisiana Civil Code's sections 2451 and 2603.²⁵

Reversing itself in *Hart v. Burnett* (1860), the same court ruled that, under the prior sovereigns, pueblo lands had been held "in trust for the public use" and so could not be sold at auction to satisfy city debts.²⁶ Chief Justice Joseph Baldwin cited Spanish and Mexican sources, as well as four Louisiana judgments, showing that Hispanic law traditionally barred execution sales of town lands.²⁷ One of these cases, *Egerton*, held that a city's tax receipts could not be seized by its creditors, under the authority of the 1825 Code's article 11 protecting "good order and public morals" from private action.²⁸ Twelve years later the justices refined *Hart*, ruling in *San Francisco v. Canavan* (1872) that the state legislature could authorize the sale of pueblo lands to fund the construction of public buildings, siding with city hall commissioners whose brief referenced a Louisiana decision.²⁹ As business pressure on California cities to release their pueblo lands grew in the late nineteenth and early twentieth centuries, state jurisprudence increasingly construed restrictions on private use narrowly.³⁰ References to Louisiana law in California land cases likewise vanished, perhaps because the 1825 Code and its judicial interpretations did not serve developmental interests.

IV. WATER RIGHTS ADMINISTRATION

While the Louisiana duck disappeared in one area of California law, its shadow could be seen in another, as French water administration, with its roots in the Code Napoléon, became a touchstone for resolving allocation conflicts. Years of litigation in California followed *Lux v. Haggin* (1886), which ruled that riparian (riverbank)

25. See Stokes, *supra* note 24, at 171-72.

26. 15 Cal. 530, 616.

27. *Id.* at 591, 595-96 (discussing *Egerton v. Third Municipality of New Orleans*, 1 La. Ann. 435 (1846); *Police Jury of W. Baton Rouge v. Michel*, 4 La. Ann. 84 (1849); *Heirs of Villars v. J.M. Kennedy*, 5 La. Ann. 724 (1850); *Municipality Number Three v. James S. Hart*, 6 La. Ann. 570 (1851)).

28. *Id.* at 436-37.

29. 42 Cal. 541, 549 (citing *De Armas v. Mayor of New Orleans*, 5 La. 132 (1833)).

30. Reich, *supra* note 23, at 368-70.

landowners have rights superior to those of non-riparian prior appropriators, regardless of whose use was more productive.³¹ State Engineer William Hammond Hall lauded France's centralized water system as a model, with its extensive corps of technical advisers overseeing diversion permits and management of streams to promote access and remove obstructions.³² Hall emphasized that the French government had title to all watercourses, with the public authorities having the right and duty "to have them respected and not tampered with by every dweller on their banks."³³ Along these lines, Engineer Hall lobbied for California officials' supervision of water right acquisition and use, but his efforts were blocked by large ranching, agricultural, and mining interests; the legislature even downsized his office after he resigned in 1889.³⁴

Yet during the Progressive Era several decades later, the combined force of competing users and a burgeoning population moved the state legislature to pass the 1913 Water Commission Act, creating a supervisory board to override prior rights and issue permits, which evolved into the modern State Water Resources Control Board.³⁵

This trend toward public water control was reflected by legal scholar Samuel Wiel, who argued in a 1919 article that California already followed the Code Napoléon by granting preferential rights

31. 69 Cal. 255.

32. WILLIAM HAMMOND HALL, IRRIGATION DEVELOPMENT: HISTORY, CUSTOMS, LAWS, AND ADMINISTRATIVE SYSTEMS RELATING TO IRRIGATION, WATER-COURSES, AND WATERS IN FRANCE, ITALY, AND SPAIN 67-71 (1885).

33. *Id.* at 73 (translating BENJAMIN NADAULT DE BUFFON, 2 COURS D'AGRICULTURE ET D'HYDRAULIQUE AGRICOLE 148 (1855)). See Bernard Barraqué, *Benjamin Nadault de Buffon (1804-1880)*, 88 LA HOUILLE BLANCHE 136 (2009) (discussing the creation of the hydraulic service within France's Ministry of Public Works based on water's being an inappropriable public benefit rather than a commercial commodity).

