The Formalities of Private Real Estate Transactions in Spanish North America: A Report on Some Recent Discoveries

Hans W. Baade
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* Hugh Lamar Stone Professor of Civil Law, The University of Texas School of Law.

The following abbreviations for Spanish statutory compilations will be used throughout the footnotes to this article:
N.R. = NOVISIMA RECOPILACIÓN;
PART. = LAS SIETE PARTIDAS;
R. = NUEVA RECOPILACIÓN;
R.I. = RECOPILACIÓN DE LEYES DE LOS REYNS DE LAS INDIAS.
The question here discussed seems as simple as it is basic: Were there any form requirements for sales and mortgages of immovables in Spanish North America in general and in the Provinces of Luisiana and Texas in particular, and if so, what were they? That question was bound to arise in all parts of the United States where there had been an appreciable volume of private real estate transactions under Spanish and Mexican rule. To be sure, it was likely to be ephemeral so far as mortgages are concerned, and only two American cases involving a mortgage subject to Spanish or Mexican law have been discovered.1 Private land sales, however, are another matter, for they are necessarily links in still-existing chains of title. Indeed, as will be seen, we find numerous decisions on the formal validity of private land sales under Spanish law in California, New Mexico, and Texas, as well as in Luisiana and Missouri.2

A brief summary of these decisions will show, it is believed, that there was judicial uncertainty as to three distinct though interrelated legal issues: the contents and construction of the pertinent general rules of "Spanish" law; the application of these rules in the particular circumstances of Spain's "last frontier;" and the adaptation of Spanish law to local conditions in America through local legislation by the Spanish authorities. These subjects will be discussed in the order just indicated, with particular emphasis on newly-discovered materials especially in the area last mentioned.

The purpose of the present study is not so much to settle the law or, for that matter, to settle the score. The legal questions dealt with here have been dormant for some time; the records of past judicial efforts will have to speak for (or against) themselves. It is hoped, however, that the discussion of past issues of Spanish North American law in the light of contemporaneous records still extant in the Spanish archives will encourage others to undertake their own investigations of the primary sources. In the final analysis, while the legal historians of our region might ulti-

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1. Moore v. Davey, 1 N.M. 303 (1859), discussed at notes 47-49 and 330-31, infra; Call v. Hastings, 3 Cal. 179 (1853), mentioned at note 332 infra.
2. See text at notes 3-46, infra.
mately succeed in building a reliable shortcut to Seville, there will never be a bypass around it.

I. AMERICAN JUDICIAL DECISIONS, 1826-1894

A. Louisiana

The first reported American decision on the formal validity of land transactions consummated under Spanish rule is the 1826 Louisiana case of Gonzales v. Sanchez. The court below had rejected the defendants' proffer of evidence of an alleged verbal sale of the premises in litigation to their predecessor in title in 1787. The respondents sought to sustain this ruling by arguing, first, that pursuant to the Nueva Recopilación, sales of real estate had to be made before a notary, and secondly, that a like provision had been introduced in Louisiana by an ordinance of Governor Unzaga, which prohibited verbal and "sous seing privé" sales of land.

Writing for the Supreme Court of Louisiana, Justice Martin disposed of the first argument by observing that the Spanish provision referred to was a fiscal measure, tied to the collection of the alcabala, a sales tax. As Spanish Louisiana had been exempt from that tax, he held, the provision referred to had never been considered as extending to Louisiana.

The argument as to Unzaga's ordinance presented an unusual difficulty, and perhaps a unique one: it was, in Justice Martin's words, "a document of which neither the original, nor any copy, is now extant." He went on to express doubts as to Unzaga's authority to enact such an ordinance if, indeed, that had been done, adding, however, that when an act of one of the Spanish governors "not ostensibly within their legal powers, has been recognized and acted upon by courts of justice, this tribunal has presumed it was authorized by the king's special order." But the ordinance of Unzaga, he pointed out, did "not appear to have ever been considered of any legal validity," and indeed, it had been "totally disregarded" by the Superior Court of New Orleans Territory.

3. 4 Mart. (N.S.) 657 (La. 1826).
4. Id. at 659, citing Nueva Recopilación 9.17.10.
5. 4 Mart. (N.S.) at 659.
6. Id. at 659-60.
7. Id. at 660, citing Rogers v. Beiller, 3 Mart. (O.S.) 665 (La. 1815).
8. 4 Mart. (N.S.) at 660.
9. Id. at 660-61.
Justice Martin concluded his observations on the subject of Unzaga's ordinance by ruling, with seeming good sense: "It is now too late to give it effect for the first time, to the overthrow of titles, hitherto undisturbed." 10

The rule of Gonzales v. Sanchez seems to have passed rapidly into Louisiana constant jurisprudence, for a mere fourteen years later, it was authoritatively stated that "Spanish law . . . as this court has repeatedly recognized, permitted parol sales of immovables." 11

B. Missouri

Statements to the same effect occur, without any further elaboration or reference to authority, in two Missouri cases dated 1842 and 1846. 12 A decade later, in the landmark case of Cutter v. Waddingham, 13 the question came up again tangentially, as Unzaga's elusive ordinance had been published in the meantime 14 and was brought to the attention of the court in a motion for rehearing. The Missouri court had decided that under Spanish rule, the Castilian law of matrimonial property had displaced the French law previously in effect, and that this transition had taken place as early as 1777, the effective date of a key transaction at issue. In his exceptionally well-researched motion for a rehearing, counsel for the appellant sought to meet this point, in part, by showing that Unzaga's 1770 ordinance had not been observed in the Upper (or "Illinois") Territory; indeed, plaintiffs own chief title paper, dated 1774, did not comply with the formalities prescribed by that ordinance. In this connection, counsel stated that the ordinance "was certainly never in force in Illinois, as has been decided repeatedly by this court and the Supreme Court of the United States." 15

The assertion just quoted is, as we have seen, correct in the sense that Missouri, too, had previously held parol sales of immovables to

10. Id. at 661.
11. Devall v. Choppin, 15 La. 566 (1840). See also Choppin v. Michel, 11 Rob. 233 (La. 1845) (follows the first Choppin case); Sacket v. Hooper, 3 La. 104 (1831) (expressly follows Gonzales without any discussion of the Ordinance); Ducrest's Heirs v. Bijeau's Estate, 8 Mart. (N.S.) 192 (La. 1829) (same). In Seelye v. Taylor, 32 La. Ann. 1115, 1118 (1880), Gonzales was cited as authority for the proposition that parol sales of immovables were valid in Cuba where Spanish law prevailed— incredibly, without discussing the obvious question of the alcabala and its effect on private transactions.
13. 22 Mo. 206 (1855).
14. See text at notes 165-70, infra.
15. 22 Mo. at 268, 272 (reasons for a rehearing presented by R. M. Field).
have been valid under the Spanish law prevailing in the Upper Territory until the adoption of the common law in 1816. That court had not, however, passed previously on the question whether the 1770 ordinance had been in effect in the Upper Territory. The motion for a rehearing in Cutter was denied, so that there was no occasion to address this question judicially on that occasion; and in subsequent cases, the court merely reiterated its previous rulings, with additional reliance on Gonzales and its progeny.

C. Texas

The initial approach of the Texas court to parol land transactions between private parties under Spanish and Mexican rule is similar to that of Missouri and Louisiana, and was manifestly influenced by the latter. In Scott and Saloman v. Maynard, the Supreme Court of the Republic of Texas held that a verbal sale of land, accompanied by possession on the part of the vendor, was sufficient to transfer title to land under Spanish and Mexican law in force in Texas in 1839; i.e., before the introduction of the common law. The Texas court relied on three Louisiana cases, including Gonzales, but did not address itself to the seemingly obvious question whether Texas had also been exempt from the alcabala. The rule of Scott v. Maynard was repeated without reexamination in two subsequent cases, but in the 1857 case of Monroe v. Searcy, it was subjected to a searching reexamination.

Chief Justice Hemphill, who had written the opinion in Scott, now took the opportunity to address himself to the question ignored in that case. He agreed with the Louisiana court's characterization of the provision there discussed as a "fiscal measure enacted to facilitate the collection of the alcabala duty," and went on to express the belief that the alcabala had not been levied on sales or exchanges of property in Texas; in any event, it had not been imposed or enforced on such sales or exchanges among the colonists. The learned Chief Justice then added:

16. See note 12, supra, and accompanying text.
17. Langlois v. Crawford, 59 Mo. 456, 466 (1875); Long v. Stapp, 49 Mo. 506, 509 (1872); Gibson v. Chouteau's Heirs, 39 Mo. 536, 558 (1866); Allen v. Moss, 27 Mo. 354, 360-61 (1858) (citing Gonzales and several other Louisiana authorities).
19. Id. at 551-52.
21. 20 Tex. 348 (1857).
22. Id. at 353, citing Gonzales v. Sanchez, 4 Mart. (N.S.) 657 (La. 1826).
We do not intend to intimate that a verbal sale under the Spanish law, as it existed in Texas, could be invalidated from considerations with reference to the Alcabala duty. The validity of such sales was recognized by early decisions, and the rule will not be disturbed. That such is the general rule of Spanish law is unquestionable. The only change in the law was with a view to the certain collection of the revenue, and this we have shown has been allowed no force under our decisions, and has certainly no application to the sale in question. That settled the main question so far as Texas is concerned.

There was, however, another and closely related point raised in Monroe v. Searcy. The plaintiffs were seeking to establish the invalidity of a parol land transaction that had taken place in Texas in 1834 or 1835. They asserted that under the laws of Spain then in effect, sales such as these should have been proved by the testimony of two credible witnesses. Chief Justice Hemphill disposed of this contention by pointing out that the Spanish rules of evidence had been replaced by those of the common law. He then drew a distinction between “requirements for the form and solemnity of an act” and rules as to the number and quality of witnesses required in proof of ordinary fact. The requirements ad solemnitatem, he held, would still be given effect as to past transactions, but the rules ad probationem had “fallen with the old system”:

Under the common law, the testimony of one witness is sufficient proof of a fact. If, under the ordinary rules of evidence in our ancient jurisprudence, two witnesses could have established the fact of a verbal sale of property, one witness would suffice for that purpose under the rules of evidence as now recognized.

The Chief Justice was, however, keenly aware of the dangers inherent in this asymmetrical interaction of two different legal systems, for he immediately went on to observe: “No doubt the evidence of two witnesses would be more satisfactory; and if verbal sales of lands were permitted under our present laws, it might be well considered by the courts whether, for the security of rights, the testimony of more than one witness to a transfer should not be required.” In other words, due to the ephemeral nature of the problem, there was no felt need for the judicial

23. 20 Tex. at 354.
25. 20 Tex. at 351.
26. Id. at 351-52.
27. Id. at 352.
development of a rule that would more accurately reflect the actual working of the legal system previously prevailing.

D. California

The California court approached the issue from the opposite direction but eventually reached the same result. In *Hoen v. Simmons*, it was held, with specific reference to the alcabala law, that land could not be conveyed under Spanish or Mexican law without an instrument in writing, because otherwise, the alcabala would have been easily evaded. The *Hoen* rule was reaffirmed in *Tobler v. Folsom*, decided the same year, but the court nevertheless decreed specific performance where there had been a delivery of title deeds of the vendor's predecessor in title, followed by actual taking of possession and substantial improvement of the property by the vendee.

A further refinement was introduced by *Hayes v. Bona*, which settled the law for the time being. There, counsel for the respondent (who relied on a highly irregular and suspect written instrument rather than a parol contract) presented an elaborate challenge to the *Hoen* rule. He argued, first, that Law number 101 of the alcabala regulations could not have been applicable in Upper California because there were never any escribanos there, and no justices of first instance to act in the place of escribanos before 1843, when alcaldes were authorized to act as judges. Secondly, he contended, it was highly likely that the alcabala had never been extended to the Californias, especially since its administration would have required a governmental machinery that was plainly not available in loco. Therefore, and in express reliance on *Gonzales v. Sanchez*, he argued that under the law in force in California at the date of the transaction here relied on, even a parol contract for the sale of land would have been valid.

The Supreme Court of California was not persuaded by these arguments. In an opinion written by Chief Justice Murray, it said:

> It may be admitted that there is some doubt whether this law was in force in California. From what we can learn, it was a fiscal law, and extended over all the States and Territories of Mexico. That it fell somewhat into disuse, there is no doubt; but, so far as we are informed, contracts for the sale of land, by the custom of the

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28. 1 Cal. 119 (1850).
29. 1 Cal. 207 (1850).
30. 7 Cal. 153 (1857).
31. See text at notes 3-11, *supra*.
32. 7 Cal. at 155-58 (summary of argument of Sidney V. Smith).
country, were required to be in writing, and although all the forms prescribed were not strictly followed, still it was necessary that the instrument should contain at least the names of the parties, the thing sold, the date of the transfer, and the price paid.33

The court then went on to discuss, in quite unflattering terms, the document before it, and the circumstances surrounding its alleged execution. Nevertheless, the court noted, the document was not being denied effect because of this suspicious background, but rather because it was “insufficient to pass any title, for want of a date, a vendor, or authority in Noe [the alleged agent] to convey on behalf of Domingo Feliz [the alleged vendor].”

In conclusion, the court reaffirmed its willingness to extend the “greatest liberality” towards contracts executed in California before American rule, and to uphold them, if possible, wherever there were any equities. But, it concluded, “to go further, and extend the rule to verbal contracts, for the sale of land, or conveyances like the present, would open the door to stupendous frauds, and unsettle every title in the State.”34

The Hayes rule was to be, however, of short duration. The details of the curious California customary civil law-based judge-made statute of frauds there formulated continued to be a source of litigation; and when the issue was examined once again in Merle v. Mathews,35 the foundations of the rule were found wanting. The court found nothing in the alcabala law that resembled the requirement that the price be expressed in the deed of conveyance.36 More importantly, it also found no authority for the proposition that the failure to execute real estate transactions before an escribano rendered such transactions void. Quite the contrary, the California court concluded, contracts entered into without the presence of an escribano were generally valid under Spanish and Mexican law. This, it stated, followed from the key rule of the Novisima Recopilación on the formal validity of contracts and obligations which in the court’s translation reads as follows:

If it appear that one had undertaken to bind himself to another by promise or by contract or in other manner, he shall be required to perform his obligation; he shall not be allowed to object that no stipulation was made; that is, that the promise was not made with

33. Id. at 159.
34. Id. at 159-60.
35. 26 Cal. 456 (1864).
36. Id. at 470.
certain legal solemnities, or that the contract or obligation was made between persons absent, or that it was not made before an *escribano publico*, or that it was made by one private person in the name of others who were absent; or that one person contracted that another should do or give something; we decree, nevertheless, that all obligations and contracts so made, shall be valid in whatever way it may appear that one may have bound himself to another.\(^{37}\)

Through applying the provision just quoted to the issue at hand, the Supreme Court of California, too, arrived at the conclusion that there was no form requirement for contracts relating to real estate in Spanish North America or in Mexico.

**E. New Mexico**

The Supreme Court of the Territory of New Mexico dealt with the question of the formal prerequisites for real estate sales under Spanish and Mexican law on three occasions in the course of slightly less than four years. The first case in the trilogy is *Salazar v. Longwill,*\(^{38}\) which set forth the proposition that "under the Spanish law a sale of real estate was made before a notary public by what was termed a 'public writing' (en escritura publica)."\(^{39}\) This statement was soon qualified, however, in *Grant v. Jaramillo,*\(^{40}\) where the court said:

> Counsel for appellant cite a number of authorities to the effect that under the laws of Mexico transfers of real estate could be made by verbal contract. This proposition has never been controverted by this court. The statute of frauds was unknown to the civil laws which were in force in Mexico at the time of the acquisition of the territory, and real estate could be sold and delivered in the same manner as personal property.\(^{41}\)

The opinions in both cases were written by Justice Lee, who explained their apparent inconsistency by pointing out that in *Salazar,* there had been "no pretension of the delivery of the property under the sale."\(^{42}\)

This element of delivery of possession was stressed once again in *Maxwell Land Grant Co. v. Dawson,*\(^{43}\) where Judge Lee, writing for the majority, said that "the statute of frauds being unknown to the civil

\(^{37}\) *Id.* at 474, quoting N.R. 10.1.1.

\(^{38}\) 5 N.M. 548 (1891).

\(^{39}\) *Id.* at 557.

\(^{40}\) 6 N.M. 313 (1892).

\(^{41}\) *Id.* at 315.

\(^{42}\) *Id.*

\(^{43}\) 7 N.M. 133, 34 P. 191 (1893).
"law," a verbal contract for real estate could have been enforced under the law as it stood at the time of the acquisition of New Mexico by the United States if possession had been delivered. Justice Freeman dissented on this point, relying on the older California authorities. He failed, however, to discuss the then most recent (and the most thorough) pertinent California decision, which of course was squarely against him.  

The Dawson case was reversed by the Supreme Court of the United States on the ground that "the civil law in this particular had been supplanted by territorial enactments" at the time here critical, which was 1868. The Court nevertheless devoted some discussion to the issue thus ultimately avoided. After referring to, and citing extensively from, Hayes v. Bona, Mr. Justice Brown stated:

It will be observed in this connection, however, that the court relies largely upon the extract from the Recopilacion which appears to have embodied a system of laws applicable to all the Spanish possessions in the Indies. The law referred to seems to have been a mere fiscal regulation, designed for the purpose of securing to the government its alcabala, or excise tax upon the transfer of land, rather than for the protection of the parties to such transfer. And as there seem to have been no Escribanos or Judges of the First Instance in New Mexico, and no tax upon land transfers, it is very doubtful whether this law was ever enforced there.

The remainder of his remarks in this connection strongly suggests that he inclined towards the position first adopted by the Supreme Court of Louisiana in Gonzales v. Sanchez, which he cited as authority. New Mexico commentators, too, appear to be of the opinion that under Spanish and Mexican law prevailing in the former province and territory, transfers of real estate could be made by verbal contract alone. They base this conclusion on Grant v. Jaramillo, but fail to take into account the additional requirement of delivery of possession there postulated.

In Moore v. Davey, the territorial Supreme Court had the unusual opportunity to discuss the Spanish and Mexican law of mortgages. The issue was one of priority between the mortgagee and a virtually simultaneous judgment creditor who had diligently pursued execution. The

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44. Id. at 144, 153-56, 34 P. at 194, 197-98 (Freeman, J., dissenting); see text at notes 35-37, supra.
47. 1 N.M. 303 (1859).
mortgage had been executed in Santa Fe county but registered in Rio Arriba county, the *situs* of the land. The territorial court determined, by resorting to a then-current English language treatise, that under Spanish and Mexican law, a “conventional” (contractual) mortgage, in order to constitute a valid charge on the land, had to be registered at the registry of the *situs* within six days if made there or within thirty days if made elsewhere. This seemed to give priority to the mortgagee, who had complied with the latter requirement.48

The court concluded, however, that legislation under American rule had changed the *locus* of registration from the *situs* of the land to the place of execution of the mortgage, so that there had been no seasonable recording, or for that matter, no proper recording at all. For this reason, the judgment creditor prevailed over the mortgagee. The court did not address itself to the additional issue whether the mortgage had to be executed in notarial form as stated in the treatise consulted, and it similarly failed to go into the seemingly obvious question—verifiable by a routine search of New Mexico mortgage registers—whether the Spanish-Mexican system there described had ever been put into effect in New Mexico.49

F. Summary

To summarize, then, the Supreme Courts of Louisiana, Missouri, Texas, California, and New Mexico ultimately arrived at the uniform conclusion that pursuant to *general* Hispanic-American law as applicable in these jurisdictions while under Spanish or Mexican rule, there were no form requirements as to sales of real property, and the same view of the matter was taken, at least by reasonably clear inference, by the Supreme Court of the United States. This conclusion rests on three foundations: (1) that Law number 101 of the alcabala, even where locally in effect, did not operate to invalidate real estate transactions executed by means other than notarial acts passed by the locally competent escribano; (2) that there were no other potentially relevant form requirements relating to real property transactions; and finally, (3) that in the absence of any pertinent form requirements, the principle of the “freedom of form” prevailed.

Additionally, the Supreme Court of Louisiana held that there were no *local* rules of Hispanic-American law to the contrary in the Province

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48. *Id.* at 305, *quoting G. Schmidt, The Civil Law of Spain and Mexico 180-85* (1851) (the page references in the opinion are inaccurate; one of these inaccuracies is in all probability the result of printing error).
49. *Id.* at 305-07; *see text at notes 333-36, infra.*
of Luisiana under Spanish rule; and the same proposition was accepted, at least inferentially, by the Supreme Court of Missouri. The territorial Supreme Court of New Mexico held, on the other hand, that the Spanish and Mexican law of mortgages, which made the validity of mortgages contingent upon their seasonable registration, had been in effect in that province and territory. That court also held that a parol sale of land was valid under Spanish and Mexican law only if there had been delivery of possession.

It will be noted that all of these propositions are substantially influenced by grave uncertainties as to basic operative facts. To name the most important of the issues left unresolved: When and where was the alcabala levied in these states in the Spanish or Mexican era? Were there any escribanos in any of these states under Spanish or Mexican rule, and if so, when, where, and how many? Was there any local Spanish legislation for North America, or part of it, on the formal requirements of land transactions, and if so, what did it provide?

In the following, an attempt will be made to provide at least some answers to these questions. Initially, however, it appears necessary to re-examine the legal premises of the decisions here summarized, for it seems very difficult indeed to imagine that in a legal, political, and social system where virtually everything was somehow documented, private land transactions were not, or at least did not have to be.

II. THE "STATUTE OF FRAUDS" FOR REAL ESTATE TRANSACTIONS IN HISPANIC AMERICAN LAW

A. The General Statutory Framework

The private law of Peninsular Spain was not uniform at any time material for the purposes of the present study; and indeed, it is not uniform today. The recognition accorded to the major fueros in article 12 of the Civil Code of 1889, and the codification of several of these fueros in much more recent days, powerfully attest to the enduring strength of non-Castilian private law on the Peninsula. Yet historians of American legal institutions perhaps were not, strictly speaking, remiss in their duties when they persistently and consistently equated Spanish law with Castilian law. Constitutionally, until the severance of the sovereign link
with mainland North America, the ultramarine possessions were part of the Crown of Castile, and quite unaffected by any Peninsular fuero.\textsuperscript{51} This exclusive dependence on Castilian law was even reinforced, so far as the insular possessions are concerned, by the Spanish Civil Code of 1889. That code restated and codified the "derecho común" of Spain, or Castilian law. Since it made no allowance for divergent fueros in Puerto Rico or the Philippines, it further strengthened the ties of those islands with the private law system of Castile.

Nevertheless, Spanish ultramarine law (or the law of the Indies, as it is commonly called at least until 1821), was not necessarily identical at any given time with Castilian law. Substantial identity of norms of general applicability can be assumed until 1614, but pursuant to a Royal cedula dated December 14 of that year, Peninsular legislation thereafter became effective overseas only if enacted (or reenacted) by the Council of the Indies.\textsuperscript{52} This cedula is but one manifestation of the substantive geographical division of governmental, judicial, and legislative powers between the Councils of Castile and of the Indies which led, in time, to the development of a special corpus of "Indian" law that was Peninsular (or "Metropolitan") in origin but applicable only overseas.

The chief repository of this law, also known as the "law of the Indies," is the \textit{Recopilación de Leyes de los Reinos de las Indias}, which is a selective and systematic rearrangement of the major relevant texts up to 1680. It deals mainly with what would now be considered public law, but also contains a key provision designating the sources of law to be resorted to for the resolution of disputes, and incidentally, the relation of these sources to each other. These are, in the order of precedence (or prelation), the \textit{Recopilación} of the Indies, prior "Indian" legislation not repealed as well as subsequent legislation adopted for the Indies, and, finally, the laws of the Kingdom of Castile in conformity with the \textit{Leyes de Toro}.\textsuperscript{53}

This latter reference serves to establish, again by indirection, the sources of the prelation of pre-1680 Castilian private law so far as applicable in the Indies. These are, again in the order of prelation, the \textit{Leyes de Toro} themselves, the \textit{Ordenamiento de Alcalá}, the \textit{Fueros Municipales}

\textsuperscript{51} See Gallo, \textit{La unión política de los Reyes Católicos y la incorporación de las Indias}, 30 Revista de Estudios Políticos 179 (1950); Manzano, \textit{Adquisición de las Indias por los Reyes Católicos y su Incorporación a los Reinos Castellanos}, 21 Anuario de Historia del Derecho Español 5 (1951).