34. DONALD J. PISANI, FROM FAMILY FARM TO AGRIBUSINESS: THE IRRIGATION CRUSADE IN CALIFORNIA AND THE WEST, 1850-1931 175-86 (1984).

35. 1913 Cal. Stat. ch. 586, 1012-1013; Eric T. Freyfogle, *The Evolution of Property Rights: California Water Law as a Case Study*, in PROPERTY LAW AND LEGAL EDUCATION: ESSAYS IN HONOR OF JOHN E. CRIBBET 73, 80, 84, 88 (Peter Hay & Michael Hoeflich eds., 1988).

to cities and towns over private owners.³⁶ Wiel went on to reference a French legal treatise, stating that irrigation canals (then highly contested in California) were state-owned and therefore “insusceptible of private appropriation.”³⁷ Contemporary California has moved ever closer to the French public water pattern through judicial expansion of the Water Board’s powers to restrict use.³⁸

Ironically, despite Louisiana’s French legal heritage and the 1825 Code’s emphasis on public rights, the state has developed a highly privatized water regime. Based on Roman, French, and Spanish law, the Code categorized running water as a “common” thing “which all men may freely use.” This definition was changed in the 1910 Code to its current one: “one of the public things that belong to the state.”³⁹ Yet Louisiana statutes now follow a common-law approach, allowing a riparian landowner to use running water “for the purpose of watering his estate” so long as he does not obstruct or redirect it.⁴⁰ Further, Louisiana courts have held that riparian owners can prevent non-owners from accessing navigable canals

36. Samuel C. Wiel, *Waters: American Law and French Authority*, 33 HARV. L. REV. 133, 157-58 (1919) (citing CODE CIVIL [C. CIV.] [CIVIL CODE], art. 642 (Fr.)). See also Peter L. Reich, *Mission Revival Jurisprudence: State Courts and Hispanic Water Law Since 1850*, 69 WASH. L. REV. 869 (1994) (maintaining that Los Angeles’s and San Diego’s preferential “pueblo water right” was a judicial mischaracterization of communal Spanish and Mexican water law).

37. Wiel, *supra* note 36, at 165 (quoting FERNAND LABORI, 5 REPERTOIRE ENCYCLOPEDIQUE 459 (1891)).

38. Freyfogle, *supra* note 35, at 88-94. See also Peter L. Reich, *The Orange County Model for California’s Water Law and Policy* 24, ORANGE COUNTY LAWYER (2023) (discussing a local jurisdiction’s water distribution system’s exceeding state-level sustainability requirements).

39. LA. CIV. CODE art. 441 (1825); LA. CIV. CODE art. 258 (1910); LA. CIV. CODE art. 450 (2023). See Karly Kyzar Dorr, *No Trespassing: The Legal Origins of Louisiana’s Water Access Dispute*, 15 J. CIV. L. STUD. 185 (2023) (discussing public water access provisions in Justinian, the Code Napoléon, and the *Siete Partidas*); James M. Klebba, *Water Rights and Water Policy in Louisiana, Market-Based Approaches or a New Managerialism?* 53 LA. L. REV. 1779, 1800-01 (1993) (discussing French law’s classification of navigable waters and those capable of floating low-draft rafts as being in the public domain). See also ANTONIN ROUSSET, LA LÉGISLATION SUR LE RÉGIME DES EAUX 105 (Marchal et Billard 1907) (discussing French mayors’ power, under prefects’ supervision, to “take all necessary measures” to protect watercourses).

40. LA. CIV. CODE arts. 457, 458 (2023). See Klebba, *supra* note 39 at 1801, 1806 (contrasting limited scope of French riparian rights with broad authorization for riparian withdrawals in Louisiana).

and rivers.⁴¹ Therefore, in water law, the 1825 Code had echoes in California, but remained hidden in its state of origin.