\textsuperscript{53} R.I. II.1.1-2.
y Reales, and, finally, the Siete Partidas. As a practical matter, however, the reference to legislation not repealed by the Recopilación of the Indies included the Nueva Recopilación of the Kingdom of Castile, which was adopted in 1567 and thus needed no separate approval by the Council of the Indies.\textsuperscript{54} It should be noted, however, and indeed will become apparent in the course of the present study, that provisions of subsequent editions of the Recopilación of Castile that reflect post-1614 enactments of the Council of Castile became effective in the Indies only to the extent that they were reenacted by the Council of the Indies or by other locally competent authority.\textsuperscript{55}

All of this sounds complicated, as indeed it was at the time and continues to be to some extent today. The complication arose mainly from the combination of several centuries of royal absolutism with an almost pathological aversion to repealing anything. This meant that the last word of the sovereign prevailed, but that if it did not exhaust the subject, all past manifestations of sovereign will had to be scrutinized in inverse chronological order.

A common shortcut was simply to use the original version of the Nueva Recopilación of Castile, assuming that it incorporated all previous texts of conceivable relevance, and checking through the indices of post-1567 legislation for the Indies for more recent legislative authorities. If neither of these sources yielded anything in point, resort could then be had to the Partidas. After 1805, resort might be had to the Novísima Recopilación rather than the Nueva, but this, as we shall see, entailed the danger of reliance on legislation that had not been enacted for the Indies.\textsuperscript{56} The opposite approach—starting with the Partidas and searching chronologically to the present—might appeal to the legal historian but hardly to the practitioner. The attractiveness of this last-mentioned method for nineteenth-century United States judges, and Mexican lawyers generally,\textsuperscript{57} lay in the fact that the more laborious second half of the process, that of up-dating the Partidas, was simply neglected. This was, to put it bluntly, about as justifiable as the decision of nineteenth-century questions of common law on the authority of Bracton alone.

\textsuperscript{54} G. Margandant, Introducción a la Historia del Derecho Mexicano 48 (1971). \textit{See also id. at 40}, for a list of the subsequent editions of the Nueva Recopilación.
\textsuperscript{55} See text at notes 89-93, \textit{infra}.
\textsuperscript{56} See text at notes 330-33, \textit{infra}.
\textsuperscript{57} Concerning Mexican lawyers, see Vasquez, Derecho español en América. Derecho castellano español y Derecho indiano (Una posible interpretación historica), to appear in IV Congreso Internacional de Historia del Derecho Indiano, 785, 789-93 (1976).
It must be pointed out, however, that legislation of the Council of the Indies not reflected in printed compilations was practically inaccessible to American lawyers in the first part of the last century. Under Spanish rule, there had been two repositories of such legislation: the archives of the Secretaría de Gobierno in New Orleans and, after 1803, in Pensacola; and the Registros of the Audiencia of Guadalajara. Both of these contained copies of acts of general legislation emanating from the Council of the Indies. These were, almost invariably, single-subject printed "circular" cedulas, i.e., cedulas marked for general distribution. Additionally, the archives at New Orleans contained legislation directed specifically at the Province of Luisiana, while those of the Audiencia of Guadalajara reflected legislative acts limited to the territory of that Audiencia, which included the other portions of Spanish North America now under United States sovereignty. This "partial" legislation, or central legislation of limited territorial applicability, is almost invariably in the form of manuscript cedulas.

The registers of the Secretaría de Gobierno at New Orleans, comprising three legajos (bundles) with about 200 items, are presently kept in the Cuba collection of the Archivo General de Indias in Seville. That collection also contains, as part of another legajo, a document entitled "Índice de las Reales Cédulas, dirigidas al Gobernador Político y Militar de esta Provincia de la Luisiana, y Florida, que se hallan en esta Secretaría," i.e., the Secretaría de Gobierno at New Orleans. The index includes 181 cedulas, two pragmaticas, and one Instrucción of general application, 72 cedulas of local application directed at the Governor or the Intendant, and four commissions of local import, including three residencias. The New Orleans registers are, in other words, no longer complete, as they presently include less items than were recorded in the Index. The gaps, however, appear to exist only as to circular cedulas readily supplied from other sources. Thus, the New Orleans Índice de las Reales Cédulas and the New Orleans-Pensacola registers, as interstitially augmented with respect to some items missing in the registers, are a source of cardinal importance for Spanish law in North America: the Official Gazette of Spanish metropolitan legislation for the Province of Luisiana.

59. A.G.I., supra note 58, Cuba, leg. 186B.
This invaluable source of Spanish North American law was readily accessible to the Spanish officials in New Orleans, and to their legal advisers. It was not, however, made available to the American authorities when the United States assumed sovereignty over the Louisiana Territory or, somewhat later, over the Floridas. This would appear to go quite far towards explaining why American lawyers and courts in Louisiana and in Missouri initially preferred the older, printed Spanish books of authority to the newer, virtually inaccessible legislation of the Council of the Indies. Their example readily commended itself to the American legal profession in Texas, New Mexico, and California, for the registers of the Audiencia of Guadalajara must have been, if anything, even more difficult of access. The Seville Archives do not contain any Guadalajara registros past 1766,60 and a comprehensive index of those registers was not published until 1971.61 Professor A. Muro Orejon of the University of Seville is currently in the process of publishing a complete American cedulario of the Council of the Indies for the eighteenth century, but it will be some time before that Herculean task is completed.62

Nevertheless, legal historians can now reconstruct the law of Spanish North America quite accurately, at least to the extent that it is based on legislation (both general and local) adopted by the Council of the Indies. The tools of the trade are, in addition to the standard printed sources mentioned above, the indices to the registros of New Orleans and Guadalajara, which in turn lead to legislative instruments that are available in at least some register or other collection. Nor is this task an exercise in futility. Even without further corroborating evidence, the law thus reconstructed could be assumed to have been a living law under Spanish rule, since the same sources were at the time available to Spanish officials and their legal advisers.

In the following, an attempt will be made to summarize the rules of Castilian law as to the formalities of real estate transactions, the transmission of these rules to the Province of Luisiana and the Audiencia of Guadalajara, and their interpretation by the Council of the Indies.

62. 1-2 A. Muro Orejon, Cedulario Americano del Siglo XVIII (1956 & 1969). The second volume ends with a cedula dated February 3, 1724. Archivo Histórico Nacional Madrid leg. 51690 [hereinafter cited as A.H.N.] contains cedulas expedited to the Indies from 1790 to about 1819, but only some of the years are properly indexed, and post-1800 coverage is spotty. Some years, e.g., 1791, seem to be missing entirely.
B. Castilian Law

1. Mortgages

The rules of Castilian law relating to the form requirements for mortgages are readily identified. A pragmática issued at the conclusion of the Cortes of Toledo in 1539 had called for the establishment of registers of mortgages in all towns and other places where courts were held, and had imposed the sanction of nullity for noncompliance. This measure appears to have been, however, almost wholly ineffective, as it did not lead to the comprehensive establishment of registers. The directive was reiterated by Phillip V in an auto acordado dated December 11, 1713, but even this reiteration of the royal will was later acknowledged to have been, in the main, unsuccessful. Another pragmática, issued by Charles III on January 31, 1768, at last had the desired effect. It not only detailed the task of the keeping of mortgage registers and specified that the escribanos had to file mortgages raised in notarial acts passed by them within a specified time in the appropriate local register, but also provided that mortgages not executed by notarial instrument duly inscribed in the register were of no legal effect even between the parties.

Thus, under Castilian law as it stood in 1768, not only execution in notarial form, but also registration in the mortgage registers were what comparative lawyers call "constitutive" elements of the contractual creation of mortgages. That this should be so is not particularly surprising to students of comparative law and of legal history, for the scheme devised by the pragmática of 1768 is also in effect today. As stated with exemplary clarity in the Mortgage Law of 1946:

The valid establishment of voluntary mortgages requires

(1) that they are constituted by a public writing;

(2) that the writing is inscribed in the Register of Property.

2. Sales of Immovables

63. R.5.15.3, corresponding to N.R. 10, 16, 1; R.5.9. Auto 21 (1772 ed.) corresponding to N.R. 10.16.2.

64. R.5.15.14 (1772 ed.)(preamble to 1768 mortgage pragmática).

65. R.5.15.14 (1772 ed.), corresponding to N.R. 10.16.3.


67. Ley Hipotecaria, of February 8, 1946, article 145. Text is I. CASTAN TOBENAS, supra note 50, (pt. IV) at 1, 104. For historical antecedents, see LEYES HIPOTECARIAS Y REGISTRALES DE ESPAÑA, FUENTES Y EVOLUCIÓN (J. Poveda Murcia ed. 1974) [hereinafter cited as LEYES HIPOTECARIAS].
Despite several efforts in that direction, Spanish-Castilian law has never accepted comparable form requirements for the sale of immovables. The auto acordado of 1713 had called for the establishment of registers for the inscription of "todos los contratos de censos, compras, y otros semejantes," but the pragmatica of 1768 had dealt only with mortgages. Nevertheless, the directive of 1713 continued to be in effect, so that there was authority and indeed a mandate to extend the registration system to sales of immovables wherever the requisite registral facilities existed. This was done, for instance, in Cataluña by the order of the Governor General in 1774. However, no similar legislative action was taken with respect to Castile.

In the absence of such special or local legislation, a strong argument can be made that informal contracts for the sale of immovables, even parol contracts, would have been valid under Castilian law. As early as 1348, the Ordenamiento de Alcada had established the general rule that contracts were enforceable irrespective of the form in which they were concluded, and had expressly specified that contracting parties would "not be allowed to object . . . that the promise was not made with certain legal solemnities . . . or that it was not made before an escribano público." Indeed, it is the unanimous opinion of Spanish authors (and almost an article of faith) that at least since the adoption of the "famous" law of the Ordenamiento de Alcada just quoted, it was a fundamental principle of Castilian law that contracts could be entered into by consent alone, and without regard to form. Any more onerous or solemn form requirement for specific types of contracts had to be based on express exceptions to that rule.

As regards real estate transactions other than mortgages, the only conceivable source of such an exception was Law no. 101 of the quaderno de las alcabalas established by Ferdinand and Isabel in December, 1491. This provision was reproduced in subsequent compilations of the law of Castile, and appears in abbreviated form in the Recopilación of the Indies. It provides, in substance, that sales of real property may be notarized only by the escribano of the situs, who has to make report of such transactions to the collector of the alcabala. The only penalty provided for non-compliance is directed at the escribano, not the

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68. R. 3.9 Auto 21 (1772 ed.) corresponding to N.R. 10.16.2 (emphasis supplied); see text at note 63, supra.
69. 1 R. ROCA SASTRE, INSTITUCIONES DE DERECHO HIPOTECARIO 27 (1942).
70. Ordenamiento de Alcala, tit. 16, ley unica, corresponding to R. 5.16.2, and to N.R. 10.1.1; see text at note 37, supra.
71. 1 ROCA SASTRE, ESTUDIOS DE DERECHO PRIVADO 94-95 (1948); Mozos, La Forma del negocio jurídico, 21 Anuario de Derecho Civil 745, 755-57 (1968).
contracting parties.\textsuperscript{72}

It is common ground that Law no. 101 of the alcabala was a "fiscal" measure; moreover, there is some suggestion that it was not generally complied with.\textsuperscript{73} In any event, this provision was, as we shall see below, not regarded as limiting the operation of the principle of the "freedom of the form" with respect to land transactions other than mortgages. Indeed, that principle appears to have assumed such an encompassing significance that even in present-day Spanish law, informal contracts for the sale of immovables are likely to be judicially enforced.

Some brief explanation, both historical and doctrinal, is necessary. It will be remembered that the auto acordado of 1713 had called for the creation of registers for life rents, sales, and similar transactions, but that the pragmática of 1768 had established a "constitutive" registration system for mortgages alone, which had subsequently been extended to real estate transactions generally in Cataluña, but not in Castile.\textsuperscript{74} The general codification commission charged with drafting the Spanish Civil Code initially adopted the general proposition that all transactions relating to immovables were to be effective upon registration only, but this proposition was subsequently rejected by a majority of the commission.\textsuperscript{75} The draft civil code of 1851 failed to be adopted. The law of mortgages was thereupon codified separately; and as described above, it now conditions the validity of mortgages upon the twin requirements of a notarial act and inscription in the mortgage register.\textsuperscript{76}

The Civil Code of 1889 is based on the 1851 draft, and it thus reflects not the initial but the ultimately prevailing decision of the codification commission on the subject of real estate transactions other than mortgages. There is no general requirement of registration, but pursuant to article 1280(1) of the Spanish Civil Code, acts and contracts designed to create, transmit, modify, or extinguish property rights to immovables "must" be in the form of a public document. The latter is defined by article 1216 as a document passed by a notary, or by a duly authorized government official, with the formalities established by law.

\textsuperscript{72} R.9.17.10, corresponding to N.R. 10.12.15, and contained in abbreviated form in R.I. 8.13.29.

\textsuperscript{73} R. Roca Sastre, supra note 71, at 94; see also 3 T. Esquivel Obregon, Apuntes para la Historia de Derecho en México 351 (1943).

\textsuperscript{74} See text at notes 68-69, supra.

\textsuperscript{75} 1 R. Roca Sastre, supra note 71, at 28-29.

\textsuperscript{76} See text at note 67, supra. Under the Law of 1861 (article 146) notarial form and registration were merely prerequisites for effect against third parties. Leyes Hipotecarias, supra note 67, at 356-57.
The Code does not provide, however, that a contract executed without the formalities thus prescribed is invalid. The general rule is that "contracts are binding, in whatever form they may be concluded, so long as they contain the essential conditions for their validity" (article 1278), and there is no express provision to the effect that the notarial form prescribed by article 1280(1) is an essential condition for the validity of sales of immovables. Quite the contrary, article 1279 provides that wherever the law prescribes written or other form to render a contract effective, the parties can compel each other to execute the contract in that form, so long as consent and "the other requirements for validity" are present.

When these three provisions are read together, it seems clear that the form requirements prescribed in article 1280 are not essential elements of the validity of the types of contracts to which they refer. This interpretation, which is based on the pre-eminence of article 1278 as reflecting the principle of Castilian law first expressed in the Ordenamiento de Alcalá⁷⁷ is the one which has been adopted by the Spanish Supreme Court. In a series of decisions dating at least from 1899, that court has upheld real estate sale contracts concluded by simple writing instead of notarial act.⁷⁸ In a leading decision dated November 29, 1950, this jurisprudence has also been extended to verbal contracts.⁷⁹ The contract there at issue was a parol agreement for the sale of movables which pursuant to the last paragraph of article 1280 "must" be in writing if involving goods with more than 1,500 pesetas. Nevertheless, there seems no reason to doubt that the reasoning adopted in 1950, and reiterated since, is applicable to parol agreements for the sale of immovables as well.

Not surprisingly, the same interpretation of articles 1278-1280 of the Spanish Civil Code was adopted, in part in reliance on some of the then current Spanish decisions in point, by the Supreme Court of the Philippines under American rule. As that court said, in Hawaiian Philippine Co. v. Hernaez,⁸⁰ "the courts in a series of decisions have held that article 1280 of the Civil Code permits a verbal agreement for the sale of real estate, and that it is not necessary that such an agreement be evidenced by a public document." The Puerto Rican courts, too, have upheld real

⁷⁷. See note 70 and text at note 37, supra.
⁷⁸. See, e.g., II-1 J. Puig Brutau, Fundamentos de Derecho Civil 184-86 (1954), and cases cited therein.
⁷⁹. Arazadi, Repertorio de Jurisprudencia No. 1694 (Spain 1950); see also, e.g., the decision of March 12, 1960, id. No. 958 (Spain 1960).
⁸⁰. 45 Phil. 746, 749 (1924), citing Doliendo v. Depiño, 12 Phil. 758 (1909); Dievas v. Acuña Co Chongco, 16 Phil. 447 (1910). See also Thunga Chiu v. Que Bentec, 2 Phil. 561 (1903), which appears to be the leading Philippine case in question, and which expressly followed Spanish authority then available.
estate contracts concluded in other than public form, also following, in this respect, the jurisprudence of the Spanish Supreme Court.81

3. Proof of Land Sale Contracts

Thus, it appears that in modern Spanish law, informal contracts for the sale of immovables are valid. Since this result is achieved largely through the historical interpretation of the key Civil Code provisions in the light of the Castilian tradition of freedom of form, the current jurisprudence of the Spanish Supreme Court strongly corroborates the conclusion reached above, which was that under general Castilian law as well, immovables could be sold by informal agreements. Careful observers will not fail to note, however, that the Spanish decisions directly in point concern written real estate transactions not in notarial form. In principle, there seems to be no reason why the rule reaffirmed in the more recent jurisprudence of the Spanish Supreme Court as to verbal contracts concerning movables should not extend, in appropriate cases, to parol contracts for the sale of real estate. Nevertheless, there is a rather obvious gap in specific judicial authority on this point in Spain. When contrasted with the willingness and even the seeming eagerness of courts in the United States and its possessions to speak to this very issue in no uncertain terms, the dearth of specific Spanish authority in point strongly suggests that there are other obstacles in Spanish law, not as yet discussed here, to the judicial enforcement of parol contracts to convey real property.

It would appear that a most formidable obstacle to the enforcement of such contracts under pre-codification Castilian law was posed by the rules governing proof testimonial. To begin with, a party could not be a witness in his own case, but almost as importantly, and for related reasons, the vendor was also disqualified from testifying as to the property sold. Finally, there was the general requirement that every transaction be proved by at least two qualified witnesses.82 These rules of evidence were obvious inducements for the conclusion not only of immovable sales

81. The first case in point would appear to be Falero v. Falero, 15 P.R. 111, 118 (1909), citing the decision of the Spanish Supreme Court of February 25, 1901. See also, on substantially the same question under Honduras law, Daniel Lumber Co. v. Empresas Hondurenas, S.A., 215 F.2d 465, 468-70 (5th Cir. 1954).

82. Part. 3.16.18, 19, 32. Post-codification Spanish law, too, is rather inhospitable toward the enforcement of parol contracts. Pursuant to article 1247(1) of the Civil Code, those who have an interest in the subject matter of litigation are disqualified from being witnesses therein. Perhaps even more importantly, article 1248 expressly cautions the courts against accepting testimonial proof concerning transactions ordinarily concluded by written instruments in all but those cases where the truth is evident.
contracts, but of all but the most routine everyday cash sales of movables
as well, in the form of a notarial act.

As will be seen below, the rules as to the form requirements of land
transactions other than mortgages, and as to the proof of such transac-
tions, were substantially identical in Spanish North America (outside of
the Province of Luisiana) and in Castile. Jumping ahead for a moment,
we can therefore hypothesize even at this stage that the apparent hospi-
tality of Texas, New Mexico, and California courts towards parol real
estate sales contracts concluded under Spanish or Mexican rule may be
nothing more than yet another illustration of the dysfunctional interplay
between “substantive” and “procedural” rules derived from different
systems. This is perhaps best illustrated by the decision of the Supreme
Court of Texas in Monroe v. Searcy, which has been discussed above.83

C. Transmission to the Indies

All of the general rules of Castilian law as to the form requirements
of real estate transactions other than mortgages, and as to the proof of
such transactions, were incorporated into the law of the Indies by opera-
tion of the transmission and reception rules outlined above. The
Ordenamiento of Alcada was made applicable through the reception
clause of the Recopilación of the Indies in conjunction with its reference
to the Leyes de Toro, which in turn refer to the Ordenamiento.84
Furthermore, the key provision of title 16 of that Ordenamiento, laying down
the principle of “freedom of form,” was reenacted in the Nueva Recopi-
lación, which applied in the Indies as a pre-1624 Castilian enactment.85
Law 101 of the alcabala regulations of 1491, too, was extended to the
Indies through incorporation in the Recopilación of Castile; furthermore,
it was expressly reenacted in the Recopilación of the Indies.86 The reiter-
ation of these two provisions of Castilian law in the Novísima Recopi-
lación87 is thus merely cumulative. Even where that latter compilation
was not applicable, as, e.g., in the Louisiana Purchase territory, these
particular rules were, thus, effective by virtue of prior enactment. The
rules of the Partidas pertaining to the qualification of witnesses and the
modes of proof, which as to the matters here dealt with had never been
modified, were for that reason applicable as residual law by express pro-

83. See text at notes 21-27, supra.
84. See text at note 54, supra.
85. See note 70 and text at note 37, supra, R. 5.16.2.
86. R. 9.17.10; R.I. 8.13.29.
87. N.R. 10.1.1, 10.12.15.
vision to that effect in the *Recopilación* of the Indies.  

When we turn to the more specific rules of Castilian mortgage and public register law enacted in the eighteenth century, the picture becomes quite different. The auto acordado of the Council of Castile, which had called for the establishment of registers for the inscription of contracts of “censos, compras, y otros semejantes,” was apparently not adopted by the Council of the Indies. Even more importantly, the same was true of the pragmática of 1768. That pragmática, it will be recalled, had detailed the task of the keeping of mortgage registers, had obligated escribanos to register mortgage instruments drafted by them in these registers, and most importantly, had provided that mortgages not executed by notarial instrument duly inscribed as there provided were of no effect even between the parties.  

An initial step in the direction of extending this reform legislation to the Indies was made by a circular cedula of the Council of the Indies dated May 9, 1778, and directed to the viceroys, presidents, audiencias, and governors of the King’s dominions in America and the Philippines. This cedula ordered that the pragmática of 1768 be observed in these ultramarine possessions as well. Even then, however, the extension of the peninsular mortgage law reforms to Spanish America was anything but automatic. A new cedula on the subject was issued on April 16, 1783. It expressly directed the establishment of mortgage register offices needed for compliance with the pragmática of 1768, but provided that there could be variations in the time requirement for filing so as to take account of greater geographical distances.

Even this, however, was not the end of the matter, as acts of local implementation were required in order to put the new system into effect. As regards New Spain, the process of implementation has been recorded in some detail and may be summarized as follows: The Fiscal of the Royal Hacienda, Ramon de Posada, prepared detailed instructions on the matter, which were, then, subject to some change, approved by the Audiencia at Mexico City on September 27, 1784. These instructions provided for the establishment of the office of Annotator of Mortgages in

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88. *Part. 3.16.18-19,21*; see text at note 54, supra.
89. It is not set out in *I A. Muro Orejon, supra* note 62, which covers the period from 1700 to 1724.
90. See text at note 65, supra.
91. This cedula is reproduced in 2 E. Benura Beleña, *Recopilación Sumaria de Todos los Autos Acordados de la Real Audiencia y Sala del Crimen de esta Nueva España . . . de Varias Reales Cédulas y Órdenes que Después de Publicada la Recopilación de Indias Han Puido Recogerse . . . . 308 (1787).*
92. *Id.* at 309.
some thirteen named cities and towns, and for the keeping of the mortgage register by the escribano publico at the other seats of government. None of these cities and towns were located in what is now the United States, for the simple reason that Luisiana and the Floridas were not part of the Viceroyalty of New Spain and that the Internal Provinces were subject to the territorial jurisdiction not of the Audiencia of Mexico but that of Guadalajara.

For this reason an attempt will be made in the next section to describe, by resort to archival materials, the pertinent local implementation legislation in the Provinces of Luisiana and Texas. Before proceeding to that subject, however, it seems appropriate to report an incident recorded in the files of the Council of the Indies which, it is submitted, puts to rest the more general question as to the validity of informal sales of immovables under the law of Castile and of the Indies.

D. The Taranco-Acinera Case

It will be recalled that in Hoen v. Simmons, the Supreme Court of California advanced a policy argument in support of its decision that under Mexican law, parol contracts for the sale of immovables were invalid. "Had it not been so," the Court said, "one main branch of the revenues of the Spanish Crown and Mexican Republic, called the Alcabala, being a duty payable upon the transfer of land, would have been easily evaded." On purely analytical reflection, this argument seems attractive but not compelling. With equal logic, a contrary conclusion could be based on the simple consideration that if informal sales were treated as invalid, they could not be taxed, thus providing an even greater incentive for the evasion of the alcabala. But whichever view might now be taken of this issue as a matter of abstract policy, its manifest practical importance at the time suggests that it could not remain unresolved; and indeed, it did not.

The authority in point is the Taranco-Acinera case, which was decided by the President of the Audiencia of Guatemala in 1785 and,

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93. Id. at 310 et seq.; id. at 315 (section 20 of the Instructions provided that mortgages not registered in accordance therewith were unenforceable and of no effect).
94. 1 Cal. 119 (1850); see text at note 28, supra.
95. 1 Cal. at 122.
96. Several of the smaller Audiencias, including those of Guatemala and Guadalajara, had Presidents, who were chief political and administrative officers rather than law-trained chief justices. See F. Muro Romero, Las Presidencias-Gobernaciones en Indias (Siglo XVI) (1975).
pursuant to his reference, by the Council of the Indies in 1791. It arose out of the land and loan transactions of the Marquess of Acinera, who was then one of the wealthiest and most influential inhabitants of Guatemala. In 1774, one Fr. Benito de Castilla had made some substantial cessions of land to the Marquess. These cessions were duly notarized and notified to the tax authorities, but the Marquess of Acinera maintained that they were not subject to the alcabala, being cessions in solutum (i.e., assignments in compromise satisfaction of a pre-existing debt) rather than sales. This odd contention was sustained by the Fiscal of the Administrator General of the alcabala in Guatemala, who opined, in a baroque opinion about fifty folios in length and honeycombed with Latin quotations, that a cession in solutum was indeed not a sale.

A decade later, the Marquess received two more haciendas by cession in solutum, from another cleric, Fr. Juan de Taranco. Again, the transactions were duly notarized and reported, and again, the Marquess insisted that no alcabala tax was due on the transactions. This time, however, the tax collector of San Vizente in Guatemala, in whose district the haciendas were located, refused to accept that argument. In his minute of the matter, he pointed out that if subterfuges such as this were to be successful, sales by simple writing as well might escape the alcabala. This was the first mention of so-called clandestine land sales in the Taranco-Acinera case, and it raised a somewhat collateral issue, for as already mentioned, the land transactions of the Marquess were duly notarized and reported.

The Fiscal de civiles of the Audiencia of Guatemala, to whom the case was next referred for opinion, took the position (supported, according to him, by the majority of authors and decisions), that cessions in solutum were the legal equivalent of sales and thus subject to the alcabala. As regards the problem of un-notarized sales, he said that these created "absolutely no difficulty, because the contract becomes perfect

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97. The following account is based on documents found in A.G.I., supra note 58, Guatemala, legs. 413 & 573.
99. The file of the case was forwarded to the Council of the Indies together with a letter (No. 489) of the President of the Audiencia, Josef Estacherria, dated January 1, 1786. It is 78 folio pages long, and preserved, together with that letter, in A.G.I., supra note 58, Guatemala, leg. 573. The references in the text are to the file folios. The facts appear in file, fol. 1-5; the fiscal's opinion is recorded thereat, fol. 6v-52. As regards the use of Roman-law authority at the time, see generally Peset Reig, Derecho Romano y Derecho Real en las Universidades del Siglo XVIII, 45 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 273 (1975).
100. File, supra note 99, fol. 55, 57v.
with the mere consent of the parties on the thing and the price, and as soon as it is celebrated, the alcabala becomes due."\(^{101}\) The Taranco-Acinera case was then submitted to the Audiencia of Guatemala, sitting judicially. The Audiencia decided, on August 1, 1785, that since this was a request for a general declaration, and as litigation arising out of the Taranco-Acinera controversy might reach the Audiencia at a subsequent date, it was presently without jurisdiction in the premises. The Audiencia went on to state, however, that the President of the Audiencia of Guatemala was free at this stage to decide the matter himself after receiving the \textit{dictamen} (or opinion) of his law-trained assessor.\(^{102}\)

The assessor then gave an opinion substantially supporting the Fiscal de civiles, and this opinion was adopted by the President. It did not expressly deal with clandestine sales, as this part of the proceeding was contentious, and thus concerned only the two cessions \textit{in solutum}.\(^{103}\) That apparently ended the case so far as the claim of the Marquess of Acinera for exemption from the alcabala with respect to the properties ceded to him by Fr. Juan Ventura de Taranco was concerned, for no appeal from the decision of the President appears to have been taken. Nevertheless, by letter of January 1, 1786, the President of the Audiencia of Guatemala referred the whole question of the taxability of clandestine sales and cessions \textit{in solutum} to the Council of the Indies for resolution.\(^{104}\)

The next step, some five years later, was a \textit{consulta}, or report, of the first Sala of the Council of the Indies, dated May 27, 1791. In the usual manner, final deliberations in Council were preceded by written consultations from the Contadura and the Fiscal of the Council of the Indies, dated April 8 and 14, 1791. Only the former is of interest here. The Contadura stated that "there cannot be the slightest doubt that clandestine sales, where the writing is not formalized, are subject to the alcabala, because they are genuine contracts, just like those where such an instrument is used, because (that instrument) does not go to their substance, but is a means for their proof and for the security of the purchaser,"\(^{105}\) It nevertheless added that a general regulation of the question for all of the Indies would be most desirable, as this would discourage the notorious practice of clandestine sales.\(^{106}\)

\(^{101}\) Id. 61, 63.
\(^{102}\) Id. 64.
\(^{103}\) Id. 72-77.
\(^{104}\) See note 99, supra.
\(^{105}\) Consejo de las Indias. Sala primera. No. 7 of May 27, 1791 (Juan Ventura de Taranco), enclosures, A.G.I., \textit{supra} note 58, Guatemala leg. 413.
\(^{106}\) Id.
The Council of the Indies acceded to this recommendation, and its consulta of May 27, 1791, resulted in a circular cedula, dated September 5, 1791. The operative clause of that cedula is to the effect that His Majesty, in view of the actions and consultations as above described, was pleased to approve the declaration made by the President of the Audiencia of Guatemala to the effect that “todos los contratos, y daciones in solutum, y las ventas clandestinas en que no se formalice instrumento publico, estan sujetas a la contribuci6n del Real Derecho de Alcabala, como verdaderas, reales, y efectivas ventas,” and to direct that this declaration be extended, and generally observed, throughout all of his dominions in the Indies.

As shown by the indices of the New Orleans government and Guadalajara Audiencia, this cedula was duly received in both places. Its applicability throughout the formerly Spanish territories of the United States is thus completely beyond doubt. It follows that under the general law of Castile and of the Indies as evidenced by the unanimous opinion of Spanish jurists in the Indies and in the Peninsula and as confirmed by Royal Cedula of general applicability, sales of land in other than notarial form were “genuine, real, and effective sales.”

There remains the possibility, however, that this general rule was subject to limitation by local enactment. In its submission of April 8, 1791, the Contadura had reported that under the alcabala regulations in effect in Cuba, title to property did not pass until the execution of the notarial instrument, plus the certification by the escribano that the alcabala was actually paid. A subsequent note in the file indicates that a regulation to that effect could not be located in the archives, but there is no suggestion that even as drastic a departure from the “freedom of form” principle, if locally adopted, would be invalid or, for that matter, undesirable. As will be seen, local legislation as to the form of land sales did indeed exist in the Province of Luisiana but not in the Internal Provinces.

108. Id.
109. Indice etc., supra note 59, entry for September 5, 1791; CEDULARIO DE LA NUEVA GALICIA 48 (E. Lopez Jiminez ed. 1971). The cedula was also received in Laredo. See note 201, infra.
110. Notation in Consulta, supra note 105.
III. Legislation for Spanish Luisiana

Spanish Luisiana was subject to special rules both as to the recording of mortgages and with respect to the formalities of land transactions generally. These two areas will require separate attention, although they are of course intimately interconnected. For what is hoped to be better clarity, these analyses will be preceded by a brief description of the main features of the legal system of Spanish Luisiana after General O'Reilly's taking of possession of that province in 1769.

A. The Basic Framework

Pursuant to the Royal Order of April 16, 1769 which directed the formal taking of possession of Luisiana on behalf of the Kingdom of Spain, General Alexandro O'Reilly was authorized to set up, "in the military as well as the political establishments, the administration of justice and the management of my royal hacienda, the form of government, dependency and subordination which may be advisable according to the instructions you bear and those which may be issued to you later." In accordance with this ample if conditional authorization, General O'Reilly promulgated two sets of texts that are of decisive significance for the subsequent development of Luisiana law under Spanish rule.

The first of these consists of two documents: the Ordinances of the Ayuntamiento of New Orleans and the Instructions for adjudicating civil and criminal cases in Luisiana. These documents are collectively known today as "O'Reilly's Laws;" they are both dated November 25, 1769, and form the basis of the organization of the Cabildo and the central administration of justice. O'Reilly's "Laws" were recommended for royal approval by the Council of the Indies on February 27, 1772, and formally approved by royal cedula dated August 17, 1772. These two documents were drafted by Dr. Manuel Joseph de Urrutia and Av. Feliz Rey, two academically trained lawyers, or letrados, who accompanied...
O'Reilly's expedition. The Ordinances regulate the organization and functions, including the judicial functions, of the ayuntamiento or (secular) Cabildo of New Orleans. As shown by the annotations of the draftsmen, they are drawn, in the main, from the Recopilación of the Indies. The Instructions regulate, in the main, the rules of civil and criminal procedure to be applied by the Governor and the Cabildo, sitting judicially; but they also contain substantive rules, especially on criminal law and the law of succession, both testate and intestate. Again as shown by the annotations, the private law rules just mentioned were drawn mainly from the Recopilación of Castile, with fifteen references, and the Siete Partidas (with thirteen).

The second set of legal texts promulgated by O'Reilly consists of a series of instructions issued to the two Lieutenant Governors at St. Louis and at Natchitoches on January 26, 1770, and to the “Lieutenants” or, in subsequent parlance, the Commandants, of the nine original posts of Ste. Genevieve, the two German Coasts (St. Charles and St. John-the-Baptist); Pointe Coupée; Opelousas; Iberia with Ascension Parish; La Fourche; Rapides; and St. James’s Parish, on February 12, 1770. These instructions, too were drafted by Dr. Manuel de Urrutia and Lic. Feliz Rey. They are, in substance, adaptations of the Instructions of November 25, 1769, to the needs of judicial administration and legal recording outside of New Orleans.

The position of the Commandants under these 1770 instructions can most conveniently be analogized to that of lay county judges or, perhaps, justices of the peace. They had civil jurisdiction over controversies not exceeding 20 pesos, and over less serious criminal offenses. Civil controversies exceeding this amount had to be brought directly before the Governor General’s Court in New Orleans. In more serious criminal cases, the commandants were directed to take evidence and to forward the file for appropriate action by higher authority. Their probate jurisdiction was regulated in some detail, with additional reference to the pertinent provisions of the Instructions of November 25, 1769. Decisions in pro-

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113. B. Torres Ramirez, supra note 112, at 117; see also Instructions, 1 La. L.J. 1, 27-28 (1841) (preamble). Urrutia was the asecor, and Rey the prosecutor, in the New Orleans treason trial of 1769. See most recently J. Moore, Revolt in Louisiana, The Spanish Occupation, 1766-1770, at 200-15 (1976).

114. Ordinances and Instructions, 1 La. L.J. 1, 49-55 (1841).

115. A.G.I., supra note 58, Cuba, leg. 188A (holograph Spanish original; printed French translation). These Instructions, too, were approved by a cedula dated August 17, 1772. A.G.I., supra note 58, Cuba, leg. 180A.

116. See text at notes 112-14, supra.
bate cases were subject to appeal to the Governor General. The juris-
diction of the Lieutenant Governors was somewhat more extensive, encompassing controversies not exceeding 100 pesos.

The Lieutenants General and the Commandants were directed to take evidence in criminal cases with the assistance of two witnesses. There being no escribano at the posts, they were likewise authorized to draft and to authenticate, again with the assistance of two witnesses, the contracts and other acts of the inhabitants, with the additional requirement of three "instrumental" additional witnesses where needed. Their functions with respect to the drafting and the authentication of marriage contracts, which will be mentioned below in more detail, were regulated in a similar manner.

The two sets of instruments described above serve well to illustrate the fundamental difference between the systems for the administration of law inaugurated by O'Reilly for New Orleans and for the more distant portions of Luisiana Province. Although the population was largely Francophonic, and although French Creoles regularly occupied several of the positions of alcalde, official New Orleans was to all intents and purposes a Spanish city, comparable to one of the major municipalities in the Indies. There was a regular system of adjudication, with an escribano to certify and to keep the record as the clerk of court; with procuradores del numero (or pleaders) to prepare formal Spanish-language pleadings, and perhaps most importantly, with a letrado assessor of the government to advise the governor and cabildo sitting judicially as to the law to be applied. There was also, as we have seen, a repository of the current legislation of the Council of the Indies. There also were two, and after 1788, three escribanos in residence, and as

117. Instructions to the Lieutenants of the posts, §§ 1, 6-8, & 2-5.
118. Instructions to the Lieutenant Governors, § 1.
119. Instructions to the Lieutenants, §§ 9 & 10: Instructions to the Lieutenant Gover-
nors, § 8. See also text at note 130, infra.
120. On December 23, 1769, O'Reilly appointed Leonardo Mazange as one of the two procuradores del numero provided for. His stated objective was to aid litigants in forming their complaints and defenses before tribunals, and under laws, as yet unfamiliar to them. A.G.I., supra note 58, Santo Domingo leg. 2582, at 607-614.
121. See text at notes 58-59, supra.
122. The first two escribanos were Juan (Jean) Garic, the former greffier of the Conseil Supérieur, and Andres Almonaster y Roxas. The number of escribanos in New Orleans was fixed at two by a cedula of June 21, 1780, A.G.I., supra note 59, Cuba, leg. 180A. Garic's successors were Leonardo Mazange (1780-1782), Fernando Rodriguez (1783-1787), and Pedro Pedesclaux, who held that office well into United States rule. Almonaster's practice passed to Rafael Perdomo (1783-1790) who was removed for usury, and then to Carlos Ximinez (1791-1803). Luis Liotau was appointed to the third position of escribano, created
shown by their archives which have been preserved and are part of the official New Orleans Notarial Archives today, these escribanos were manifestly capable of drafting the appropriate notarial documents in the requisite form and in the Spanish language.  

The situation at the posts, on the other hand, was quite different. There were no escribanos at that level, and for this reason, the commandants were authorized to pass notarial acts with the additional attestation of witnesses. As already described, their judicial powers were severely circumscribed as to subject matter and amount in controversy. Furthermore, although there were occasionally commandants who were native Spanish speakers, and although an effort was made to conduct at least the correspondence between the governor and the commandants in that language wherever possible, most commandants were Francophonic. As a practical matter, the posts were governed in the French language, and the official documents compiled or recorded at Post level were overwhelmingly written in French, with heavy borrowings from French notarial precedents.  

As late as 1796, the situation just described had remained basically unchanged. In that year, the then Governor General of Luisiana and West Florida, Baron de Carondelet, reported that the diligencias (or official communications) from the posts were almost always in a foreign language, as there was no one available locally who could speak Spanish. The Commandants were underpaid, and if they managed to find a Spanish-speaking scribe, that person was likely to be one of the two or three locally resident “Españoles pobres y sin instruccio.” Carondelet proposed the creation of cabildos at St. Louis, Pointe Coupée, Baton Rouge, and Atakapas or Opelousas, and the stationing of a letrado in St.  

by cedula of February 25, 1788, A.G.I., supra note 58, Cuba, leg. 180A. His practice passed to Francisco Broutin (1790-1799) and then to Narcisco Broutin. See A.G.I., supra note 58, Santo Domingo, leg. 2351, at 617-21; id. leg. 2539, at 78-81; see generally C. MADUELL, MARRIAGE CONTRACTS, WILLS AND TESTAMENTS OF THE SPANISH COLONIAL PERIOD IN NEW ORLEANS, 1770-1804, at iii (1969).  

123. See, e.g., text at notes 137 and 172 infra.  

124. On February 19, 1770, O'Reilly instructed A. de Mézières, the Lieutenant Governor of Natchitoches, to conduct all correspondence with the New Orleans authorities in Castilian. A.G.I., supra note 58, Cuba, leg. 188A; English translation in 1 H. BOLTON, ATHANASE DE MéZIÈRES AND THE LOUISIANA-TEXAS FRONTIER 1768-1780, at 150-51 (1914).  

125. See, e.g., text at note 183, infra. This phenomenon will be documented more fully in a forthcoming study on marriage contracts in Spanish Luisiana, covering the post judicial archives of Ascension, Atakapas, Avoyelles, Cape Girardeau, the Two German Coasts, New Madrid, Opleousas, Ouachita, Pointe Coupée, Ste. Genevieve, St. Charles and St. Ferdinand, and St. Louis.
Louis.\textsuperscript{126} His proposals were not received without sympathy in Madrid,\textsuperscript{127} but the war and the cession prevented whatever further action might eventually have been taken. It is this background of a veritable "dual state"\textsuperscript{128} that has to be kept constantly in mind when discussing the legal history of Spanish Luisiana.

B. Mortgages

Both the Ordinances of the Ayuntamiento and the Instructions to the Commandants contained provisions regarding mortgages. The former dealt with the subject in connection with the delination of the functions and duties of the escribano of the Cabildo. The pertinent provision reads as follows:

The escribano of the Cabildo shall also annotate, in a separate book, mortgages in all contracts that are drafted by him or another, placing in every instrument a certificate of the burden or mortgage with which the thing sold or mortgaged is obligated, in order to avoid the frauds that can result from its omission, thus effectuating the purpose of the law.\textsuperscript{129}

The Instructions to the Commandants reflected the scheme established by the Ordinances of the Cabildo. As already mentioned, there were no escribanos at the post level, and the commandants were generally authorized to pass notarial acts. There was a separate provision dealing with marriage contracts. These, too, were to be passed by the commandants in the same manner as notarial acts at the post level, but wherever a marriage contract, or any other act passed by the commandants, embodied a mortgage contract, the commandant had to give notice of that fact to the escribano of the Cabildo, "supplying him the part of the act that contained the mortgage, with its date and all the

\textsuperscript{126} A.G.I., supra note 58 Santo Domingo, leg. 2351, at 489, 490-91 (1796).

\textsuperscript{127} See id. at 494, 495 (report of the Fiscal of the Council of the Indies, October 1, 1798, concurring in the recommendation of stationing a letrado in St. Louis, with the suggestion, however, that this be either the asesor of the government or of the intendancy in New Orleans).

\textsuperscript{128} This term is borrowed from E. Fraenkel, The Dual State, A Contribution to the Theory of Dictatorship (1941), but is not used here to describe either a central system combining arbitrary power with the Rule of Law, or a comprehensive system according one law to the rich and another to the poor (see especially Ten Broek, California's Dual System of Family Law: Its Origin, Development, and Present Status (2 pts.), 16 Stanford L. Rev. 257, 900 (1964)). It is employed, rather, in reference to what might be called legal culture and subculture, usually associated with local autonomy in the administration of law in non-metropolitan areas. See generally J. Dawson, A History of Lay Judges 268-86 (1960).

\textsuperscript{129} Ordinances, supra note 112, § IX 4 (translations from the Spanish).
circumstances, so that the said escribano can make a note of it as ordained in a general regulation of the Government.\textsuperscript{130}

The passage just quoted has remained obscure until recently, but both the Spanish original and the printed French text of a regulation by General O'Reilly on the subject of mortgages have now been located in the Seville archive.\textsuperscript{131} The regulation is dated February 12, 1770. It starts by referring to two provisions in the fifteenth title of Book 5 of the Recopilación of Castile: § 2, which provides that vendors who conceal charges upon their houses, heritages, or possessions from their purchasers are liable to pay twice the amount realized by such mortgages; and § 3, which reproduces the original cedula on mortgage registers, given at Toledo in 1539.

It will be recalled that the Toledo cedula had called for the keeping of life rent and mortgage registers at all places where royal jurisdiction was exercised, and had provided that all mortgage contracts not there registered within six days were not enforceable in law or opposable to third parties. It will also be recalled that the pragmática of 1768, or more than two centuries later, grew out of the realization that the Toledo cedula had remained a dead letter: registers had not been established, and the courts had continued to give effect to unregistered mortgages.\textsuperscript{132} O'Reilly's regulation of February 12, 1770, is thus an attempt, paralleling that of the pragmática of 1768, to put, as it were, some teeth into the cedula of 1539. The significance of taking this step in Luisiana in 1770 becomes apparent when it is recalled that the pragmática of 1768 had not been enacted in the Indies, and that even in Mexico, it was not implemented until 1784.\textsuperscript{133}

The regulation then goes on to refer to the inconveniences and injustices of clandestine mortgages. Its legislative purposes are stated to be the desire to enable the inhabitants of the Province to "enjoy the important and salutary benefits" of those laws of the Nueva Recopilación, and the wish to put an end to past abuses. The operative clauses are five in number.

First, "all acts, contracts, and obligations which are made with a mortgage charge on property, shall be inscribed by the notary (escribano) of the Government and Cabildo, in a book which he shall keep for such purpose" within six days from the date of the transac-

\textsuperscript{130} Instructions to the Lieutenants, \textit{supra} note 115, § 10.
\textsuperscript{131} A.G.I., \textit{supra} note 58, Cuba, leg. 188A (printed French translation); A.G.I., \textit{supra} note 58, Santo Domingo, leg. 1223 (Spanish holograph copy certified by O'Reilly).
\textsuperscript{132} See text at notes 63-65, \textit{supra}.
\textsuperscript{133} See text at note 93, \textit{supra}.
tion, "subject to the penalties imposed by the said laws" (i.e., of the Nueva Recopilación).

Secondly, in case of insolvency, only creditors inscribed in the mortgage register were entitled to preference, in the order of priority, again pursuant to the "said laws."

Thirdly, to assure the full effect of these provisions, the escribano before whom these acts, contracts, and obligations were passed was held, within six days, to give an exact and substantiated account of them to the escribano of the Government and Cabildo, so that he might inscribe the said notice.

Fourth, escribanos failing to give notice as thus directed were personally liable for the damage occasioned by their neglect in this respect.

Finally, "no act of sale, transfer, or alienation of houses, heritages, or slaves shall be passed unless the charges and mortgages to which they are subject are first listed in a certificate by the said escribano of the Government, of which mention shall be made in the said act (of sale)."

It will be observed that this mortgage regulation makes the inscription of mortgage obligations in the mortgage register a "constitutive" element of their validity both inter partes and erga omnes, and provides the additional sanction of the personal liability of the escribano who fails to effect the registration in the manner prescribed and in the time provided.

This scheme corresponds to the system put into effect in Castile by the pragmatica and subsequently codified by the provisions of the Mortgage Law of 1861 which are still in effect today. Its implementation in Luisiana in 1770, on the other hand, seems remarkable for at least two reasons. First, as already mentioned, the pragmatica of 1768 was an enactment of the Council of Castile that was not reenacted at the time by the Council of the Indies. Secondly, the transmission of the mortgage validity and registration system laid down by that pragmatica occurred through the cedulas of 1778 and 1783; the latter one expressly allowed for variations in the time requirements for filing to allow for greater geographic distances. No such allowances were made by O'Reilly's mortgage regulation of February 12, 1770. It follows that this regulation, while in harmony with then-recent reform legislation in the Peninsula, was well ahead of the law of the Indies by more than a decade.

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134. See text at note 67, supra
135. See text at notes 91-92, supra.
Another point worth noting is that in addition to implementing the "constitutive" eighteenth-century Castilian system of mortgage validity through registration, the 1770 regulation established, in its ultimate operative clause, requirements as to the contents of notarial acts for the sale of immovables and slaves. As contradistinguished from the rules pertaining to mortgages, this provision was not accompanied by a sanction. As we shall see presently, however, that sanction was supplied later that year by another regulation, relating to the sale of immovables and slaves. Before proceeding to discuss that regulation, however, it seems appropriate to speculate about the practical effects of the mortgage regulation of 1770. How could that regulation possibly be implemented in as vast a territory as Luisiana—from St. Louis to Balize at the mouth of the River; from Natchitoches to Biloxi?