V. LOUISIANA'S ABANDONMENT OF COMPARATIVE NEGLIGENCE

Perhaps the most dramatic resurgence of the 1825 Code in California occurred when its highest tribunal adopted comparative negligence (fault apportionment between parties in tort cases), while Louisiana maintained contributory negligence (completely barring recovery if a plaintiff bore any responsibility for damages). Roman law and the Code Napoléon were silent on fault apportionment, and the comparative fault doctrine appeared in French jurisprudence in 1879 before being codified in 1915.⁴² Significantly, the 1825 Louisiana Civil Code anticipated France's adoption of this principle, specifying that "[t]he damage caused is not always estimated at the exact value of the thing destroyed or injured; it may be reduced according to circumstances, if the owner of the thing has exposed it imprudently."⁴³ One commentator felt that this provision was due to "the ingenuity of the jurists themselves."⁴⁴

Despite the 1825 Code's innovative approach, Louisiana courts largely abandoned comparative negligence for a century and a half.

41. *National Audubon Society v. White*, 302 So. 2d 660 (La. App. 3d Cir. 1974) (owner could block neighbor's use of man-made canal for hauling agricultural goods); *Buckskin Hunting Club v. Bayard*, 868 So. 2d 266 (La. App. 3d Cir. 2004) (owner could prevent hunting along man-made canals and natural rivers). *See also* Dorr, *supra* note 39, at 240-41 (arguing against Louisiana jurisprudence's abandonment of the civilian public water use tradition). *But cf.* Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257, 282-84 (1996) (nineteenth-century Louisiana judges cited Roman law to support riparian owners' private rights to alluvion attaching to their estates).

42. Ernest A. Turk, *Comparative Negligence on the March*, 28 CHI-KENT L. REV. 189, 208-10, 239-40 (1950). *See also* HARRY LAWSON & BASIL MARKENSIS, 1 TORTIOUS LIABILITY FOR UNINTENTIONAL HARM IN THE COMMON LAW 132-34 (Cambridge U. Press, 1982) (discussing twentieth-century French caselaw apportioning fault).

43. LA. CIV. CODE art. 2303 (1825); LA. CIV. CODE art. 2323 (1870).

44. Haywood Hillyer, *Comparative Negligence in Louisiana*, 11 TUL. L. REV. 112, 122 (1936). *See also* HERMAN, *supra* note 9, at 53 ("... the exact origins of [article 2323] remain in doubt.").

Late-nineteenth-century legal theory considered that all individuals were equally capable of protecting themselves from injury—the view behind the doctrines of “assumption of the risk” (plaintiff’s knowledge of an unsafe condition barred recovery) and “last clear chance” (the party who could last avoid an accident was solely responsible).⁴⁵ This prevailing common law view went hand-in-hand with the promotion of capital investment through minimizing businesses’ liability and mistrust of juries’ sympathy for injured plaintiffs.⁴⁶ Louisiana was no exception to the national trend adopting the individualistic contributory negligence doctrine, which immunized accident-prone steamboat and streetcar companies if they were not one hundred per cent at fault.⁴⁷

The general pattern of Louisiana tort jurisprudence from the mid-nineteenth through the early twentieth centuries reflected the state courts’ acceptance of the “all or nothing” contributory negligence model.⁴⁸ For example, in *Fleytas v. Pontchartrain Railroad Company* (1841) the owner of an enslaved person could not obtain compensation when the latter was killed by a train after having fallen asleep on the tracks.⁴⁹ Almost a century later, Louisiana courts were still denying recovery if contributory negligence were present, as in *Inman v. Silver Fleet of Memphis* (1939), when a plaintiff failed to stop her car in time to avoid a collision.⁵⁰ In the only deviation from this trend, a court in *Fortunich v. City of New Orleans* (1859) ruled for a fruit vendor whose stalls were attacked by a mob, despite his

45. G. EDWARD WHITE, *TORT LAW IN AMERICA: AN INTELLECTUAL HISTORY* 41-50 (Expanded ed., 2003).

46. Wex. S. Malone, *Comparative Negligence—Louisiana’s Forgotten Heritage*, 6 LA. L. REV. 125, 136-40 (1945).

47. *Id.* at 137-39.