So far as New Orleans itself is concerned, the answer seems simple, for at least a major part of the Spanish mortgage registers has been rediscovered in the Mortgage Office of the Civil District Court of New Orleans. The oldest records in that Office, Record Books 1 and 2, are readily identified as registers of the Annotator of Mortgages. These registers start with March 15, 1788. Entries until early January, 1804, are in Spanish; the French language was used from January 10, 1804. The first volume is slightly damaged, and no like records for prior periods have as yet been located. Nevertheless, it can be readily established from the New Orleans Notarial Archives that the Mortgage Register was in existence as of February, 1771.

The judicial records of the Governor and Cabildo of New Orleans show that the Spanish judicial authorities of that city as well as the pleaders and escribanos were fully familiar with the mortgage regulation of 1770, and that they followed and applied it routinely. In Samora v.

136. Mortgage Office, Civil District Court of New Orleans, Record Books 1 & 2; id. 2, at 228r. All annotations are by Pedro (Pierre) Pedesclaux, who succeeded to the notarial practice of Garic in 1788 (see note 122, supra).

137. The first notarial act by Juan (Jean) Garic (the escribano of the cabildo and the first annotator of mortgages) containing the annotator's certificate is a slave sale by Thomas de Acosta to Diego de Alba as agent of Joseph Sanchez, dated February 16, 1771, 2 Garic 18-19. The notarial acts referred to hereinafter are on file in the Notarial Archives, Civil District Court, New Orleans, where they are bound separately for each notary (or escribano) in several volumes, and paginated by folio. They are cited here by volume, notary, and folio. The instrument of sale just cited states that the slave is "libre de gravenmen, como constara i el final para certificacion del anotador de hipotecas." At the end, there appears a statement, signed by Garic, anotador, reading: "Certifico en vista de los libros de hipotecas y tributos de mi cargo, que el negro contenido en la escritura antecedente no consta esté grabado hasta este dia." See also notes 172 and 177, infra.
Ramoz,\textsuperscript{138} for instance, the plaintiff brought an action on a mortgage; in addition to the notarial mortgage instrument, he submitted a certificate of registration as part of his proof documentary. In the Bertucat Estate\textsuperscript{139} case, the court approved a scheme of division and distribution reached by the parties, and ordered a beneficiary thereunder to furnish security by way of mortgage, "tomandose luego razon en el oficio de hipotecas." In Petition of José Mendes et ux,\textsuperscript{140} the spouses were permitted to cancel a mortgage given by the husband as security for his wife's dowry; the escribano then certified that appropriate notice had been given to the Annotator of Mortgages.

Compliance with the mortgage regulation outside of New Orleans was, however, another matter. Printed French texts would appear to have been communicated to the Lieutenant Governors and the Commandants not only in the lower territory,\textsuperscript{141} but in the Illinois district as well. An inventory of the archives of government at St. Louis, signed by Lieut. Gov. Manuel Perez on June 20, 1792, includes an item styled "Dos exemplares impresos en el idioma Francés para el metodo de registrar los autos contrados é hipotecas."\textsuperscript{142}

An examination of the Spanish judicial archives of St. Louis and of the other major posts of the Upper Territory failed to yield any evidence of attempts to comply with the requirement of the Mortgage Ordinance of giving an "exact and substantial account" of mortgage transactions to the Annotator of Mortgages in New Orleans. Nevertheless, the records also show the use of local recordation techniques well suited to combat the evil of clandestine mortgages, to which O'Reilly's mortgage ordinance was addressed.\textsuperscript{143} Mortgage contracts were passed in the Upper Territory in the same manner as conveyances, \textit{i.e.}, by surrogate notarial act of the Lieutenant Governor or commandant, acting with the assistance of two witnesses as prescribed by the Instructions.\textsuperscript{144} They were kept in the post judicial archives, and cancellations were recorded either on the instruments themselves or, occasionally, by a subsequent instrument also incorporated into the archives.\textsuperscript{145}

\begin{footnotesize}
\begin{enumerate}
\item 138. A.G.I., supra note 58, Cuba, leg. 170 (Carondelet, J.; Vidal, asesor, 1791).
\item 139. A.G.I., supra note 58, Cuba, leg. 170 (Carondelet, J.; Vidal, asesor, 1793).
\item 140. A.G.I., supra note 58, Cuba, leg. 169 (M. de Salcedo, J.; Vidal, asesor, with \textit{dictamen}, 1803).
\item 141. Two printed copies of the mortgage regulations were found in the Natchitoches file in A.G.I., Cuba, leg. 188A. See also note 146, \textit{infra}.
\item 142. A.G.I., supra note 58, Cuba, leg. 122A.
\item 143. See text after note 133, supra.
\item 144. See text at note 119, supra.
\item 145. \textit{E.g.}, F. Dorlac to A. Chouteau, 1785, paid and cancelled, 1786, Historical Society
\end{enumerate}
\end{footnotesize}
On the other hand, the Natchitoches judicial archives indicate that compliance with the Ordinance was both prompt and substantially more complete at least in this major post of the Lower Territory. As early as June 27, 1770, a mortgage executed before Athanase de Mézières in surrogate notarial form carried the following annotation of the same date: "Envoyé Copie à l’écritain de cabildo." The full extent of compliance can only be determined by a post-by-post analysis of judicial archives in conjunction with a study of the New Orleans mortgage register itself—a task that substantially exceeds the scope of the present study. Nevertheless, it seems reasonably clear even at this point that what might here be called the secondary legislation of the O'Reilly era had a considerable impact beyond New Orleans.

C. Sales of Immovables and Slaves

At the outset of the present study, mention was made of the Louisiana case of Gonzales v. Sanchez. There, the court had addressed itself to two arguments: first, that pursuant to the Nueva Recopilación, sales of real estate had to be made before a notary, and secondly, that a like provision had been introduced in Luisiana by an ordinance of Governor Unzaga, which prohibited verbal and "sous seing privé" sales of land.

The court, which was manifestly not familiar with the cedula of September 5, 1791, had disposed of the first contention by holding (correctly) that the provision relied on was a fiscal measure, tied to the collection of the alcabala, and by then proceeding to hold (quite wrongly) that Spanish Luisiana had been exempt from that tax. The treasury accounts for the Province show clearly that the alcabala was indeed levied under Spanish rule, but the court's error in this regard was ultimately harmless. For as shown above, violation of Law 101 of the alcabala rules was not a ground for nullity. Furthermore, for the sake of completeness, it might be added that for some reason or other, the...
Louisiana alcabala collection records that are still extant today do not include receipts for taxes on the sale of houses,\(^{153}\) and the notarial records do not suggest that any such taxes were levied.

The second argument in *Gonzales v. Sanchez*, dealing with Governor Unzaga's land sales ordinance,\(^ {154}\) presented an unusual difficulty to the Louisiana court, for it was, in Judge Martin's words, "a document of which neither the original, nor any copy, is now extant."\(^ {155}\) He went on to express doubts as to Unzaga's authority to enact such an ordinance if, indeed, that had been done, adding that it did "not appear to have ever been considered of any legal validity," and indeed, it had been "totally disregarded" by the Superior Court of New Orleans Territory.\(^ {156}\)

Judge Martin declined to give effect to this elusive enactment, especially since to do so would unsettle hitherto undisturbed land titles; and his decision that parol contracts for the sale of land were valid under Spanish law as it had prevailed in Louisiana quickly passed into constant jurisprudence.\(^ {157}\) We are not concerned here with the justification of that decision in policy terms, which seems fairly obvious. Our question is, rather, whether the court was wrong once again in its reading of Louisiana legal history. Did the ordinance exist, and if so, what did it provide?

The historical foundations\(^ {158}\) of the rule of *Gonzales v. Sanchez* disappeared almost exactly at the time of its passage into Louisiana constant jurisprudence. In 1841, Gustavus Schmidt published an English translation of the 1769 Ordinances and Instructions,\(^ {159}\) which should have put careful students on notice as to the strong possibility that the Ordinance of 1770 might in fact exist, if only as a device to lend additional effectiveness to the Register of Mortgages there provided for.\(^ {160}\) (Knowledge of the ultimate clause of the 1770 mortgage regulation made the existence of the land and slave sales ordinance a virtual certainty, but that regulation escaped notice until the present.\(^ {161}\)) In the same year,

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\(^ {153}\) A.G.I., *supra* note 58, Santo Domingo, leg. 2632, contains the alcabala accounts of Louisiana for the years 1790 to 1795. These are mainly export and import charges, but one category is a tax imposed on the sale of vessels by notarial instrument. See, *e.g.*, Cuenta de 1790, at 935-36.

\(^ {154}\) 4 Mart. (N.S.) at 659-60.

\(^ {155}\) *Id.*

\(^ {156}\) *Id.* at 661.

\(^ {157}\) See note 11, *supra*, and accompanying text.

\(^ {158}\) See text at notes 3-9, *supra*.

\(^ {159}\) See note 112, *supra*.

\(^ {160}\) See text at note 129, *supra*.

\(^ {161}\) See text at notes 131-34, *supra*. 
Schmidt also wrote an article on the so-called Batture Question, in which he reported that in a printed brief submitted by Isaac T. Preston, one of counsel for defendants in the then-current Batture case of Municipality No. 2 v. Orleans Cotton Press, parts of the text of the 1770 Ordinance were quoted. This reference does not, however, appear in the printed report of argument of counsel, and was not dealt with in the majority opinions or in Judge Martin's dissent. But any continuing doubt as to the existence of the ordinance was put to rest by the publication, in 1854, of the third volume of Gayarré's History of Louisiana. The author of that work stated, rather laconically, that "[w]ith regard to the private sale of lands and other immovables, Unzaga had issued, on the 9th of November, 1770, a prohibitory decree, which is of some importance." Despite the seemingly unusual brevity of this reference, he gave additional evidence of his awareness of its importance by including, in the appendix of his work, the full text of the elusive ordinance.

The ordinance starts by reciting that Don Luis de Unzaga, Colonel in the armies of his majesty and Intendant and Governor-General in and for the Province of Luisiana, had "from experience, become acquainted with the different frauds and malpractices which are apt to be committed in all sales, exchanges, permutations, barters, and generally in all alienations concerning negroes, immovables, and real estates, which are made clandestinely and in violation of the public faith, by a simple deed in writing under private seal, whereby the inhabitants of this province are greatly distressed, their rights put in jeopardy, and the administration of justice reduced to a state of confusion." It then goes on to express the Governor General's intent "to remedy such pernicious abuses, and next, to establish good order in this commonwealth and to govern it as are all the other possessions of his Majesty."

It should be interjected at this point that almost exactly four decades previously, in 1733, the Conseil Supérieur of French Louisiana had expressed substantially the same views as to clandestine transfers of immovables in the colony. In a decree adopted on September 9 of that year, the Council noted that although it had been theretofore provided that such sales could not be made without official permission, many persons had nevertheless sold their houses, habitations, and other immovables

163. 18 La. 122 (1841).
165. Id. at 99.
166. Id. at 631-32.
167. Id. at 631.
without obtaining the approval of the Council and "in fraud of their legitimate creditors."\textsuperscript{168}

The Superior Council then proceeded to prohibit all sales and purchases of immovables without the permission of the judicial authority of the \textit{situs}, plus publication of the intended transaction on three consecutive Sundays at the appropriate principal public places. Sales in contravention of these provisions were declared to be "\textit{nul}." Notaries were directed to assure compliance with the terms of this decree when passing or receiving contracts for the sale of immovables. Purchasers were rendered liable to pay the purchase price to the vendor's creditors even if they had already paid to the vendor, saving, however, recourse against the latter. Finally, offending purchasers and vendors were subjected, \textit{in solidum}, to a fine of fifty \textit{livres} for the benefit of the hospital.

Far from being an ephemeral oddity, then, Governor Unzaga's 1770 land transfer legislation followed sound Louisiana historical precedent. The substantive provisions of his ordinance are three in number:\textsuperscript{169}

First, "no person, whatever be his or her rank or condition, shall henceforth sell, alienate, buy, or accept as a donation or otherwise, any negroes, plantations, houses and any kind of sea-craft, except it be by a deed executed before a Notary Public; to which contracts and acts of sale and alienation shall be annexed a certificate of the Registrar of Mortgages."

Secondly, "all other acts made under any other form shall be null and void, and as if they had never been made; . . . the sellers and buyers shall have no right to the things thus sold, bought or exchanged; . . . they cannot acquire any just and legitimate possession thereof; . . . and . . . in cases of fraud, all parties therein concerned shall be prosecuted with all the severity of the law."

Thirdly and finally, "the Notary who shall make a bad use of the confidence reposed in him by the public and of faith put in the fidelity of his archives- and who shall have the audacity to antedate or postdate the deeds executed before him, shall, for this delinquency, be declared unworthy of the office he holds, and shall be condemned to undergo all the penalties provided for such a case;

\textsuperscript{168}. Superior Council of Louisiana, Arrêt of September 9, 1733, reprinted in Dart, \textit{The Cabildo Archives}, 3 LA. HIST. Q. 71, 83-84 (1922) (the translation from the French original is the present author's). The prior restrictions on land sales thus referred to were contained in section 14 of a French Royal Decree of August 10, 1728, which required the approval of the Company of the Indies for all sales of concession lands in Louisiana. Text in \textit{4 Pub. L. Hist. Soc.} 107, 114 (1908).

\textsuperscript{169}. 3 C. Gayarré, \textit{supra} note 164, at 631-32.
and said Notary, should he forget to annex to his acts the certificate of the Registrar of Mortgages as aforesaid, shall be proceeded against according to the circumstances of the case."

The final clause of the ordinance provides that "no one shall plead ignorance of this proclamation we order and decree, that it be promulgated with the beat of the drum; and that copies thereof certified by the Secretary of the Government and by the Secretary of the Cabildo be posted up at the usual places in this town, and sent to all the posts dependent on this Government."170

Was this ordinance really, as Judge Martin suggested in Gonzales v. Sanchez, an instrument that had "not... ever been considered of any legal validity?"171 So far as New Orleans itself is concerned, the answer is simple. The New Orleans Notarial Archives show regular compliance with the Land and Slave Transaction Ordinance as of mid-February, 1771. Notarial acts for the sale of slaves and immovables made after that date regularly make reference to the certificate of the annotator of mortgages as required by the ordinance; and the notarial acts passed by the escribano of the cabildo (who was also ex officio the annotator of mortgages) include the certificate itself at the end of the document.172

Additionally, the ordinance was judicially considered in several decisions by the cabildo of New Orleans. The first case in point here is Baure v. Boarie,173 tried before Juan Ventura Morales, who was an alcalde at the time, in 1783. The plaintiff sought recovery of the purchase price for the sale of a slave child at auction. The defendant, who had been the successful bidder, had refused to cooperate in the passing of a formal act of sale before Leonardo Mazange, a New Orleans escribano. His initial defense was that the slave had dropsy, but he later urged that the sale was incomplete in any event, there having been no compliance with the solemnities prescribed in the decree proclaimed by "O'Reilly" [sic].174 Alcalde Morales thereupon ruled that the decree be translated into Spanish. An examination of the original record, which is still extant, shows that the decree alluded to is none other than the so-called Unzaga

170. Id.
171. Gonzales v. Sanchez, 4 Mart. (N.S.) 657, 661 (1826).
172. See note 137, supra, and e.g., Jean Feneteau & Andrés Fenetau, exchange of land, February 19, 1771, 2 Garic 22; R. Gautier to J. de Aguiar, slave sale, January 13, 1771, 1772 Almonaster 3; see also note 177, infra.
174. Id. at 276.
ordinance of November 3, 1770. Since a translation into Spanish was required by the ruling of the alcalde, it seems also clear that the ordinance was initially issued in the French language. After the ordinance was produced, there was some additional legal skirmishing, but then the plaintiff agreed, with some haste, to dismiss the proceedings and to pay the costs of the action.  

The Bauré case removes any doubt both as to the existence of the ordinance of November 3, 1770, and as to its enforcement by judicial authority under Spanish rule, although it might also suggest some lack of familiarity of the parties and their pleaders with the actual writing of the ordinance itself. Rafael Perdomo, who was the escribano of record, regularly complied with its requirements in his own notarial acts of sale, but this may, have been due more to adherence to “precedent” (in the original meaning of that word) than to actual knowledge of the law. Be that as it may, the lesson of Bauré was speedily appreciated by the New Orleans Spanish legal establishment.

The foregoing is apparent from two other proceedings in the Spanish judicial archives, both of which originated in 1788. In the first one, Brasilier, a widow successfully applied for the issuance of new title papers complying with the formalities required by the law prevailing under Spanish rule, with the allegation that “the sale... was concluded by simple writing, as was customary in the period of French rule.” In Ramis v. Beluche, a successful claim arising out of the sale of slaves in the French period was established by the like allegation. In both instances, the moving parties clearly appear to have assumed that even written instruments of sale of slaves or immovables were ineffective under the law then prevailing in Spanish Luisiana unless they complied at least with the formalities required for notarial acts.

Outside of New Orleans, the situation is somewhat less clear. Mention has already been made of the Missouri case of Cutter v. Waddingham, where counsel for the defendant had argued that Un-

176. Porteus, supra note 173, at 279.
177. E.g., A. Mercenario to José Cuntia, slave sale, January 4, 1783, 1 Perdomo 2; Tomas de Acosta to Pedro Aragony y Villegas, real estate sale, January 21, 1783, 1 Perdomo 21.
179. Ramis v. Beluche (Beluche succession), September 3, 1788 and May 26, 1972, summarized in Laura L. Porteus Papers, Louisiana State University, Baton Rouge. The original record has not as yet been located.
180. 22 Mo. 206 (1855), discussed in text at notes 13-17, supra.
zaga's 1770 ordinance had not been observed in the Upper (or "Illinois") Territory; indeed, as he pointed out, plaintiff's own chief title paper, dated 1774, did not comply with the formalities prescribed by that ordinance. Counsel had also said that the ordinance "was certainly never in force in Illinois, as has been decided repeatedly by this court and the Supreme Court of the United States," but this latter assertion seems extravagant and unsupported by direct authority.

An examination has been made of conveyances in the Spanish judicial archives of St. Louis and of Natchitoches, the leading posts of the Upper and the Lower Territories under Spanish rule. The St. Louis French and Spanish Judicial Archives contain 2,991 numbered items, all but a few of which refer to the Spanish period (1770-1804). Substantially more than half of these are conveyances or mortgages of land or slaves; conveyances of real estate predominate. All of these instruments are executed in careful compliance with the requirements of the Instructions for surrogate notarial instruments at the posts in the absence of escribanos, i.e., before the Lieutenant Governor or his representative and two witnesses of assistance, but there is no mention of the certificate of the annotator of mortgages.

It seems impossible to determine whether this scrupulous compliance with surrogate notarial form in land and slave sales contracts in the Upper Territory was intended, as it were, as half-compliance with the Land and Slave Transfer Ordinance. Resort to notarial form may have been nothing more than an atavism, especially where the documents were drafted in French and followed French notarial precedent. This method of land sale contracting was so deeply ingrained, especially in the Upper Territory, that even United States and Virginia legislation expressly provided for it as an alternative method of conveyancing on the left bank of the River long after the change of sovereignty. Another explanation may have been the felt need for proof by authentic act or, in

181. Id. at 268, 272.
182. Missouri Historical Society of St. Louis, St. Louis Historical Records (calendar listings and personal inspection).
183. The Virginia Act of October, 1778, 9 Hening's Va. Stats. 552, 553, provided for the establishment of civil authorities to which the French inhabitants had been accustomed. The incumbents of such offices were directed to "exercise their several jurisdictions, and conduct themselves agreeably to the laws which the present settlers are now accustomed to." Pursuant to this authority, J. A. Labuxiere was appointed notary in Kaskaskia on August 30, 1781. Kaskaskia Records 1778-1790, at 260-63 (C. Alvord ed. 1909). The Northwest Ordinance of July 13, 1787 enacted specific rules for successions and conveyances, "saving, however, to the French and Canadian inhabitants . . . . their laws and customs now in force among them, relative to descent and conveyance of property." 1 Stat. 50, 51 note a. Numerous French-style Kaskaskia, Cahokia, and Fort Chartres conveyances
any event, by authenticated writing rather than other, surely less reliable methods. Some of the major disqualifications of witnesses established by Castilian law were expressly spelled out in the Post instructions, and this must have given some notice of evidentiary difficulties under the new law. Furthermore, the Post judicial archives are not likely to contain many instruments not drafted in compliance with these instructions, i.e., contracts by simple writing (oral contracts were by definition unrecordable as such).

The Natchitoches French and Spanish judicial archives contain some 2,500 sets of documents relating to the Spanish period, including a large number of slave and land conveyances. Seemingly without exception, these instruments comply with the form prescribed by the Instructions for surrogate notarial acts at posts without escribanos, i.e., they are acts passed by the lieutenant governor or his locum tenens with the assistance of two witnesses. We have seen further above that the Mortgage Ordinance was known in Natchitoches as early as June 27, 1770, but no evidence of a like awareness of the Land and Slave Transfer Ordinance could be found in any Natchitoches post document before late in 1774. As of October 12 of that year, Natchitoches land and slave conveyances contain an express undertaking by the vendor to provide the purchaser with a certificate of the annotator of mortgages to the effect that the property sold is without lien as warranted; the obligation to pay the purchase price is made contingent upon the production of that certificate.

This practice demonstrates that the Land and Slave Transfer Ordinance was not only known in Natchitoches by the end of 1774, but that every effort was made by the local authorities to comply with its requirements in spite of the trouble and distance involved. This ordinance was also known in Pointe Coupée by 1772, but local practice at that post appears to have been to procure the annotator's certificate before the

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184. Instructions to the Lieutenants, supra note 115, § 11 (disqualified women, monks, minors less than fourteen years of age, and "those who are unworthy of belief").

185. Conveyance Records, vols. 1-31, Office of the Clerk of Court, 10th District Court, Natchitoches, La. The total count for the French and Spanish periods, from August 1, 1738, to October 29, 1803, is 3068 registered items.

186. See note 146, supra, and accompanying text.

187. H. Trichele to J. Davion, land sale, 1774, Natchitoches Parish Deed Records, No. 5, instrument 946 (before A. de Mézière, Lt. Governor). See also, e.g., Ledoux to Pavie and Pavie to Brousset, slave sales, 1778, id., No. 11, instruments 1247 & 1248; see note 189, infra.
In conclusion, it seems clear that throughout the Province of Louisiana, the so-called Unzaga Ordinance, at the very least, reenforced a pre-existing custom of effecting land transactions in notarial form. (The pervasiveness of that custom is demonstrated by the fact that it was not infrequently resorted to even by a buyer and a seller who were both illiterate to the point of being unable to sign their names.) Beyond that, the Ordinance as such was known, and was complied with to the extent locally possible, in the major post of the Lower Territory. There is no evidence, however, of similar knowledge or attempted compliance in the Upper Territory. More generally, it seems quite beyond doubt that outside of New Orleans, the standard form of land transactions in Spanish Louisiana was a surrogate notarial instrument, while in New Orleans itself, it was a proper notarial act.

IV. THE SOUTHWESTERN UNITED STATES UNDER SPANISH AND MEXICAN RULE

A. The Basic Framework

Private land transactions presuppose some population, and some private ownership of land. In Spanish North America west of the Sabine river, the former seems to have regularly preceded the latter: land was granted by the Crown in private ownership only some time after the initial settlement. Private land transactions, in turn, occurred only some time after the initial land grants. For this reason, as a practical matter, our inquiry is restricted to the territory covered by the present States of Texas, New Mexico, Arizona, and California while under Spanish or Mexican rule. Colorado apparently did not progress beyond the land grant stage, barely reached before its incorporation into the United States;190 Nevada and Utah appear to have been entirely unaffected by Spanish or Mexican land law, whether public or private.

188. See, e.g., Croizet to LeDoux, land sale, March 20, 1772, conveyance Records, Pointe Coupee Parish, Book 1771-72, No. 484 (annotator's certificate dated October 24, 1771); J. Marre to J.M. Armand, Slave Sale, November 19, 1771, id., No. 459 (certificate dated October 5, 1771).

189. Natchitoches Parish Deed Records, No. 5, instrument 948, land sale, 1774 (name of parties illegible). In H. Trichele to J. Davion, supra note 187, both parties also signed with an X.

190. See Sanchez v. Taylor, 377 F.2d 733, 737 n.3 (10th Cir. 1967). The writer has not examined the deed records in Southern Colorado counties with Hispanic-name settlements, and must therefore reserve judgment on this matter.
The area where private land transactions occurred under Spanish rule corresponds, in the main, to the Spanish Provinces of Texas, Nuevo Mexico, and (since 1804, Alta) California. It also includes three territorial fragments: the so-called Nueces Strip with the city of Laredo, which was part of the colony of Nuevo Santander, the presidios of Tuscon and Tubac in Arizona, which belonged to the Province of Sonora and Sinaloa, and the Mesilla Valley in Southern New Mexico, which was part of the Province of Nueva Viscaya. There were several realignments of political organization after Mexican independence, especially in the territorial unit that included the Arizona presidios. As a general proposition, however, it seems permissible to identify the three major areas with the Mexican State of Coahuila y Texas and the Mexican Territories of Nuevo Mexico and California. The Nueces Strip, the Mesilla valley, and the Arizona presidios were part of the Mexican States of Tamaulipas, Chihuahua, and Sonora, respectively.\footnote{191. See generally E. O’GORMAN, HISTORIA DE LAS DIVISIONES TERRITORIALES DE MÉXICO 3-25 (3d ed. 1966) (Spanish period); id. at 35-101 (Mexican period). As to the evolution of the international boundary, see C. SEPVLEDIA, LA FRONTERA NORTE DE MÉXICO 41-80 (1976). Martinez, On the Size of the Chicano Population: New Estimates, 1550-1900, 6 Aztlan, INTERNATIONAL JOURNAL OF CHICANO STUDIES RESEARCH 43 (1975) provides most of the demographic data required. See especially id. 52 fig. 1, 55 tab. 3.}

In chronological terms, our inquiry commences shortly after the Spanish reconquest of New Mexico (1692), when town lots and lands were granted in private ownership to conquerors and settlers.\footnote{192. These grants are collected in Cabildo de Santa Fé, Toma de razon, 1713, Spanish Archives of New Mexico, Microfilm Roll 23, frames 40-56, State of New Mexico Records Center, Santa Fé, New Mexico.} It ends with the acquisition of southern Arizona by the United States through what is commonly known as Gadsden’s purchase in 1853.\footnote{193. Gadsden Purchase Treaty, 10 Stat. 1031 (signed December 30, 1853; effective June 30, 1854).} The earliest conveyances that could be located in the areas here investigated are from Santa Fé, and start towards the end of the seventeenth century. At the other extreme, the last Mexican commandant at Tuscon officiated at land transactions as late as March 8, 1856.\footnote{194. S. Rodriguez to M. de Velasco, Santa Fé, October 10, 1707, Spanish Archives of New Mexico, Series 1, Document No. 1028 (microfilm); Telles to Warner, Tuscon, March 8, 1856, Pima County Recorder’s Office, Tuscon, Arizona, Deed Records Book 1, at 24 (microfilm). See also 2 R. TWITCHELL, THE SPANISH ARCHIVES OF NEW MEXICO 5 (1914; reprint 1976) (lists several earlier conveyances; the outside date, seemingly, is 1697).}

Thus, our documentary evidence covers roughly a century and a half—a time span somewhat (but not very substantially) longer than
United States rule in the Southwest to date. It should be noted even at the outset, however, that this periodization is somewhat artificial if applied to the entire area here under investigation. In California, for instance, proprietary land grants without restraint of alienation were made on a substantial scale only in the last two decades of the Mexican era, and the earliest California conveyance discovered dates from August 20, 1833—not much more than a decade before United States rule.\(^\text{195}\)

The political and legal setting of Spanish North America west of the Sabine river is perhaps best put into focus through a comparison with roughly contemporaneous conditions in to the east of that demarcation. We have seen in the last chapter that Spanish Luisiana was virtually a “dual state.” On the one hand, there was New Orleans with the Governor General in direct communication with the Council of the Indies, a letrado lawyer available to give legal advice, an up-to-date repository of legislation for the Indies, an ayuntamiento organized and functioning as a secular cabildo, an intendant when that office was not cumulatively held by the Governor General, and, after 1792, a resident bishop. The governor, the cabildo, the intendant, and the bishop all exercised judicial authority, following the dictamen (or opinion) of the letrado when needed.

Judicial proceedings were regularly recorded by the escribanos of the government and of the cabildo, and in ecclesiastical cases, by the escribano who held an additional appointment as notary apostolic.\(^\text{196}\) The pleadings were drafted by licensed procurators, and notarial acts were duly passed and recorded by two, and after 1788, by three escribanos. As shown by the still extant Notarial, Judicial, and Ecclesiastical Archives, this system operated, on the whole, without major functional irritants; and the legislation enacted in the O'Reilly-Unzaga era indicates that local implementation of eighteenth-century Peninsular reforms was, if anything, somewhat ahead of the rest of the Indies, including New Spain.\(^\text{197}\)

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\(^\text{195}\) J. O. Condry to T. O. Larkin, August 20, 1833, Monterey County Archives, Salinas, Calif., vol. 15, at 89-95. It is quite likely that this conveyance relates to the lot of the Larkin House, a museum in present-day Monterey.


\(^\text{197}\) See text at notes 120-23, 131-70, supra.
Outside of New Orleans, on the other hand, everything was different. There was no lawyer in residence anywhere else in the province: no letrado, no procurator, and most importantly for present purposes, no escribano. The lieutenant governors of St. Louis and Natchitoches and the commandants of the various posts exercised what was, in essence, lay justice at about the justice-of-the-peace level. They had no professional legal advice but were guided by a few standard instructions, augmented in time by the precedents accumulated in the post judicial archives. Since these officials were expressly authorized to pass notarial acts with the assistance of two witnesses, conveyances and mortgages could and were passed in this surrogate notarial form, but a full implementation of Provincial conveyance and mortgage legislation at the posts was simply impossible.\footnote{98}

In more general terms, the administration of justice outside of the capital was deficient to the point of being termed a major irritant. As Baron Carondelet reported in 1796, the absence of letrados, the language barrier, and the necessity of recruiting scribes from among a few "Españoles pobres y sin instruccion" obstructed the orderly recording and processing of judicial proceedings at the posts, and added intolerably to the workload of the letrado. At the time, he proposed the establishment of several additional cabildos and the stationing of an additional university-trained lawyer in St. Louis, but his recommendations (although received with favor) did not lead to remedial action before the cession of the province to France.\footnote{99}

Turning now to the areas west of the Sabine river, we note, first of all, the absence of a regional capital comparable to New Orleans north of the present international boundary or, for that matter, in what today is Northeastern and Northwestern Mexico. With the exception of Laredo and the "Nueces Strip" which were directly subject to the Viceroy and to the Audiencia of New Spain in Mexico City,\footnote{200} the "Spanish Southwest" belonged, for the major part of Spanish rule during the time period here covered, to the Internal Provinces of New Spain. This was an organizational framework established in 1776 primarily for the coordination of

\footnote{198}{See text at notes 117-19, 143-45, 180-89, \textit{supra}.}
\footnote{199}{See text at notes 126-27, \textit{supra}.}
\footnote{200}{The cédula of September 5, 1791, on clandestine sales and cessions in defeat of the alcabala (see note 107, \textit{supra}) for instance, was sent to Laredo by order of Vice-Roy Revilla Gigedo, without the intermediary of the Commandant General of the Internal Provinces. \textit{4 SPANISH ARCHIVE TRANSCRIPTS OF LAREDO} 1033-41 (typescript copy, St. Mary's University, San Antonio, Texas). Other legislative instruments in the Laredo Archives appear to conform to this pattern without exception. \textit{See generally} Wilcox, \textit{The Spanish Archives of Laredo}, 49 S.W. Hist. Q. 341 (1946).}
the security and defense of the sparsely settled territories of the Mexican Northeast and Northwest. The Internal Provinces were governed, as to military and political matters, by a Commandant General in direct communication with the Council of the Indies and thus independent, at least in principle, of the Viceroy of New Spain.201 (Exceptions were made from this rule as to individual Vicerneys with Northern experience.)

The Commandant General of the Internal Provinces resided at Chihuahua City, with interims in Arizpe, but due to the predominantly military character of his office, his headquarters did not develop into a regional capital. He exercised appellate jurisdiction from the governors' courts in military matters, but with that exception, the appellate tribunal of the Internal Provinces in civil and criminal matters was the Audiencia of Guadalajara, with the (theoretical) possibility of further recourse in civil matters to the Council of the Indies sitting judicially.202 Jurisdiction in fiscal and administrative matters was exercised by the intendents of San Luis Potosi and of Durango for the Eastern and the Western Internal Provinces, respectively;203 and ecclesiastical jurisdiction was vested in the Bishops of Linares (Monterrey; Nuevo Leon), Durango, and Arizpe (Sonora).204

The lines of legislative authority are somewhat more difficult to ascertain, but it would seem that the implementing authority for fiscal, postal, military, and ecclesiastical legislation was the Commandant General or, whenever he exercised authority in the Internal Provinces, the Viceroy.205 The general legislation of the Council of the Indies, on the other


202. Royal Order and Instructions of August 22, 1776, §§ 8 & 9, reprinted in 1 R. Velasco Ceballos, La Administracion De D. Frey Antonio Maria de Bucareli y Ursua 332, 335-36 (Publicaciones del Archivo General de la Nacion, vol. 29, 1936); T. de la Croix, Proclamation, August 13, 1777, Bexar Archives (Univ. of Texas, Austin, hereinafter cited as B.A.), Governmental Publications, 1768 to 1821, filed according to date. A preliminary survey of judgments of the Council of the Indies recorded in A.H.N., supra note 62, Consejos, legs. 21696 et seq. (1761ff) has failed to disclose any case arising from areas now included in the continental United States. Local judicial records in Lusiana and in the Internal Provinces are consistent with our preliminary impression that there was in fact never such an appeal.

203. See L. Navarro Garcia, Intendancias en Indias 149 (1959) (see map following page 149). For the sake of completeness, it should be added that Tuscon and Tubac were part of the Indendancy of Sonora. Id.


205. This account is based primarily on a survey of the documents in B.A., Governmental Publications, 1768 to 1821, and on a corresponding survey of the California Archive
hand, would appear to have been directed only to the Audiencia of Guadalajara.\textsuperscript{206} It is not clear to what extent, if any, that Audiencia exercised rule-making authority over the Internal Provinces, although there is evidence that its acts of judicial authority in respect of those provinces were not confined to the disposition of appeals in contentious proceedings.\textsuperscript{207}

In practical terms, this diffusion of authority meant that the first component of the dual system of judicial administration in Luisiana, a well-staffed capital with adequate records and repositories, was lacking in the Internal Provinces. The Commandant General, being the appellate authority in military justice, had an \textit{asesor letrado}, but he lacked the authority, the means, and indeed the inclination to exercise judicial functions beyond those expressly conferred upon him.\textsuperscript{208} Furthermore, no repository of current legislation of the Council of the Indies was available at his headquarters, and neither, so it would seem, was there an escribano. As late as 1806, a Commandant General of the Internal Provinces certified a public document with the assistance of two witnesses, "falta de todo Escriv.o."\textsuperscript{209}

But for the presence of a \textit{letrado} and of a reasonable comprehensive administrative archive, then, the legal machinery at the very headquarters of the Internal Provinces bore little resemblance to the fairly sophisticated legal system in operation in New Orleans. Indeed, with these two exceptions, the obvious parallel even at that level is with one of the major Luisiana posts (such as Natchitoches) rather than with the capital city itself.

Transcripts, Bancroft Library, University of California, Berkeley, as well as consultation of the Spanish Archives of New Mexico, accessible in the Microfilm Edition of the Spanish Archives of New Mexico, 1621-1821 (1968).

\textsuperscript{206} This follows from a comparison of the legislative instruments listed in \textit{CEDULARIO DE LA NUEVA GALICIA} (E. Lopez Jiminez ed. 1971), with corresponding documents in the Texas, California, and New Mexico archives, see note 205, \textit{supra}, as well as the Laredo Archives, see note 200, \textit{supra}.

\textsuperscript{207} See, e.g., B.A., General Correspondence, September 5, 1803 (inquiry concerning the number of lawyers in Texas, directed to Intendant in San Luis Potosi; draft reply, \textit{id.}, October 12, 1803); 6 CALIFORNIA ARCHIVE TRANSCRIPTS 50 (1791) (authorization by Juez general de bienes de difuntos of the Audiencia of Guadalajara for the payment of small sums owing by estates).

\textsuperscript{208} See especially the dismal reports on the administration of justice in the Internal Provinces by Commandants-General Felipe de Neve, December 1, 1783, A.G.I., \textit{supra} note 58, Guadalajara, leg. 268, and N. Salcedo, September 4, 1804, \textit{id.}, leg. 316.

\textsuperscript{209} Application of A. Tresaliente y Cano, teniente letrado and asesor ordinario of the intendancy and government of the province of Sonora and Sinaloa, for appointment to an audiencia, legalized by Alexo de Garcia Conde as quoted in text, A.G.I., \textit{supra} note 58, Guadalajara, leg. 316.
This comparison is perhaps not entirely satisfactory, for the head-quarters of the Internal Provinces was initially conceived as a mobile military command post. A better point of reference might be the capital of Nueva Viscaya, Durango, which in 1821 had not only a letrado municipal judge, but some eight university-trained advocates in residence. Yet even in Nueva Viscaya outside of the capital itself, it was reported in 1812 that the judges were honorable persons but without knowledge, lacking in their archives the Ordinance of Intendants and all cuerpos de leyes, i.e., major compilations essential for the accurate application of law in all but the most simple cases. When the Cadiz Constitution of 1812 was ordered to be proclaimed and published locally in solemn form, all but two or three of some hundred northern Mexican municipalities and other settlements certified their compliance through declarations signed by a public official and two witnesses in default of an escribano.

At the provincial level, and especially in those of the Internal Provinces (or portions thereof) that are now part of the United States, the parallels with the “rustic” component of Luisiana’s dual legal system were almost complete. Under Spanish rule, i.e., until 1821, the only two settlements west of the Sabine river to achieve the rank of municipal cabildos were San Fernando de Bexar (San Antonio) in Texas, and Santa Fé in Nuevo Mexico. Neither of these two cities succeeded, however, in sustaining the organizational and personal framework required for a formal cabildo. The Spanish governors of Texas, Nuevo Mexico, and (Alta) California had no asesores letrados and no escribanos de gobierno; and this was a source of bitter but futile complaint.

210. Garcia Conde to Governación de Ultramar, March 5, 1821, A.G.I., supra note 58, Guadalajara, leg. 268.
211. Bernardo Bonavia to Ignacio de la Pezuela, October, 1812, A.G.I., supra note 58, Guadalajara, leg. 316. For a brief summary of the basic legal texts, see text at notes 52-56, supra.
212. A.G.I., supra note 58, Guadalajara, leg. 316.
213. Benson, Texas’ Failure to Send a Deputy to the Spanish Cortes, 1810-1812, 64 S.W. HIST. Q. 14, 20 (1960); M. Simmons, supra note 201, at 194-97. See also text at note 340, infra.
214. See, e.g., Texas Governor Manuel de Salcedo’s report of August 8, 1809, English translation in Benson, A Governor’s Report on Texas in 1809, 71 S.W. HIST. Q. 603, 609-10 (1968); P. Pino, Exposición sucinta y sencilla de la Provincia de Nuevo México (Cadiz 1812), reproduced in H. Carroll & J. Haggard, Three New Mexico Chronicles 211, 216-17 (1942); see generally Report, Dr. Miguel Ramos de Arizpe 26-32 (N. Benson ed. 1950) (English translation of Ramos Arizpe’s Report to the Cadiz Cortes, dated November 7, 1811).
Nor were there any comprehensive repositories of ultramarine legislation in this area, for the provinces of Texas, Nuevo Mexico, and California were not on the schedule of the Council of the Indies for the distribution of "circular" cedulas. The political archives of the governors, while fairly extensive, contained, subject to rare exceptions, only such legal documentation as was deemed to be necessary for local purposes by the Viceroy of New Spain or the Commandant General of the Internal Provinces. A survey of Spanish legislative instruments in the Bexar Archives, i.e., the political archives of the Governors of Texas, shows that these instruments only rarely covered private law subjects. In the main, they dealt with administrative concerns, with a heavy concentration of revenue (especially tobacco), currency, postal matters, the military, and the clergy.215 Other repositories in the area, which are less extensive, reveal essentially the same pattern.216

Thus, there were no law-trained lawyers or judges in the American Southwest while under Spanish rule, and neither were there any comprehensive repositories of civil legislation. Furthermore, there were no escribanos de gobierno to minute the official acts of the governors and no procuradores del numero to draft pleadings in appropriate form.217 To that extent, the parallel with contemporaneous legal institutions at post level in Spanish Luisiana was almost complete. There was, however, one difference, at least initially: San Antonio had an escribano de cabildo when founded.

This requires some brief explanation. In the Indies as in Castile, the office of escribano was one of profit, vendible by the Crown and subject to "renunciation" (or further sale through the nomination of a successor) by the incumbent. The revenue obtained by the public treasury from the sale of the office depended on its attractiveness to prospective purchasers, which was in turn dependent on its perquisites. These latter were a territorial and/or a functional monopoly, set fees, and the obligation of the pertinent authorities, policial or judicial, to act only in conjunction with the appropriate escribano.218

215. See note 205, supra.
216. See text at notes 205-06, supra.
217. On March 4, 1810, Governor Salcedo of Texas decreed that the tribunals of his province were to accept only pleadings drafted by four named individuals. The stated reason for this decree was the delay caused by the ignorance or bad faith of those who had previously undertaken to exercise the functions of procurators and scribes. Nacogdoches Archives, January 16, 1809-July 23, 1820, Part I, at 45-46 (Texas State Archives, Austin). This attempt at licensing appears to have been overtaken by the events described at notes 350-52, infra.
218. R 4.25.1, corresponding to N.R. 10.23.7; R. 4.25.41, corresponding to N.R.
The appointment of escribanos for and in the Indies was expressly reserved to the King, acting through the Council of the Indies; notarial appointments by the viceroyos, audiencias, or governors were specifically prohibited. Since, as stated, the purpose of this monopoly of appointment was primarily fiscal, the treasury receipt books supply accurate information as to the royal appointment of escribanos in the Indies. From an authoritative index-digest of these books, it appears that such royal appointments were indeed made for Luisiana, but not for Texas, Nuevo Mexico, or California.

There were, however, two exceptions from the prohibition of the appointment of escribanos by authorities in the Indies. The first of these covered the unusual case of the death of all of the escribanos of one settlement, and need not concern us here. The second exception relates to newly discovered or settled territories. With respect to these, the viceroyos, audiencia presidents, and governors of the Indies were authorized to make interim appointments of escribanos (del numero or del Consejo) from among persons who appeared to be qualified and able.

Manifestly in reliance on this exception, Francisco Joseph de Arocha was appointed escribano of the cabildo of San Fernando de Bexar when that cabildo was constituted in 1731. He occupied that office for some twenty-six years, until January 13, 1757, when he petitioned the cabildo to be relieved from his functions which, as he then stated, had not produced sufficient sustenance for his numerous family. This was hardly an inducement to prospective purchasers; and the office remained vacant until the cabildo itself became defunct.

In Santa Fé, on the other hand, there apparently was no “founding escribano,” at least after the re-conquest of 1692. Joseph Manuel Gilthomey, when reporting on his task of making an inventory of the papers of the cabildo on July 21, 1713, stated that he had been nominated escribano, but his tenure in office, if any, seems to have been very short.

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221. R.I. 5.8.1 in fine.
222. B.A., General Manuscript Series, January 13, 1757. As shown by the endorsement, the petition was granted by the Cabildo, presumably on the same day.
223. Cabildo de Santa Fé, Toma de razon, supra note 192, at 40.
lived. A year later, Gilthomey signed a conveyance not as an escribano but as a witness *de asistencia*; and when Capt. Juan de Estrada y Austria took the *residencia* of former Nuevo Mexico governor Juan Ignacio Flores Mogollon in 1717, he had to appoint a local escribiente, or scribe, to keep the minutes of proceedings. For, as he stated bluntly in his instrument appointing Joseph de Acosta to that position, "en este Reyno (sc. Nuevo Mexico) no ay escribano Publico ni real, ni en la Ciudad de Mexico halle ninguno que quiera acompanarme por lo dilatado de viaje."225

It stands to reason that a vendible office of profit will be vendible only if it is likely to show a profit. In New Orleans, the two escribanias established in 1769 and 1770 flourished, and had to be augmented by a third one in 1788.226 In the Spanish possessions west of the Sabine river, almost exactly the opposite development occurred. The initial escribania at San Antonio atrophied; and the one at Santa Fe (where no judicial fees were levied)227 was apparently never activated. With these forbidding precedents, new ones were not established elsewhere.

This situation remained unchanged after Mexican independence. Constitutional rule and federalism brought some improvements in the legal system as such; both Nuevo Mexico and Alta California at least intermittently had a resident *asesor letrado* while they were Mexican federal territories,228 and there as in Texas, at least current legislation became more routinely and reliably available.229 So long as the office of

224. P. Montes de Oca to Antonio Godiney and wife, Santa Fé, December 6, 1714, Spanish Archives of New Mexico, Series I, Document No. 1074.
225. Residencia of Governor Juan Ignacio Flores Mogollon by Juan de Estrada y Austria, 1717, Spanish Archives of New Mexico, Microfilm Roll 23, frames 65ff, State of New Mexico Records Center, Sante Fé, New Mexico.
226. See note 122, supra.
227. Testimony of Joseph Gilthomey in Residencia, supra note 225, at frame 23r.
228. Pursuant to a Mexican Presidential decree of August 29, 1829, B.A., General Printed Series, subsequently approved by a decree of the Mexican General Congress of February 15, 1831 (2 M. DUBLAN & J. LOZANO, LEGISLACIÓN MEXICANA 153, 312, 313 (1876), justice in the federal territories was administered at first instance by the alcaldes in consultation with *asesores letrados* appointed for that purpose. 2 M. DE LA PEÑA Y PEÑA, LECCIONES DE PRÁCTICA FORENSE MAJICANA 74-75 n.1-2 (1836). Rafael Gomez, who arrived in California in 1830, was apparently the first *asesor letrado* there. See H. BANCROFT, CALIFORNIA PIONEER INDEX AND REGISTER 1542-1848, at 162 (1964). In Texas, too, justice was initially administered at first instance by the alcaldes in consultation with the *asesor letrado*, but the latter was stationed at the capital of the state, *i.e.*, in Coahuila. State of Coahuila and Texas Law No. 39 of June 21, 1827, article 25 (Spanish text in Texas Historical Collections, University of Texas at Austin, T22 345.12 C 63 le).
229. See, e.g., B.A., General Printed Series, 1822 et seq., and the legislative instruments listed in C. CASTAÑEDA, A REPORT ON THE SPANISH ARCHIVES IN SAN ANTONIO,
escribano remained vendible, however, and so long as the economy of the Mexican North remained stagnant, there was no room for the exercise of that office in this area.

Thus, Francisco Joseph de Arocha of San Antonio and, perhaps fleetingly, Joseph Manuel Gilthomy of Santa Fé were destined to remain the only two escribanos in Spanish North America west of the Sabine river and north of the present international boundary line. Since Gilthomy's tenure of office was quite brief, and as Arocha resigned his office in 1757, the unfortunate fact is that not even one of the conveyances in the American Southwest recorded in the repositories to be discussed in the next section was passed before either of these two notaries. Indeed, allowing for egregious discoveries in non-judicial archives or in private collections, it seems safe to state that no conveyance currently on record in Texas, New Mexico, Arizona, or California was passed before a Spanish or a Mexican escribano there resident. The only exception—if indeed, it should be regarded as such—is the occasional notarial instrument passed by an escribano on the Mexican side of the present international boundary, with respect to real property then located in his jurisdiction, in a territory subsequently ceded to the United States.