48. See Turk, *supra* note 42, at 318-26 (surveying Louisiana decisions where a plaintiff’s fault barred recovery).

49. 18 La. 339. See Ferdinand Fairfax Stone, *Tort Doctrine in Louisiana: From What Sources Does it Derive?*, 16 TUL. L. REV. 489, 500 (1942) (observing that plaintiff’s attorney Christian Roselius, a noted civil law scholar, did not appear to have argued the applicability of the 1825 Code).

50. 175 So. 436 (La. App. 1937), reh’g denied 176 So. 657 (1937). See also *Belle Alliance Co., Ltd. v. Texas & P. Ry. Co.*, 125 La. 777 (1910); *Legendre v. Consumers’ Selzer & Mineral Water Mfg. Co.*, 197 La. 120 (1920) (rejecting claims for accident damages when both parties were negligent).

illegal operations of the stalls at night, citing the 1825 Code's comparative negligence article.⁵¹ Only in 1979 did Louisiana join the many states that had moved to comparative fault, via a statute providing that

[i]f a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.⁵²

VI. CALIFORNIA'S COMPARATIVE NEGLIGENCE RENAISSANCE

Unlike Louisiana, California legislated a contributory negligence rule of general application in its civil code.⁵³ Indeed, the California Supreme Court explicitly rejected comparative fault in *Buckley v. Chadwick* (1955), dismissing a construction contractor's heirs' lawsuit against a crane lessor whose equipment malfunctioned, arguably due to the deceased lessee's failure to maintain it.⁵⁴ In a strong dissent, Justice Jesse W. Carter criticized the majority on the grounds that the decedent's negligence was improperly being imputed to his survivors, the plaintiffs, and that the contributory fault doctrine was a mere "argument of convenience" because precise apportionment between partially blameworthy parties was difficult.⁵⁵

51. 14 La. Ann. 115.

52. LA. CIV. CODE ANN. art. 2323 (1979) (2010). *See also* VICTOR E. SCHWARTZ & KATHRYN KELLY, COMPARATIVE NEGLIGENCE §§ 104(b), 104(c) (6th ed., 2020) (surveying state comparative negligence legislation from 1860 through 1984).

53. CAL. CIV. CODE § 1714 (1872). *See* SCHWARTZ & KELLY, *supra* note 52, at § 105 (e) ("section 1714 was intended to codify the then-existing rule of contributory negligence").

54. 45 Cal. 2d 183.

55. *Id.* at 205 (Carter, J., dissenting). *See* Michael A. Zamperini, *Justice Carter, Contributory Negligence and Wrongful Death: A Call to Get Rid of a "Bad Law With Bad Results,"* in THE GREAT DISSENTS OF THE "LONE DISSENTER": JUSTICE JESSE W. CARTER'S TWENTY TUMULTUOUS YEARS ON THE CALIFORNIA SUPREME COURT 111, 116-25 (David B. Oppenheimer & Allan Brotsky eds., 2010) (Carter's critique of contributory fault's harshness anticipated California's move to comparative negligence).

California's Supreme Court decisively reversed *Buckley* in *Li v. Yellow Cab* (1975), citing the 1825 Louisiana Civil Code in support of its ruling.⁵⁶ This decision occurred in the context of mounting judicial criticism of the fault system by other state courts in the late 1960s and early 1970s.⁵⁷ In *Li*, the plaintiff was injured when she turned her car left across a busy Los Angeles street, which the trial court found contributed to her injuries from a collision with defendant's taxicab.⁵⁸ Countering the plaintiff's appeal, the defendant/respondent argued that contributory fault should not be judicially abolished, for "[t]o overturn such a long established law affecting literally thousands of cases ... requires legislative action."⁵⁹