In this basic respect, then, the parallel between the Luisiana posts and the Spanish and subsequently Mexican possessions west of the Sabine river is complete. There were no escribanos at the Luisiana posts, and at least for the periods covered by instruments presently on record at the various population centers, there was no escribano in what is now Texas, New Mexico, Arizona, or California. There is even a further parallel between the Luisiana posts and the territories west of the Sabine, and one that is of crucial importance for present purposes.

It will be recalled that in Luisiana, the lieutenant governors and the post commandants had been authorized by the Instructions dated November 25, 1769, to draft and to authenticate, with the assistance of two witnesses, the contracts and other legal instruments of the local inhabitants. The stated reason for this rule was the absence of escribanos at the

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230. The earliest conveyance recorded in the Bexar County deed records is M. de Carbelo & spouse to S. de Arocha, exchange of property, August 30, 1758, before J. M. de Santa Maria, alcalde, acting "por receptoria a falta de escribano publico ni Real que lo ne ay." I Bexar County Record of Spanish Deeds 7, 9.

231. José María Tovar to José Trinidad García, Matamoros, August 10, 1835, before Antonio Escobedo, escribano publico, Webb County Courthouse, Laredo, Texas, Deed Book B, at 2-3.
On closer examination, this judicial authority to pass notarial instruments in surrogate form in the absence of a notary turns out to be merely a restatement of a general rule of the law of the Indies to that effect.

The practical importance of that rule for the subject here dealt with is well illustrated by a bando, or proclamation, of Viceroy Revilla Gigedo on the subject of alcabala avoidance in land sales transactions, dated December 22, 1789. That proclamation condemned the use of simulated contracts of agency designed to avoid the incidence of the land sale tax on the initial sale where several transactions were contemplated. It directed that, under penalty of removal from office, no escribano nor “juez que por su falta proceda como Juez receptor” was to authorize any escritura of sale or exchange embodying such a simulated transaction.

The legal basis of the authority of judicial officers to pass instruments in the form of escritura publica is indicated by the passage just quoted. Under Castilian law, judicial records, too, were public instruments. As stated in the leading treatise of Pareja, this included the records of non-contentious proceedings, such as emancipations, donations, and guardianships. Hence, any judicial officer could, in his capacity as a receiver and recorder of evidence, draft and issue public instruments having the same legal effect as notarial acts.

For the obvious reason of preserving the emoluments of escribanos and thus, the royal revenue, however, the courts were required to exercise their judicial functions only in conjunction with the appropriate local escribano. Where, on the other hand, there was no escribano in loco, that requirement could not apply, and judicial officers had unrestrained competence to issue what were, in effect, notarial acts. These quasi-notarial instruments were usually, but not invariably, legitimated by the inclusion of an express judicial declaration noting the lack of an escribano within the jurisdiction of the court; and they were almost invariably attested by two witnesses de asistencia. This latter practice would appear to be a consequence of the two-witness rule.

232. See text at note 119, supra.
233. L. NAVARRO GARCIA, SONORA Y SINALOA EN EL SIGLO XVII 112 (1967).
234. B.A., General Printed Series, December 22, 1789, also in 4 SPANISH ARCHIVE TRANSCRIPTS OF LAREDO 903-04.
236. R. 4:25.1, corresponding to N.R. 10:23.7; G. DE PAREJA, supra note 235, at 245 (no. 77); see text at notes 218-19, supra.
237. PART. 3:16.32; see text at note 82, supra, and at note 240, infra; McKissick v. Colquhoun, 18 Tex. 148, 151-52 (1856).
The authority of judicial officers to act in the manner described, with two witnesses de asistencia in the absence of an escribano, was expressly reconfirmed by the Mexican (federal) Act of May 23, 1837, on the Provisional Regulation of the Administration of Justice, which "Mexicanized" judicial administration and procedure.\(^{238}\) A decree of the Congress of the State of Coahuila and Texas, dated April 12, 1834, went somewhat further, and authorized judges to act in conjunction with two witnesses de asistencia even in districts where an escribano had been appointed, if that official was unavailable for cause.\(^{239}\)

Both of these enactments were, as already indicated, mainly declaratory of pre-existing rules of the general law of Castile and of the Indies. The following is a fairly representative (if somewhat elaborate) formulation of the clause employed in this connection in judicial instruments of a notarial character throughout the Southwest while under Spanish and Mexican rule:

En el Pueblo de Nacogdoches a los quince días del mes de Diciembre de mil ochocientos treinta y uno: Ante mí el Ciudadano Manuel do los Santos Coy Alcalde Unico Constitucional de este referido pueblo y testigos de asistencia con quienes auto por reseptoria a falta de escrivano qe no le hay en los terminos qe la Ley previene comparecieron . . . \(^{240}\)

As already indicated, the scheme just described generally prevailed throughout the "Spanish Southwest," from Nacogdoches in East Texas to Sonoma in northern Alta California. There were, however, some minor deviations. In New Mexico, the governors traditionally employed secretarios de gobernacion y de guerra who certified public records although, being neither judges nor escribanos, they could not themselves pass notarial acts.\(^{241}\) Seemingly in emulation of this precedent, substantially the same functions of certification were performed by the

\(^{238}\) Arreglo Provisional de la Administracion de Justicia en los Tribunales y Juzgados del Fuero Comun, of May 23, 1837, article 85 (judges of first instance), and 118 (alcaldes and jueces de paz). [1837] B. ARRILLAGA, RECOPILACION DE LEYES 399, 418 & 426; see generally G. MARGADANT, INTRODUCCION A LA HISTORIA DEL DERECHO MEXICANO 154-55 (1971).

\(^{239}\) B.A., General Printed Series, April 12, 1834; English translation in 1 H. GAMMEL, LAWS OF TEXAS 363. Article 44 of Law No. 39 of June 21, 1827 (see note 228, supra) had provided that "[s]o long as there are no escribanos publicos in this State, all judges shall act with witnesses de asistencia."


\(^{241}\) The Governor's order of July 21, 1713, approving the compilation of the Toma de razon of early New Mexico land grants (see note 192, supra), was certified by the secretario
secretarios of the ayuntamientos under Mexican rule. Where a judicial officer acted in conjunction with the appropriate secretario, there was thus no need to employ lay witnesses *de asistencia*, and some New Mexico conveyances of the Mexican period, while executed before judicial officers, were attested by a secretario rather than witnesses.\textsuperscript{242} This was not, however, uniform practice.\textsuperscript{243}

In Texas, there is no evidence of a similar attestation practice by municipal secretaries, but in the final years of Mexican rule, judicial powers to pass notarial acts were, as already mentioned, expanded by the decree of April 12, 1834, which authorized judicial officers to act in conjunction with witnesses *de asistencia* even where the local escribano was unavailable for cause.\textsuperscript{244} This enactment made no substantive change in Texas because there were, as we have seen, no escribanos there at that time. It partially explains, however, a stylistic change in some Texas conveyances in the last two years of Mexican rule, where the reference to the absence of an escribano is omitted altogether and notarial powers are asserted by the judicial officer himself.\textsuperscript{245}

Public instruments passed by judicial officers were drafted and recorded in more or less the same manner as notarial instruments executed pursuant to the law of Castile and of the Indies. The original text, or *protocolo*, was incorporated in the judicial archives and could not be removed therefrom. The first copy, called *original* or, commonly in North America, *testimonio*, was delivered to the person authorizing the instrument. Where the act passed was a conveyance, the *testimonio* was the vendor's title paper, which was delivered to the purchaser when the transaction was consummated. Additional copies could be made, at least in principle, only pursuant to judicial authorization upon notice to parties with a potential adverse interest.\textsuperscript{246}

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\textsuperscript{242} See note 278, infra, and accompanying text.

\textsuperscript{243} See note 277, infra, and accompanying text.

\textsuperscript{244} See text at note 239, supra.

\textsuperscript{245} J. M. Carbajal to J. K. Allen, conveyance, San Felipe de Austin, July 7, 1835, before F. W. Johnston, self-described as judge of the First Instance of the Jurisdiction of Austin and "ex officio notary public," Nacogdoches Archives (Blake Transcripts) vol. F, at 134.

\textsuperscript{246} A. DE ASO & M. DE MANUEL, INSTITUCIONES DEL DERECHO CIVIL DE CASTILLA 281 (6th ed. 1805); 3 J. FEBRERO, LIBRERIA DE ESCRIBANOS (Febredo Adicionado) 408-15 (1817). For one illustration of American usage, see text at note 340, infra. See also McPhaul v. Lapsley, 20 Wall. (87 U.S.) 264, 267-68, 284 (1873); Herndon v. Casiano, 7 Tex. 322, 332 (1851).
Given this basic framework, private land transactions of the Spanish and Mexican periods consummated by public instrument are most readily traced wherever the *protocolos* have survived intact. A comparison between the Province of Luisiana and the provinces west of the Sabine river may serve to put this matter into proper perspective. In Louisiana, the acts passed by the New Orleans escribanos survive in the New Orleans Notarial Archives, and the instruments executed before the post commandants are part of the present deed records of the respective parishes. It is thus possible to trace virtually all Spanish notarial or quasi-notarial land transactions in Louisiana through public records.

In Missouri, too, there is some continuity between pre- and post-1804 judicial records, for the Missouri recorders were under the statutory duty of recording French and Spanish land papers in their possession. As we have seen, private land transactions in public form are readily traced in most of the Upper Territory, for the judicial archives of St. Louis, Ste. Geneviève, and New Madrid have survived more or less intact. Even here, however, there are gaps: the judicial archives of Cape Girardeau cannot be located, and our (limited) knowledge of land transactions in Southeast Missouri under Spanish rule is based entirely on a few transcriptions of earlier documents into post-1804 county records.

West of the Sabine river, the situation is quite different in this respect: There is, unfortunately, no legal continuity between the Mexican judicial archives and the Texas, New Mexico, Arizona, and California county records. Nevertheless, through historical accident and the foresight of the California Legislature, the *protocolos* in the California Mexican judicial archives pertaining to Monterey County have survived intact. In Texas and in New Mexico, too, sets of *protocolos* survive in

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247. See notes 137, 185, supra, and accompanying text.

248. See text at notes 143-45, 182, supra.

249. Only a few such transcriptions were located: Stocker to Gibony, mortgage, December 30, 1801, Cape Girardeau County, Jackson, Mo., Record of Deeds Books A and B, at 19; Widow Randall to her children, general mortgage, July 19, 1802, id. at 66. Louis Lorimier, the Commandant, regularly recorded deeds and marriage contracts in the French language and with two assisting witnesses, but seemingly without the benefit of form precedent.

250. Pursuant to section 1 of the "Act concerning the Archives now remaining in Monterey," of May 1, 1851, Cal. Laws 1851, ch. 120, p. 443, the California Secretary of State was directed to have a survey made of the Spanish Archives then in Monterey, and to dispose of the various classes of documents as directed, with the proviso that "such portion thereof as relates to titles of lands in the county of Monterey, and the proceedings and decrees of Courts relative to real estate in said county . . . . shall remain in the offices." Thus, the Monterey *protocolos* were saved; see, e.g., 15 Monterey County Archives 17, captioned Protocolo de Instrumentos Publicos Otorgados ante Marcelino Escobar, Alcalde
various archival collections; they are, however, incomplete.

The most important source for tracing Spanish and Mexican conveyances in the "Spanish Southwest" is, almost perversely, the recording system established after Texas independence or United States rule. That system was primarily designed to serve constructive notice on third parties, and to protect the interests of purchasers against such third parties in the order of recordation rather than transaction. Provision was regularly made for the recording of instruments executed before the effective date of the recording and conveyancing statutes enacted in the American Southwest; and in due course, conveyances executed under Mexican and even Spanish rule were transcribed into the new American county deed record books.

It would appear that, at least as a rule, these transcriptions were made from testémonios in the possession of parties in interest rather than from the protocolos in the defunct "Spanish" (i.e., Mexican) archives. Occasionally, certified copies were used. The Laredo transcriptions, for instance, are almost entirely based on certified copies issued by Mexican officials of Nuevo Laredo, where the Laredo judicial archives came to be located when the loyal Mexican population of that town followed the flag across the Rio Grande in 1848. It seems likely that in some instances, the protocolos themselves served as the texts from which the transcriptions were made, but this is not so readily ascertained today.

Unico Constitucion En Monterey y en Año de 1833; see note 288, infra. For early judicial recognition of the value of this collection, see United States v. Limantour, Hoffman's Land Cases 389, 396-97 (N.D. Cal. 1858).


253. See generally Webb County, Laredo, Texas, Deed Record, Books A and B. These records were transcribed starting November 8, 1848. There is a typewritten transcript and a holograph index, prepared by Miss Esperanza Leal of the County Clerk's Office, Webb County.

254. In Texas, this was authorized by the Act of August 7, 1876. 8 H. GAMMEL, LAWS OF TEXAS 920-21. The Barrera transcripts in San Antonio (see note 263, infra), were apparently made pursuant to that authority. For cases where the authorizing officer himself was available to present a protocolo executed by him for transcription, see Howard v. Colquhoun, 28 Tex. 134, 143-44 (1866); McKissick v. Colquhoun, 18 Tex. 148, 151-52 (1856).
In any event, the conveyancing and recording statutes contained elaborate provision for the verification or previously executed instruments filed for recording; and there is little reason to doubt the authenticity of the transcriptions of Spanish and Mexican real estate transactions found in the county deed record books of Texas, New Mexico, Arizona, and California. The following account is primarily based on these transcriptions.

B. Sales of Immovables

The prototype for the instruments of conveyance regularly used throughout Spanish North America in the eighteenth and nineteenth centuries is readily identified as the standard form recommended for such transactions in the third Partida, augmented by some five centuries of Castilian notarial practice. Its bare essentials are as follows: A standard clause, such as the one reproduced above, placed generally at the beginning of the instrument but occasionally at its end, identifies the escribano or judicial officer acting as such, the place, the date, and where appropriate, the witnesses de asistencia. This is followed by an identification of the parties, vouched for by the notarizing official, and a declaration by the vendor that he is selling, on behalf of himself and his heirs, in venta real or real sale, the premises described by metes and bounds plus their appurtenances, to the purchaser for a specific price. The vendor also surrenders possession to the purchaser, warrants his title to the property sold and the absence of incumbrances and other undertakings to convey, pledges all his present and future property in support of his obligation, undertakes to defend the purchaser’s title against challengers, and waives all jurisdictional privileges that might be available to him against the purchaser.

The basic form as just described was usually augmented by clauses reflecting the peculiarities of the particular transaction, and by standard precautions developed in notarial practice. Three such standard clauses occur with great frequency, and are readily identified since they involve the use of Latin terminology. The first of these relates to the mode of payment. Pursuant to a provision of the fifth Partida aimed at fraud in executory loan contracts evidenced by written instruments, the desig-

256. Part. 3.18.56. Use of this form was not mandatory. See text at notes 70-82, 96-108, supra.
257. See text at note 240, supra.
nated payee who had not in fact received payment could, within two years of the transaction, demand the return of the instrument by asserting that the money had not been paid in his presence. Notarial jurisprudence coped with this contingency by a clause waiving that assertion, denominated in Latin as *exceptio non numeratae pecuniae*.

A second standard clause dealt with the power of the vendor to set aside the sale for lesion, or a disproportionate difference between the actual and the contractual value of the thing sold. This was dealt with in fairly elaborate fashion: The vendor expressly stated that the contractual price represented the true value of the property, but additionally made a complete gift, "which the law calls *inter vivos,*" to the purchaser of the difference, if any, between price and value.

The third standard clause, placed at the end of the operative part of the conveyance, augmented the waiver of jurisdictional privileges by an express confession of the conveyance as *res judicata,* subject to judicial execution without right of appeal. This cognovit clause was frequently, but not invariably, accompanied by the express interposition of the judicial authority of the official before whom the conveyance was executed.

The above description of the style of conveyancing in the "Spanish Southwest" is based on a fairly extensive field study of Spanish and Mexican deeds in Texas, New Mexico, Arizona, and California. A detailed account of that survey would serve little purpose, since it would be largely cumulative and repetitive. Nevertheless, a brief summary of our findings might be of interest not only by way of illustration and substantiation, but also (at least so it is hoped) as a guide to further and perhaps more systematic research in county deed records.

In Texas, the most extensive collection of conveyances dating from the Spanish and Mexican periods is found, rather unsurprisingly, in the

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258. *PART. 5.1.9.*


260. R. 5.11.1, 6, corresponding to N.R. 10.1.2.

261. 2 J. Febrero, supra note 246, at 388-89, 467-68.

262. Express interposition of judicial authority was regular though not entirely uniform practice in New Mexico, seemingly starting with Montes de Oca to Godiney and wife, Santa Fé, December 6, 1714, Spanish Archives of New Mexico, Series 1, Document No. 1074. See, e.g., M. Duran to J. P. Segura, Las Vegas, April 9, 1836, Deed Record Book No. 1, p. 154, San Miguel County, Las Vegas, New Mexico.
deed record transcripts of Bexar County in San Antonio.\footnote{263}{Bexar County, San Antonio, Texas, Transcribed Record, C-1 (roughly 100 transactions, dating mainly from 1830 to 1835); Record of Spanish Deeds, 2 vols., transcribed in 1877 by Juan E. Barrera, 640, 349 pp., starting with 1758. For statutory authority for these transcriptions, see notes 252 and 255, supra.} These collections can be augmented to some extent by stray protocolos in the Bexar Archives.\footnote{264}{Luis Galan, First Alcalde, San Antonio, protocolos, February 12-November 27, 1810, B.A. February 12, 1810. See text at note 353, infra.} The Nacogdoches Archives, too, contain a number of conveyances.\footnote{265}{Nacogdoches Archives, R. B. Blake Transcripts, Texas State Archives, Austin. See, e.g., V. Micheli to J. Lucobiche, October 2, 1800, id. vol. C, 15-16.} The deed transcripts of Bahia de Espiritu Santo, the third Spanish settlement in the Province of Texas, unfortunately were mostly destroyed by fire. Nevertheless, some conveyances dating from the Mexican era survive there, and in neighboring Refugio County.\footnote{266}{M. de Jesus de Leon to J. Cameron, February 24, 1834, Goliad County Deed Record, Transcript Book K, at 389; J. A. Valdes (the priest of Bahia de Espiritu Santo) to J. Cameron, September 27, 1834, Refugio County Transcribed Record Book ABC at 255.} With minor variants, these conveyances follow the Castilian form precedent just described.

Mention has already been made of the Laredo records which are not, strictly speaking, records of Spanish or of Mexican Texas.\footnote{267}{See text at note 253, supra.} These, too, follow the familiar pattern, although they show occasional signs of political strain between 1836 and 1848.\footnote{268}{See, e.g., Galan to Garza, 1805, Webb County Deed Records, Laredo, Texas, Book A, at 1-2; Vidauri to de la Peña, 1831, id. 5-6, both executed before judicial officers with two assisting witnesses; \textit{but see} Garcia to Ramón, January 29, 1844, in simple form, "supiendo nuestro mutuo convenio lo que faltarle pa juridico," Book B, at 3, indicating that local government was not functioning regularly at the time.} Perhaps the most interesting records for legal and social historians are the deed transcripts of Stephen Austin's original settlement, San Felipe, in the records of Austin County. These show quite clearly that the original Anglophonic settlers of Texas (the legal immigrants, in today's parlance) were quite familiar with, and meticulously followed, the traditional Castilian style of conveyancing.\footnote{269}{See, e.g., Harvey to Robbins, 1825, Austin County, Bellville, Texas, Spanish Record Book A, no. 3; Kelly to Borden, 1831, id. no 8.} A number of Spanish-language San Felipe de Austin conveyances, which start in 1825, contain a statement by the parties that they had received an "explicacion clara del contenido de esta acta en mi propio idioma."\footnote{270}{Harvey to Robbins, supra note 269.} Beginning in 1834 when English was recognized as an offi-
cial language in Texas, conveyances were regularly drafted in English, virtually in literal translation of the Castilian form precedent locally in use.

This practice, which is also found in Nacogdoches, is not encountered outside of Texas. Another device, seemingly quite common among the Anglophonic population of San Felipe but not encountered elsewhere in the “Spanish Southwest,” is what might be called two-step conveyancing: The vendor initially bound himself through a so-called title bond, subject to forfeiture of a stipulated penalty sum, to execute a conveyance in favor of the prospective purchaser upon demand and tender of the purchase price.

In New Mexico, again unsurprisingly, the most extensive records of Spanish and Mexican deeds are to be found in the Santa Fé County deed records and in the Santa Fé Archives. The latter are a more fertile source of such records than are the comparable archives in Texas, but it would seem that despite a chronological advantage of some fifty years, the volume of Santa Fé conveyances does not reach that of San Antonio. Subject to exceptions presently to be noted, the style of deeds used in Santa Fé follows the familiar Castilian model, as does the style of conveyances transcribed in the deed records at Las Vegas, Albuquerque, and Las Cruces.

272. E.g., Chandler to Roberts, Austin County Spanish Record Book A, No. 71.
274. See, e.g., Chandler to Roberts, supra note 272 (“[i]n conformity with a title bond made and signed [by the vendor] before the Alcalde of Austin on the 10th day of June 1831”). An early case involved a title bond executed in Texas while the civil law was still in effect. Patterson v. Goodrich, 3 Tex. 331 (1849). See also The Diary of William Barrett Travis, August 30, 1833-June 26, 1834, at 42, 43, 89, 93, 105, 108, 181 (R. David ed. 1966) [hereinafter cited as Travis Diary], which shows that the drafting of such bonds was a major part of law practice in San Felipe de Austin at the time. The main purpose of these title bonds was to evade statutory restrictions on the alienability of colonization land grants. See, e.g., Williams v. Chandler, 24 Tex. 4 (1860).
275. Condado de Santa Fé, Oficina de la Corte de Pruebas, Libros de Registro, Letras A-P-1; Spanish Archives of New Mexico, State of New Mexico Records Center, Santa Fé (microfilm). The latter documents are accessible through R. Twitchell, supra note 251. See, e.g., the documentos de Don Manuel Alvarez, Letra A, at 53-98, starting with Mendoza to Benavides, 1744; see notes 194 and 224, supra.
276. See notes 194 and 230, supra.
277. See, e.g., Duran to Segura, Las Vegas, April 9, 1836, San Miguel County Deed Record Book No. 1, at 158; P. Anaya to Francisco Armijo, San Felipe de Nerió (Albuquerque), September 16, 1813, Bernadillo County Record Book A, at 67 (microfilm); P.
are, first, the frequent but not invariable custom of attestation by the secretario of the respective ayuntamientos rather than two witnesses de asistencia as elsewhere in Spanish North America, and secondly, the formal interposition of the judicial power of the recording officer in the cognovit clause.

Arizona presents a somewhat different picture. There were some land grants in the last phase of Spanish rule in northern Sonora, but no conveyances dating from the Spanish era could be discovered. Since the judicial archives of the presidios of Tuscon and of Tubac appear to have perished, the only repositories of Arizona conveyances antedating United States rule in the western portion of the Gadsden Purchase area are transcriptions in deed records established after the transfer of sovereignty.

Arizona was initially administered as the western division of the New Mexico county of Doña Ana, and there are two sets of such records. The Doña Ana deed records, which start in 1856 and were initially kept in Tubac, contain the transcription of a fairly elaborate Castilian-style conveyance dated September 20, 1855. While relating to land situated in the district of the presidio of Tuscon, that conveyance was, however, executed (in the usual surrogate notarial form) before the judge of the pueblo of Ramanichi in Sonora, Mexico. No other Castilian-style conveyances could be found in these records.

The deed records of Pima County, Arizona, commence in 1863, but they contain some transcriptions of prior conveyances. These are, seemingly without exception, sales of city lots in Tuscon in the first half of 1856, executed before the last Mexican commandant of that presidio or...
his deputy. While drafted in Spanish and executed in the appropriate surrogate notarial form with the attestation of two witnesses de asistencia, these conveyances do not follow Castilian form precedent but are limited to a brief statement of the identity of the parties, the nature of the transaction, the location of the property, and the purchase price.

This rather unusual departure from precedent, previously encountered only in Cape Girardeau in the Upper Territory of Louisiana, would appear to be attributable primarily to the lack of judicial archives and to the consequent absence of standard forms. Additional factors to be considered in this connection are the unusually low purchase price stipulated in these Tuscon conveyances, ranging from $10 to about $40, and the time pressure to which the last Mexican commandant in Tuscon was then subject. The region had been ceded to the United States by a treaty signed on December 30, 1853, more than two years earlier, and official taking of possession by the United States could be expected at any moment.

In California, too, there were few proprietary land grants before Mexican independence; and there as well, no conveyances dating from the Spanish era could be located. The chronological frame of reference is, therefore, the quarter-century immediately preceding United States rule. Substantial land grants were made during this period, and it has been possible to discover a respectable number of conveyances executed in the Mexican era.

In the case of Monterey and its surroundings, the record is complete, since the Monterey protocolos survive. In some other counties, especially Sonoma and San Francisco, there are deed transcripts in

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283. On March 2, 1856, Joaquim Morales acted as Commandante interino with two witnesses, in a transaction in which Joaquim Comaduran, the Comandante, was acting as the agent of the seller. Pima County Recorder's Office, Deed Records Book 1, at 25. This indicates concern for formalities even in difficult circumstances. See note 284, infra.

284. Telles to Warner, Tuscon, March 8, 1856, id. 24, executed two days before the United States officially took possession of Tuscon, see F. Lockwood, Tuscon—The Old Pueblo 34 (1930).

285. See note 249, supra, and accompanying text.

286. See Pima County Recorder's Office, Deed Records Book 1, at 3, 24-25.

287. See notes 193 and 284, supra.

288. See note 250, supra. The pertinent instruments can be traced conveniently through Office of the Recorder, Monterey County, Salinas, Calif., Translations of Spanish Records, vol. 2. The oldest deed there recorded is cited in note 195, supra.

289. Lazaro Piña to Mariano G. Vallejo, Sonoma, December 4, 1839, Sonoma County, Santa Rosa, Calif., Deed Book F, at 41-42. See also R. Cacho to J. W. Revere, Sonoma, October 28, 1846, Marin County, San Rafael, Calif., Deed Book A, at 43-45.
early county records or documents.\textsuperscript{290} Perhaps even more significantly, applicants for confirmation of land grants by the United States Board of Land Commissioners set up by the Act of March 3, 1851, had to establish their \textit{prima facie} entitlement to the grant if there had been a mesne conveyance;\textsuperscript{291} and the records of the Land Board have yielded copies of deeds from all parts of the Territory then populated.\textsuperscript{292}

With very few exceptions,\textsuperscript{293} these California conveyances dating from Mexican rule follow familiar Castilian form precedent. They are regularly executed before judicial officers acting with two witnesses \textit{de asistencia}, and on occasion tend to be somewhat more elaborate than their Texas and New Mexico counterparts. One detail worth mentioning in this connection is the reference, in some conveyances, to the \textit{Novisima} rather than the \textit{Nueva Recopilación} in connection with the clause waiving the right to rescind for \textit{laesio enormis}, which suggests the availability of a nineteenth-century edition of Febrero\textsuperscript{294} or some other standard text, or at least of relatively recent Mexican form precedents drafted in reliance thereon.

It is clear, then, that the form of conveyance quite generally in use in the "Spanish Southwest," from Nacogdoches to Sonoma, was a surrogate notarial instrument executed before a judicial officer and duly at-

\textsuperscript{290} Jacob Leese to Wm. Rae on behalf of Hudson's Bay Company, Dolores, September 9, 1841, Recorder's Office, San Francisco County, Original Grants, Book A, at 69. Contrary to a widely held view, the San Francisco "Spanish" (\textit{i.e.}, Mexican) records have survived the earthquake and the fire of 1906. Efforts are presently being made to house these records, or copies thereof, in the Bancroft Library, University of California, Berkeley.

\textsuperscript{291} Act of March 3, 1851, 9 Stat. 631; Martin v. United States, Hoffman's Land Cases 146, 148 (N.D. Cal. 1856).

\textsuperscript{292} These records are now stored in the Bancroft Library, University of California, Berkeley, and registered by Land Board file number and United States judicial district (N. & S.D. Cal.). \textit{See}, e.g., Arenas to Dalton, Los Angeles, December 19, 1844, in Dalton v. United States, S.D. Cal. No. 121, record at 46-50; Carlo to Branche, Santa Barbara, April 11, 1843, in Branch v. United States, S.D. Cal. No. 75, at 20-22; Romulo (a Native) to J. Wilson, San Luis Obispo, June 26, 1846, in Wilson v. United States, S.D. Cal. No. 261, 1858, at 260.

\textsuperscript{293} One such oddity is W. Richardson & Wife to Santiago (James) McKinley, San Francisco, November 6, 1841, San Francisco Spanish Records Liber A, at 55, in primitive wording suggesting translation from the English, and by private instrument signed by the parties and one (!) witness, but accompanied by a certificate of the Justice of the Peace of San Francisco stating that the seller had paid his municipal taxes and that no claim against him was known to the court.

\textsuperscript{294} Both Arenas to Dalton, note 292, \textit{supra}, and Cacho to Revere, note 290, \textit{supra}, refer to N.R. 17.10.1, 2, rather than to R. 5.11.1, 6 in the waiver-of-lesion clause. See note 260, \textit{supra}, accompanying text. As regards the various editions of J. \textit{FEBRERO}, \textit{supra} note 246, see note 259, \textit{supra}. 
tested, drafted to conform with the form precedent contained in the third Partida as modified by several centuries of Castilian notarial practice. The one exception from this pattern is found in Tuscon in 1856, but there, too, surrogate notarial instruments were duly executed, and the primitiveness of the deed forms used is readily explained by conditions unique as to both time and place.295

At this point, it should be recalled that under the law of Castile and of the Indies as it prevailed in Spanish North America outside of Louisiana, there were no form requirements for conveyances of immovables.296 The question arises, therefore, why there should have been such pervasive and virtually uniform resort to a type of instrument that constituted the closest approximation to Castilian notarial deeds then locally attainable. Before taking up that issue, however, it seems appropriate to discuss another matter figuring so prominently in nineteenth-century judicial decisions on our subject: the taxation of land sales under Spanish and Mexican rule in the “Spanish Southwest.”297

Alta California was exempted from the alcabala at the time of its original settlement; and this exemption was periodically extended thereafter.298 Substantially the same situation seems to have prevailed in Nuevo Mexico,299 and no reference to that tax could be found in conveyances executed in either of these two jurisdictions under Spanish or Mex-

295. See text at notes 283-87, supra.
296. See text at notes 70-73, 96-110, supra.
297. See text at notes 5, 22-23, 28, 30-33, 36, supra.
298. Galindo Navarro, the asesor letrado of the Commandant General of the Internal Provinces, stated in a dictamen dated April 1782 that no provision for the collection of alcabalas had been made in the Instructions of José de Galvez for California, since its inhabitants needed assistance rather than additional burdens. 2 CALIFORNIA ARCHIVE TRANSCRIPTS 212, 218. This exemption was expressly continued in 1786 for the period of five years (4 id. at 65), and in 1794 for the period of ten additional years (7 id. at 136). It seems unlikely that the alcabala was collected thereafter, but no subsequent California authorities in point could be found.

299. Juan de Oñate's request for a fifty-year exemption from the alcabala in his draft contract for the discovery and conquest of New Mexico, dated September 21, 1595 (English translation in I G. HAMMOND & A. REY, DON JUAN DE OÑATE 42, 54), was apparently granted by the King as recommended by the Viceroy. See id. at 196. At the residencia of Governor Flores Mogollon of Nuevo Mexico in 1717, Joseph Gilthomey testified that in view of extreme poverty and total lack of commerce, the alcabala was not applied to the province. Residencia, supra note 225, at f. 24r.

Nuevo Mexico was later exempted from the alcabala for ten years by a Royal Order of October 12, 1795, which is cited in a Viceregal proclamation reproduced in M. SIMMONS, SPANISH GOVERNMENT IN NEW MEXICO (second illustration following p. xv) (1968). Again, it seems quite unlikely that the alcabala was ever levied in Nuevo Mexico. See id. at 91-92.
ican rule. In Texas, on the other hand, there was apparently no such exemption, but the deed records furnish only fragmentary evidence as to the payment of the alcabala. Nevertheless, it is quite clear from these records that this tax was levied and paid, in the amount of two percent of the stated purchase price, on sales of land in San Antonio in 1825 and again in 1833-35. It was also collected in that latter period in Nacogdoches and in Laredo. The incidence of the tax (where imposed) was relatively minor, since it depended on the stated purchase price—a factor hardly overlooked by the parties. Alcabala assessments appear to have ranged, in the main, between one and five pesos.

Since the Alcabala Regulations did not impose form requirements for land transactions, these findings are of importance primarily to students of nineteenth-century judicial historiography. There was, however, a much more pervasive impost on land transactions in public form: a stamp tax, enforced through requiring the use of papel sellado ("sealed," i.e., stamped paper) for public instruments. This tax was applicable in Spanish North America west of the Sabine river at all times here material, but its collection was gravely hampered by the local lack of the requisite stamped paper. Perhaps as many as half of the instruments examined for the present study contain the stereotype formula that simple paper had to be used because there was no papel sellado to be had.

Nevertheless, sealed paper was quite uniformly used when available, and it appears to have been fairly regular in supply in the latter part of Mexican rule. The amount of the stamp duty varied with the stated value of the transaction, but twenty reales (or $ p. 2.50) seems to

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300. F. Enrique to J. Casiano, San Antonio, August 11, 1825, Bexar County Transcribed Records C-1, at 135; see also id. 29, 31, 33, 37, 88 & 122 (1833); id. 45, 134 & 136 (1834); J. Cubier to Oliver M. Jones, July 29, 1834, id. 199, 200; id. 5 (1835) (ten pesos for a purchase price of 499 pesos).

301. J. K. Allen to Leander Smith, Nacogdoches, February 16, 1836, Nacogdoches Archives, supra note 265, vol. A, at 112. See also id. at 82 (1834), and Nacogdoches County, Record of Deeds, Book B, at 212, 213, 214 & 225 (1835).


303. See note 9, supra (the item last cited is by far the largest).

304. See text at notes 73, 96-109, supra.

have been a fairly representative amount.\textsuperscript{306} The records of Stephen Austin's Texas settlement in San Felipe, in particular, show meticulous compliance with the requirement of using stamped paper. William B. Travis, who acted as a legal adviser and municipal official there before moving on to more conspicuous tasks, was well aware of the need for \textit{papel sellado}, and took some trouble to assure its supply.\textsuperscript{307}

There is some question whether the execution of land transactions in public form entailed expenses in addition to the ones just mentioned. In theory, under Mexican rule, judicial officers acting in lieu of escribanos where authorized to do so were entitled to notarial fees fixed by statute,\textsuperscript{308} but it does not seem likely that these fees were exacted with any regularity. In the Spanish era, it would appear, judicial instruments were issued free of charge other than the stamp tax just mentioned,\textsuperscript{309} and even that, as we have seen, was not exacted where \textit{papel sellado} was not in supply locally.

This rather modest setting serves to explain at least in part why land transactions were executed so frequently in the form of public instruments in Spanish and Mexican Texas, Nuevo Mexico, and Alta California: it was relatively inexpensive to do so. There were no escribano's fees to be paid; and even the modest charges for stamped paper were frequently avoided because there was none. An alcabala in the amount of two per cent of the stated purchase price was another matter, but this tax, as we have seen, was levied only intermittently in Texas and not elsewhere in the "Spanish Southwest." Furthermore, primitive economic circumstances, rather likely reinforced by prudence in public

\textsuperscript{306} Bexar County Transcribed Records C-1, 161 (1832). \textit{See also} id. 157 (1831); \textit{id.} 155 (1833).

\textsuperscript{307} \textsc{Travis Diary, supra} note 274, at 45, 49, 51, 168 & 184. It would seem that all San Felipe deeds were recorded on papel sellado. \textit{See, e.g.}, Smith & Kinsey, partition, May 21, 1825, Austin County Spanish Record Book A, No. 17; \textit{compare} text at notes 22-23, \textit{supra}. Article VI of the Ordinance Establishing a Provisional Government, adopted by the Consultation on November 13, 1835, expressly provided that conveyance could be "made in English, and not on stamped paper, and that stamped paper be, in all cases dispensed with." \textsc{H. Gammel, Laws of Texas} 538, 540.

\textsuperscript{308} Federal Law of February 12, 1840; cap. II, art. 21 (judges of first instance); cap III, art. 2 (alcaldes and jueces de paz). \textsc{3 M. Dublan & J. Lozano, Legislación Mexicana} 676, 679-80 (1876); State of Coahuila & Texas, Decree No. 54 of May 1 & 2, 1828, art. 64, \textsc{B.A. General Printed Series}.

\textsuperscript{309} At the residencia of Governor Flores Mogollon of Nuevo Mexico in 1717, Joseph Gilthomy testified that in view of the poverty of the province, no court and counsel fees were assessed at the time. Residencia, \textit{supra} note 225, at 23r. On the other hand, William B. Travis charged $5 for drafting title bonds and $5 to $10 for drafting deeds, and he continued this practice even after his appointment as secretary of the ayuntamiento of San Felipe de Austin. \textit{See Travis Diary, supra} note 274, at 43, 49, 168, 183.
documentation of private wealth, kept the stated price of transactions at a modest level. In more prosperous sections of the Indies, we have seen, there was some incentive to avoid taxes by conveyancing through private writing rather than public instrument, but this factor was of little significance in the "Spanish Southwest."

Where the cost element was insignificant, the advantages of conveyancing by public rather than private writing must have been obvious. There was, first of all, the public faith enjoyed by public instruments, which made them proof of the highest order known to law as to the matters recited in them. In relatively unsettled, pioneer conditions on a military frontier, this was surely a major factor: witnesses might become unavailable through transfer or death, but the instrument of sale would prove itself. Furthermore, the very fact of its being recorded in the protocolos of the local judicial records was security against loss or destruction of the testimonio in private hands, for a new copy could be obtained from the judicial archives. Contemporary awareness of these advantages as to the mode of proof and the perpetuation thereof is demonstrated by several instances where conveyances of land initially consummated by private writing were subsequently submitted to the judicial authorities for incorporation in the judicial archives as public instruments. As one petition put it, this was to prove, "en todo tiempo," title to the property thus acquired.

These advantages as to proof and its perpetuation inured, at least in theory, to the benefit of both parties, although even here, the interest of the purchaser manifestly predominated in view of his continuing investment in the security of the transaction. An examination of the Castilian form precedent employed in the "Spanish Southwest" shows that the

310. See text at notes 100 and 106, supra.
311. PART. 31.18.114; A. DE ASO & M. DE MANUEL, supra note 246, at 280-81.
312. See text at note 246, supra.

314. Petition of Reimondo Noris to the Governor of Texas, April 23, 1810, Nacogdoches Archives, vol. C-1, at 24. The extreme delay in official response to this petition is probably explained by contemporary political conditions. See text at notes 350-52, infra. The two-step conveyancing practice in San Felipe de Austin (see text at note 274, supra), shows that Anglophonic immigrants, too, were well aware of the advantages of the execution of conveyances in public form.
predominance of concern for the purchaser was much more pronounced, and indeed the basic theme, of the contracts of conveyance then in common use. The seller routinely warranted his title free from encumbrances, undertook to defend the title of the purchaser against all challengers, and pledged his present and future assets in support of these obligations. He also, at least usually, waived formal proof of payment and remedies for lesion or unconscionable overreaching, making a gift inter vivos of the discrepancy (if any), waived his jurisdictional privileges, and in conclusion, submitted himself to the execution of the conveyance in the same manner as a judgment no longer subject to appeal.315

Without going into further detail, it seems apparent that several of these warranties and waivers, most notably the cognovit clause, could not be achieved without a public instrument. Furthermore, no prudent purchaser who exacted such detailed stipulations in his favor was likely to forego the ready opportunity of perpetuating their proof at the time of the execution of the transaction. Finally, and perhaps most significantly, no subsequent purchaser was likely to pay full value for land held by his vendor through mesne conveyances falling short of the standard Castilian deed executed in public form.

There can be little doubt that the informed public in Spanish North America was aware of the form and style of the conveyances then in use. It should be recalled that in addition to the vendor and the purchaser, three persons regularly participated in the execution of conveyances: the alcalde (or juez) and the two witnesses de asistencia. The former was a member of the local “establishment” by definition, and because of rotation in office, many members of the literate oligarchy had personal exposure to judicial office. For more or less the same reason, the witnesses were likely to be persons of some standing. Indeed, the attestation clauses of some deeds read like extracts from the local “social register.”316 This applies not only to the older population centers, but to Stephen Austin’s San Felipe settlement as well.317

Additionally, there is ample evidence of a more general popular awareness of the essentials of conveyancing as then practiced. Some of

315. See text at notes 256-62, supra.
316. It seems difficult to surpass the following: Juan Bautista Alvarado to Juan (John) B. Cooper, Monterey, December 7, 1843, before J. A. Vallejo, juez, with Pablo de la Guerra and Manuel Castro as witnesses de asistencia. (Alvarado was a Governor of California.) Monterey County Conveyances Book A, at 165.
317. Chandler to Roberts, supra note 272, was executed before David G. Burnet as Judge, with Ira R. Lewis and W. B. Travis acting as instrumental witnesses, and N. Townsend and J. H. Kuykendall, as assisting witnesses.
this has already been mentioned, but one more example as to the tenacity of the Castilian style might be cited here: As late as 1853, Domingo Peralta conveyed part of his rancho of San Antonio to his wife by private conveyance drafted in obvious reliance on Castilian form precedent, concluding with the request that the instrument be recorded in the appropriate office, "dando fe de ella un Escribano Publico."

All of this is not to say, of course, that there was a rule of customary law in all or part of Spanish or Mexican North America requiring the execution of conveyances in public form. As we have seen, conveyances by simple writing were used at times, and some of these were transformed into public instruments not for purposes of validation, but in order to facilitate and to preserve proof of the transaction. The point is, rather, a more narrow one: Any assertion that a conveyance had been made in Spanish or in Mexican days in a form deviating from the Castilian standard then prevailing was inherently suspect, and credible only in exceptional cases.

This seems to furnish an explanation of the Texas, New Mexico, and California decisions in point, which were discussed much further above. When reexamined, they deal primarily with transactions in which at least the alleged purchasers were recent Anglophonic immigrants without previous exposure to the customs of the region. Perhaps for this reason, there was some justification in regarding the submissions of the parties or of counsel as not inherently improbable. It is quite another matter, however, to generalize this exceptional setting, and to suggest that informal conveyancing was not only effective under "Spanish" law but indeed the prevailing custom. A mistake of such mag-

318. See notes 313-14, supra, and accompanying text.
320. See notes 313-14, supra, and accompanying text; see also Garcia to Ramon, Laredo 1844, supra note 268. There are a number of conveyances executed by private parties in times of political turmoil or uncertainty, in close approximation to Castilian form precedent: e.g., Sisto Berreysa to Josefa Higuera, Sonoma, February 7, 1851, Sonoma County Recorder's Office, Santa Rosa, Calif., Deed Book Transcripts, Book A (Copy), at 146-47.
321. See text at notes 18-46, supra.
322. Possible exceptions are Grant v. Jaramillo, 6 N.M. 313 (1892), Salazar v. Longwill, 5 N.M. 548 (1891), Sullivan v. Dimmitt, 34 Tex. 114 (1871). The original parties to the asserted informal sale were not, however, before the court in these cases, and counsel were uniformly of non-Hispanic origin. No attempt was made, apparently, in any of the cases discussed in text at notes 18-46, supra, to associate Mexican counsel with the proceedings, or to present expert testimony on Mexican law.
C. Mortgages

It will be recalled that in culmination of longstanding reform efforts, the Castilian law of mortgages was fundamentally revised in 1768. A pragmática issued on January 31 of that year detailed the task of keeping local mortgage registers, obligated escribanos to record mortgages drafted by them in these registers, and, most importantly, sanctioned compliance with these requirements by providing that mortgages not duly executed and registered as thus provided were of no effect even between the parties. The 1768 pragmática was not at first adopted by the Council of the Indies, in all probability for the simple reason that its implementation outside of the Peninsula faced geographic and administrative obstacles of some magnitude.

The six-day registration period could not readily apply where travel time was measured in weeks or even months, and where there were no escribanos to keep the register and none to draft the mortgages, even the mechanics of the registration process required adaptation to local circumstances. It was for this reason that the cedula of April 16, 1783, which completed the process of extending the 1768 mortgage reform to the Indies by directing the establishment of local mortgage registers, left the details of the implementation of this new scheme to the respective audiencias.

The discussion above also illustrates that the obstacles encountered elsewhere in the Indies did not exist in New Orleans, where mortgage reform legislation paralleling but not directly reflecting the Castilian pragmática of 1768 was adopted on February 12, 1770. It was also noted, however, that the implementation of the ambitious scheme then enacted was difficult at best even in the major posts of the Lower Territory, and virtually impossible at the more remote settlements such as St. Louis.

Once again, the Luisiana background may serve as a useful point of reference for the three Spanish provinces west of the Sabine river. The cedula of 1783 was implemented in New Spain through instructions adopted by the Audiencia at Mexico City on September 27, 1784. These instructions provided for the establishment of the office of Annotator of Mortgages in some thirteen named cities and towns, and for the keeping of the mortgage register at other seats of government by the escribano.

323. See text at note 65, supra.
324. See text at notes 91-92, supra.
325. See text at notes 131-46, supra.
publico or, where there was none, by the appropriate tribunal. None of the towns named expressly are located in what is now the United States. This was so not only because San Antonio and Santa Fé were too insignificant at the time to merit special mention, but more fundamentally because with the exception of Laredo, the "Spanish Southwest" was then subject to the jurisdiction not of the Audiencia of New Spain but of Guadalajara.

A search of the Laredo deed transcriptions and political archives has failed to turn up any indication that the Instructions of 1784 had been received there, or for that matter, any evidence of knowledge of, or of attempts to comply with, the letter or the spirit of the Castilian mortgage reform of 1768. Standing alone, this might well be considered an oddity explained by local conditions. An examination of the pertinent records and archives in other parts of the "Spanish Southwest" has shown, however, that subject to a remarkable though ephemeral exception soon to be mentioned, the situation in Texas, Nuevo Mexico, and Alta California was essentially the same in this regard: The Castilian mortgage reform legislation stopped, as it were, at the international boundary to be established (some eighty years hence) between Mexico and the United States.

An uncrirical reading of the few decisions in point might suggest otherwise. In Moore v. Davey, it will be recalled, the territorial Supreme Court of New Mexico had held that under "Spanish" and Mexican law there prevailing, a mortgage was a valid charge upon the land only if registered at the registry of the situs within six days if made there, or within thirty days if made elsewhere. This holding was indirectly based on the 1768 pragmatica, which in turn had been cited as authority by Gustavus Schmidt, the author on whom the New Mexico court relied. A similar argument, again derived from Mr. Schmidt's treatise, was made by counsel in the California case of Call v. Hastings but not passed on by the court.

The Moore case, and counsel's submission in Call, are based on the proposition that the pragmatica of 1768 was operative in the Indies proprio vigore—an assumption that perpetuated an error originally com-

326. See text at note 93, supra.
327. See text at notes 200-07, supra.
328. See notes 200 and 253, supra.
329. See text at notes 338-56, infra.
330. 1 N.M. 303 (1859), discussed at notes 47-49, supra.
331. 1 N.M. at 305, quoting from G. SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 180-185 (1851) (inaccurate page references, probably due in part to printing error).
332. 3 Cal. 179, 181 (1953).
mitted by Mr. Schmidt, who appears to have been quite unaware of the mechanics of the transmission of eighteenth-century Castilian mortgage reform legislature to the ultramarine possessions. If apprised of this transmission process, court and counsel might have directed their attentions to a search for local traces of instructions on the subject by the Audiencia of Guadalajara or, at a minimum, to the seemingly obvious question whether there were any libros de registros de hipotecas in existence in Nuevo Mexico or California before United States rule.