Nevertheless, after exhaustively examining the relevant sources, the court installed comparative negligence in California. The justices acknowledged that the 1872 California Civil Code's section 1714 did not adopt comparative fault, which was not then in force in any U.S. jurisdiction, including Louisiana.⁶⁰ However, the provision's language to the effect that a tort defendant's liability might be limited "so far as the [plaintiff] has brought the injury upon himself" mitigated the harshness with which the prevailing contributory doctrine would be applied.⁶¹ The court further noted that section 1714's drafters referenced the Code Napoléon and the 1825 Louisiana Civil Code, and, significantly, considered that the latter "appeared to establish comparative negligence."⁶² All of this evidence showed that the California legislature did not intend to restrict the courts from developing new negligence standards or to "thwart judicial progress

56. 13 Cal. 3d 804, 818-19.

57. See *Maki v. Freit*, 85 Ill. App. 439 (1967) (appellate panel recommended comparative negligence, which was reversed by state supreme court before being adopted via legislation); *Loui v. Oakley*, 50 Haw. 260 (1968) (footnote suggested move to comparative negligence, then adopted legislatively); *Hoffman v. Jones*, 280 So. 2d 431 (Fla. 1973) (state supreme court adopted comparative negligence).

58. 13 Cal. 3d at 808-09.

59. Defendants' and Respondents' Answer to Petition for Hearing at 3, 7, *Li v. Yellow Cab*, 2d Civil No. 41888 (1974).

60. 13 Cal. 3d at 819.

61. *Id.* at 820.

62. *Id.* at 819-20. See Izhak Englard, *Li v. Yellow Cab Co. A Belated and Inglorious Centennial of the California Civil Code*, 65 CAL. L. REV. 4, 20 (1977) (discussing civil law influences on section 1714).

toward the humane goal” of the statute.⁶³

Turning to their practical and policy concerns about an appropriate negligence rule, the justices admitted the challenges for juries of apportioning relative fault among multiple parties and of assigning specific percentage amounts for each. They suggested that guidelines for fact assessment and interrogatories could help jurors with these tasks.⁶⁴ The court went on to state that the complexity and unfairness of the traditional, liability-limiting defenses of “assumption of the risk” and “last clear chance” would be eliminated by simply diminishing damages “in proportion to the amount of negligence attributable to the person recovering”—that is, comparative fault.⁶⁵ Reversing the trial court, and with a nod to Louisiana, the justices entered California into the ranks of states abandoning “all or nothing” tort recovery for a more equitable system.⁶⁶

VII. CONCLUSION

The 1825 Louisiana Civil Code has had a long history in California law, from serious consideration as a legal template in 1849-1850, through its prominence in municipal land cases, to indirect but unmistakable reflection in later designing of water administration, and finally in its reemergence via the judicial adoption of comparative negligence in the 1970s. Many elements of California’s multifaceted legal legacy account for its consistent recourse to the Code. Its civilian heritage from the Spanish and Mexican periods, the antebellum codification movement, Progressive Era interest in government’s public service role, and the modern impetus toward remedial equity—all these strands intertwine in California’s judicial tradition. Indeed, given that California is a common-law jurisdiction, this civil code influence has manifested primarily in judicial decisions rather

63. *Id.* at 823.

64. *Id.* at 823-24.

65. *Id.* at 829.

66. *Id.* at 830. The California Supreme Court subsequently expanded *Li* to require damage apportionment among multiple tortfeasors. *American Motorcycle Assn. v. Superior Court*, 20 Cal. 3d 578, 583 (1978).

than in legislation. Nevertheless, it is clear that the Code's innovative preference for the general good, even if not always recognized in Louisiana itself, has resonated in perennially reform-minded California. The Louisiana duck's persistent paddling in California waters suggests that its adaptability to other states' legal environments may be worth investigating.⁶⁷

67. See, e.g., Reich, *supra* note 12, at 81-84 (detailing role of Louisiana law in antebellum Texas decisions); Milton J. Hernandez, *Codification in Mississippi: Nineteenth-Century Efforts for a Mississippi Civil Code*, paper delivered at Louisiana Civil Code 1825 Conference, LSU Law School, March 20, 2025 (assessing Louisiana influence on Mississippi legislation).