Inquiry along these lines would have shown that the 1783 cedula directing the establishment of mortgage registers was duly received and registered by the Audiencia of Guadalajara. On the other hand, if presently available records and extracts therefrom can be relied on as presenting a reasonably comprehensive account, it could also have been established then that there is no trace of any implementing instructions of that Audiencia on the subject of mortgages in the political archives or land records of New Mexico, California, or for that matter, Texas. Perhaps decisively for present purposes, an examination of the Spanish and Mexican land registers and transcriptions therefrom would have disclosed that there were no registros de hipotecas dating from Spanish or Mexican rule anywhere in the “Spanish Southwest.”

It is most unfortunate that inquiries along the lines just suggested were not made at the time when questions on “Spanish” and Mexican mortgage law were first presented to courts in the United States. The testimony of former Mexican government officials and judicial officers was then still available, and records now scattered or destroyed might have been perpetuated. Additionally, it can be established even from United States territorial county deed records that a regular system of mortgage registers was in existence in at least parts of the Mexican

333. G. Schmidt, supra note 331, citing N.R. 10.16.1-2, and especially id. 10.16.3. This is the recopilación of the pragmática of 1768. See note 65, supra, and accompanying text.
335. Such testimony was regularly taken by the California Land Commissioners. See, e.g., Alemany v. United States, S.D. Cal. 1858, No. 388, record at 32 et seq. This practice was approved judicially in Fremont v. United States, 17 How. (58 U.S.) 542, 557 (1855), and in State v. Cuellar, 47 Tex. 295, 304-05 (1877).
336. The latter include especially the originals of the California Spanish and Mexican political archives, which were (with few exceptions) destroyed in the San Francisco earthquake and fire of 1906. The present study has attempted to fill at least part of the gap thus created by resort to the California Archive Transcripts in the Bancroft Library, University of California, Berkeley. See notes 205 and 298, supra. These transcripts are, however, frequently summaries rather than copies, and there is no assurance now that all essential documents extant in 1846 have been perpetuated at least in this manner.
Northwest in the latter half of the nineteenth century. If based solely on an unsuccessful search of surviving archives and records more than a century after the event, the conclusion that such a system did not also exist some time earlier to the north of the present international boundary would be somewhat bold and perhaps even imprudent.

There is, however, additional evidence available. In Texas, an attempt was made in 1810 to introduce and to implement the 1768 Castilian mortgage reform legislation through enactment at the provincial level. The motivation, substantive contents, and ultimate fate of the Texas Mortgage Ordinance of 1810 furnish, as will be seen, a remarkably clear insight into the state of the matter at that time.

On March 4, 1810, Governor Manuel de Salcedo of Texas issued an ordinance on the subject of mortgages, which was ordered to be published by *bando* throughout the province for three festive days of major assemblage so as to insure full compliance. The preamble of the ordinance stated that the Royal pragmatica of January 31, 1768, had ordered the establishment of general mortgage registers in the capital cities, to be kept by the escribanos of the ayuntamientos, in which all mortgages of immovables were to be recorded. It then went on to observe that since there was no escribano in the capital, there had been no compliance with the 1768 pragmatica and the Instructions cited therein in Texas, with the result that many injuries and frauds had been suffered.

In order to remedy this abusive situation, Governor Salcedo proceeded to order all judges subject to his jurisdiction to place in all mortgage instruments passed before them a notice to the effect that these were to be recorded with the provincial government within six days if executed in San Antonio, and within one month if executed elsewhere in the province. The judges were also directed to inform the parties to mortgage instruments that unless they complied with the requirement of recordation thus imposed, such instruments would be ineffective, in court or out of it, for the purpose of prosecuting the mortgages therein contained, or of encumbering the property purported to be affected. Mortgages executed before the enactment of the ordinance were similarly required to be registered as a precondition to judicial enforcement.

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337. Elias family to Cameron brothers, sale of ranches with mortgage, Ures, Sonora, July 25, 1862, Pima County Recorder's Office, Tucson, Ariz., Deed Records Book 1, at 261.  264: The judge before whom the instrument was executed advised the parties that they had to record it at the mortgage office within the period provided by law; and this was done on August 25 of that year at the Registro de hipotecas of the juzgado of Magdalena, Sonora, *id.* 267.

Additionally, judicial officers were charged not to execute instruments of sale of goods of whatever kind capable of being mortgaged, without the presentation by the parties of a certificate from the Government to the effect that the goods affected were free of mortgage or encumbrance. Finally, mortgages made in Texas but relating to goods situated outside of the Province were ordered to be registered not only as thus provided, but also, within a period of three months, at the situs of the property.

The technical details of the implementation of the impressive mortgage registration and title certification scheme laid down in the Ordinance of March 4, 1810, had already been dealt with in instructions issued two months earlier. These provided for the keeping of a central mortgage register, subdivided by geographic area and by year, by the provincial government at the capital, since there was no formal municipal cabildo in Texas at the time.

The judicial officers before whom mortgage instruments were executed were charged, in addition to the tasks of content control and instruction already mentioned, with the duty of sending the testimonios of these instruments to San Antonio for registration, and of noting such registration, when accomplished, on the margin of the protocolo. They were also required to furnish notice of all pre-existing mortgage instruments in their files, presumably so that these, too, might be recorded in the central register to be set up in San Antonio.

It is readily apparent from the stated purpose of the Texas Mortgage Ordinance that as of 1810, the Castilian mortgage reform legislation of 1768 had not been implemented in Texas. Furthermore, it seems reasonably certain that Governor Salcedo's actions on the subject of mortgages were not prompted by a belated attempt of the Viceroy, the Commandant General of the Internal Provinces, or the Audiencia of Guadalajara to implement the cedula of 1783 or the Instructions of 1784 in the northern outposts of New Spain. No correspondence on this subject with any of these superior authorities appears in the Bexar Archives for 1809 and 1810 or, for that matter, in the Laredo, New Mexico, or California archives for these years. Furthermore, no similar attempt at local legislation on the subject of mortgages appears to have been made either in Nuevo Mexico or in California.

340. See text at note 246, supra.
341. See text at note 357, infra.
342. See text at notes 92-93, supra.
We are dealing, then, with a unique piece of mortgage reform legislation at the provincial level. Content analysis shows that both the regulations issued on January 4, 1810, and the Mortgage Ordinance promulgated two months later were drafted with substantial and in some cases literal borrowings from the Castilian pragmatica of 1768. The provision as to Texas mortgages of properties situated elsewhere seems to have been locally inspired, and the requirement of a certificate of freedom from encumbrances as a precondition for the execution of sales of immovables in public form, finally, appears to have been taken from Governor Unzaga's Luisiana Land and Slave Transfer Ordinance of November 4, 1770.

This last suggestion is not entirely conjectural. Manuel de Salcedo, the Texas governor who promulgated in all likelihood also drafted the 1810 mortgage instructions and legislation, was the son of the last Spanish governor of Luisiana. He had been stationed in that province from 1801 to 1804, and had assisted his father in administrative matters. Furthermore, he was related by marriage to a prominent Luisiana Creole family, and familiar with Luisiana notarial practice through personal experience. He had also renewed his Louisiana contacts before assuming his position as governor of Texas in 1808.

These connections alone might not suffice to explain the rather remarkable phenomenon of the apparently spontaneous enactment of a fairly original piece of mortgage reform legislation in a remote part of the Internal Provinces. Additional impulses could have been supplied by

343. The Ordinance of March 4, 1810, is derived mainly from the pragmatica of 1768, N.R. 10.16.3, Instr. §§ 1, 2, and 10. Literal borrowings extended even to such terms as "escrituras de majorazgos," or entailed estates of the nobility, which were manifestly of little utility in Texas at the time. This shows that the text of the pragmatica was available in San Antonio in 1810, but research has failed to uncover its source. One likely explanation is that Governor Salcedo had a personal copy of the Novisima Recopilacion, which was published in Spain in 1805, about two years before his posting to Texas. There is, however, no further evidence supporting this supposition. The regulations of January 4, 1810, literally borrow from N.R. 10.16.3, § 1.

344. The instructions accompanying the pragmatica merely required registration at all places where the mortgaged property was situated. N.R. 10.16.3, § 1.

345. See text at notes 129 and 169, supra. No literal borrowings could be established.

346. Benson, A Governor's Report on Texas in 1809, 71 S.W. Hist. Q. 603, 603-04 (1968); Pedro Denis de la Ronde, Alfarez Real and Alcalde of first vote of New Orleans, undertaking to supply dowry of $ p. 2,000 to his niece Maria Teresa Josefa so as to enable her to marry Manuel Salcedo, New Orleans, November 29, 1802, 18 Ximinez 406, cancelled by Manuel Salcedo on May 16, 1804., id., marginal note. See also the parental permissions to marry, id. 150,405.

a then current case involving an insolvent debtor, which concerned Governor Salcedo in his military as well as judicial capacities, and by some dealings in slaves (likely to be subject to Louisiana mortgages), including one such transaction by the governor himself. A more definite conclusion on the issue of actual motivation does not seem possible, especially when it is recalled that 1810 is also the year of the Hidalgo Revolution.

Father Hidalgo sounded the Grito de Dolores on September 16, 1810—some six months after the events here described. Governor Salcedo was seized and deposed by a revolt in San Antonio on January 21, 1811. Although he was freed from detention a few weeks later, his major immediate concerns were military; these culminated in his participation in the court martial and execution of Father Hidalgo in July of that year. The defeat of the Hidalgo movement brought little respite to the Royalist cause in Texas, however; and in any event, Governor Salcedo’s political and administrative authority was shaken by his initial removal from power. Necessarily preoccupied with military matters, he concentrated on the military defense of Texas against invasion by filibusters from Louisiana. He was ultimately defeated by the forces of the Gutiérrez-Murphy invasion that started in August, 1812, and was murdered outside of San Antonio on April 3, 1813, one day after the surrender of his forces to the rebels.

Given this background of violence, it seems hardly surprising that the Texas mortgage reform legislation of 1810 proved to be ephemeral. By a fortunate coincidence, the protocolos of public instruments executed by the First Alcalde of San Antonio between February 12 and November 27, 1810, have survived. These contain two mortgage instruments, both of which carry a statement to the effect that they were to be registered within six days, on pain of nullity, in the libro de asientos de hipotecas. It has not been possible, however, to find such a record

348. Piernas v. Fernandez, B.A., September 9, 1809. The debtor, who was stationed with the Nacogdoches garrison, was permitted to avoid execution of judgment by undertaking to pay the debt within one year and placing his property in “embargo” until then. Id., November 13, 1809.


350. See generally F. Almaraz, supra note 347, at 95 et. seq.

351. Id. at 118-23.

352. Id. at 130-71.

353. Maria de la Garza to Cipriano de la Garza, mortgage, San Antonio, September 1, 1810, Galan Protocolos, B.A., February 12, 1810, at 15r; Luciano Garcia to Ramon Martinez de Pinillo, mortgage, San Antonio, February 12, 1810, id. 1, 2.
in the Texas Spanish Archives or record transcripts. The evidence supports the hypothesis that if such a record ever existed, it perished in the course of the revolutionary events just referred to. This conclusion is supported by the fact that no mention of the mortgage register or indeed of the requirement of registration occurs in the few post-1813 Texas Spanish or Mexican mortgages that could be discovered. Additionally, the ephemeral nature of the Texas mortgage reform efforts is also attested indirectly by the absence of any trace of certificates or lack of encumbrance in post-1810 Texas conveyances or other land records.

It is concluded, then, that the Castilian mortgage reform legislation of 1768 was not implemented in the northern tier of the Internal Provinces when this reform was extended to New Spain towards the end of the eighteenth century, and that the isolated attempt of Governor Salcedo of Spanish Texas to enact a rather unique variant of progressive mortgage law in that province proved to be ephemeral. This strongly suggests that real estate mortgages as such were of little significance in the legal and economic life of the "Spanish Southwest" under Spanish and Mexican rule. That, too, seems reasonably clear from the record, for our search has turned up only a few isolated instances of mortgages predating Texas independence or United States rule in these areas. The negative inferences arising from our largely unsuccessful search is also corroborated to some extent by contemporary authority: Governor Salcedo's request for a report on mortgages in the Nacogdoches judicial archives produced a list of only five items, and no more than one of these was a real estate mortgage.

Moreover, some of the few mortgage instruments that could be located are highly atypical. Thus in 1844, we find a Monterey, California debtor conveying a usufruct in a house to a creditor in partial security for an antecedent obligation, with the stipulation that full title was to be conveyed if the debt had not been discharged at the end of the year next following. At the other extreme, there is a San Felipe mortgage by


355. See text at notes 338 and 345, supra. Even the deeds in the Galan Protocolos make no reference to such certificantes, although Galan was well aware of Salcedo's mortgage legislation. See text at note 353, supra.

356. See note 354, supra, text at notes 358-59, infra.

357. Noticia de las Hipotecas que existen en el Archivo de Nacogdoches, B.A., January 1, 1810.

358. R. Juan to M. Dias, "mortgage," October 31, 1844, 11 Monterey County Archives 1693.
Henry Austin to William Cato, dated May 18, 1835, in the form of a conditional conveyance to two named trustees, later discharged by payment to the surviving trustee. These two instruments literally span the development of Anglo-Saxon mortgage law from Glanville to Blackstone, but they also disclose a complete lack of familiarity with Castilian form precedent in point. When it is recalled that the instruments just referred to were executed before local judicial officers acting with the assistance of knowledgeable witnesses, and recorded in the official protocolos, the pervasive lack of experience with Castilian mortgage law becomes all the more apparent.

Unfamiliarity with pertinent form precedent and practice may be explained in part by the relatively underdeveloped level of real estate credit transactions even in the more economically advanced regions of Mexico after independence. As late as 1873, a leading commentator observed that in Mexico, the potential of real property as an instrument of credit had remained "casi nulo." He attributed this to the defects of the old legislation, the fault of security of land tenure especially outside of the cities, judicial maladministration, and, finally, the lack of capital.

One illuminating insight supplied in this connection is his comment that the Bank of London and South America had started mortgage operations in Mexico along lines then current in Europe, but had quickly withdrawn from such activities. This account is perhaps somewhat onesided, for in 1840, the London banking house of Baring Brothers financed the acquisition of the estates of the marquisate of Aguayo on the security of a mortgage of the Sánchez Nevarro estates in Coahuila, and that transaction turned out to be satisfactory. That was, however, one of the largest land transactions in history, and the bank was protecting a prior investment. At a less exalted level, there can be little doubt that Professor Lonzano was correct in his statement that real estate was not a significant source of credit in nineteenth-century Mexico—an observation that was all the more applicable to the "Spanish Southwest" before Texas independence and United States rule.

359. Austin County, Bellville, Texas, Deed Record, Transcribed Book A, at 17-23. The mortgage was later discharged by payment, as recorded by the surviving trustee.
360. See 3 R. Powell, Real Property § 438, at 545-47 (1967), with further citations.
361. J. Lozano, Derecho Hipotecario Comparado 16-17 (1873).
362. Id. at 20.
363. C. Harris, A Mexican Family Empire, The Latifundio of the Sánchez Navarreros, 1765-1867, at 163-72 (1975). The mortgage was for $120,000, and the transaction increased the Sánchez Navarro holdings to 16.5 million acres—about sixteen times the size of the King Ranch in Texas. Id. at 166.
The ostensible reasons for this underdevelopment of the mortgage market are many. They range from the outright prohibition of the mortgaging of town lot grants in eighteenth-century California\textsuperscript{364} to the extremely low price even of improved residential property in Tuscon in 1856.\textsuperscript{365} While there is some difficulty in assessing the relative importance of legal and economic obstacles and, more importantly, in distinguishing between cause and effect, it seems nevertheless possible to single out one element as the crucial one: the availability, throughout the period here dealt with, of public land grants at little or no cost.

So long as such grants were readily obtainable, the price of land privately offered for purchase (and hence, available as security) reflected little more than comparative locational advantage plus the value of improvements. In time, as well-situated towns grew into commercial centers and irrigation farming assumed importance along with cattle grazing, these factors would become more significant. Where, however, the main incentive for purchasing real property rather than applying for a land grant was the presence of an adobe structure of doubtful permanence a few minutes closer to the plaza, real estate prices necessarily remained rather modest. Landed wealth remained too slender a basis for raising commercial capital; improved land could be, and routinely was, purchased without the assumption of purchase money mortgages. Perhaps the best illustration of the consequences of this setting for real estate credit transactions was the otherwise quite startling fact that in the standard conveyance used in the “Spanish Southwest,” it was the vendor rather than the purchaser who pledged his assets as security for the transaction.\textsuperscript{366}

**Summary and Conclusions**

The purpose of this study was to ascertain the form requirements for sales and mortgages of immovables under Spanish or Mexican rule in areas that are now part of the continental United States. This question was litigated with some frequency as to conveyances, although much more rarely with respect to mortgages, in the course of the nineteenth century.\textsuperscript{367}


\textsuperscript{365} See text at note 286, supra.

\textsuperscript{366} See text at note 257, supra.

\textsuperscript{367} See text at notes 3-49, supra.
A survey of these decisions showed that the ultimate issue remained unresolved when addressed by the Supreme Court of the United States in 1894\textsuperscript{368} as did two questions long deemed basic in this connection: the applicability of the alcabala to land sales, and the availability of escribanos, in Spanish North America. Additionally, there had been some judicial discussion of the possibility that there might have been local legislation on the subject in Luisiana, but this question, too, remained unresolved.\textsuperscript{369} 

As shown by the geographic incidence of that litigation, the questions here examined arose in five states, corresponding to two distinct historical regions: Louisiana and Missouri in the former Province of Luisiana; and Texas, New Mexico, and California in New Spain. This limits the relevance of Mexican law, which became applicable after 1821 in the latter area only. Such a geographic concentration of the problem has been shown to be due to demographic and economic factors: these were the only areas of Spanish North America that proceeded from the initial land grant stage to the conveyance stage before the change of sovereignty.

The same factors also set the time frame for the present study. The outside dates for Spanish North America as a whole are around 1700 for the first conveyances under Spanish rule and 1856 for the last conveyance of the Mexican era. When viewed separately by political area, however, the actual time span of Spanish or Mexican conveyancing varies from place to place and is usually very much shorter than suggested by these dates.\textsuperscript{370}

The private law of Spanish North America was not “Spanish” law as such, but Castilian law as modified and transmitted to the ultramarine possessions by the law of the Indies and as further modified there by local legislation and, where territorially applicable, Mexican federal and state legislation.\textsuperscript{371} Castilian law was based on the principle of “freedom of form,” laid down by the Ordenamiento de Alcala. Since there were no specific form requirements for conveyances as such, it followed that informal contracts for the sale of immovables were valid under Castilian law. The proof of such agreements was, however, made difficult by strin-

\textsuperscript{368} Maxwell Land Grant Company v. Dawson, 151 U.S. 586 (1894), discussed at notes 43-45, \textit{supra}.

\textsuperscript{369} Gonzales v. Sanches, 4 Mart. (N.S.) 657 (1826), discussed in text at notes 3-11, 147-57, \textit{supra}.

\textsuperscript{370} See text at notes 190-95, \textit{supra}.

\textsuperscript{371} See text at notes 50-55, 93, 129-33, 166-70, 239-40, 339-40, \textit{supra}.
gent requirements as to the qualification and number of witnesses.\textsuperscript{372} This description is still accurate for Spanish and Puerto Rican law today.\textsuperscript{373}

The Castilian law of mortgages, on the other hand, was radically reformed in the eighteenth century. A pragmática of 1768, which represents the culmination of efforts in this direction, established two requirements for the validity of mortgages, even between the contracting parties: the execution of the mortgage by notarial act, and the registration of that act in the Mortgage Register. Again, this description still fits present-day Spanish law.\textsuperscript{374} The difficulty for the present study is not that there were different rules of Castilian law as to the formal validity of conveyances and mortgages, respectively, but that the mortgage pragmática of 1768 was not as such extended to the ultramarine possessions at the time of its enactment.\textsuperscript{375}

Turning now to Spanish North America, the territories east and west of the Sabine river require separate treatment. In Luisiana, a comprehensive system of mortgage registration and of conveyancing was introduced, along with the Castilian legal system itself, within the first two years of Spanish rule. The legislative instruments relevant in this connection are the Ordinances of the Ayuntamiento of New Orleans and the Instructions to the Commandants, both of 1769, and the Mortgage and Land and Slave Transfer Ordinances, which were enacted in 1770.\textsuperscript{376}

This legislation established a Mortgage Register in New Orleans, and made the validity of mortgages even \textit{inter partes} dependent upon inscription in that register. Furthermore, it conditioned the validity of conveyances of slaves, land, and vessels upon the execution of the sales contract in notarial form, with the additional requirement of a certificate from the Registrar of Mortgages reflecting the record of encumbrances, if any. The commandants of the posts were authorized to execute transactions in surrogate notarial form with the assistance of two witnesses. They and the escribanos were required to file mortgages contained in instruments passed by them with the Registrar for recording.\textsuperscript{377}

This scheme was enacted by Governors O'Reilly and Unzaga in pursuance of long-standing Castilian law reform efforts, but indepen-

\begin{thebibliography}{9}
\bibitem{1} Ordenamiento de Alcalá, tit. 16. ley unica, corresponding to R.5.16.2 and to N.R. 10.1.1; \textit{Part.} 3.16.18-19, 22, discussed at notes 70-71 and 82, \textit{supra}.
\bibitem{2} See text at notes 76-81, \textit{supra}.
\bibitem{3} See text at notes 65-67, \textit{supra}.
\bibitem{4} See text at notes 89-90, \textit{supra}.
\bibitem{5} See text at notes 112-19, 129, 131-34, 166-70, \textit{supra}.
\bibitem{6} See text at notes 131-34, 166-70, \textit{supra}.
\end{thebibliography}
dently of the Mortgage Pragmatica of 1768. The requirement of execution in public form for conveyances, in particular, went well beyond Castilian law as it then stood.\(^{378}\) The notarial and judicial archives show regular compliance with Spanish Luisiana legislation or mortgages and conveyances in the capital of the province,\(^{379}\) where there were two, and after 1788, three escribanos in residence. At the posts, too, conveyances and mortgages were regularly executed in public form, and in the Lower Territory, at least, an effort was made to comply with the requirements relating to the Mortgage Register so far as local conditions permitted.\(^{380}\)

In the Upper Territory, on the other hand, the provisions relating to recording in New Orleans and obtaining certificates of registered encumbrances were not observed.\(^{381}\)

Turning now to the three provinces west of the Sabine river, we note, first of all, the absence of comparable local legislation as to the form of conveyances. Consequently, general Castilian law was applicable in this respect. At least in principle, then, informal conveyances of immovables in Texas, Nuevo Mexico, and California were valid, although their proof and judicial enforcement was difficult if not impossible under the rules of evidence then prevailing. There was, however, the question whether this principle suffered an exception wherever an alcabala was collectible on land sales, since the alcabala regulations required the escribano before whom the conveyance was executed to notify its contents to the local tax authorities.\(^{382}\)

Much judicial time and effort was later spent on this question, and especially on two concomitant issues of local administrative and judicial history: whether the alcabala was applicable at all in these areas, and whether there were any escribanos who could have complied with the Regulations just mentioned.\(^{383}\) The basic question was, however, whether the sanction for noncompliance encompassed, in addition to the

\(^{378}\) See text at notes 70-73, supra; see also the discussion of the *Taranco-Acinera* Case (Council of the Indies 1791), text at notes 96-108, supra.

\(^{379}\) See text at notes 136-40, 172-79, supra.

\(^{380}\) See text at notes 143-46, 185-88, supra.

\(^{381}\) See text at notes 182-83, supra.

\(^{382}\) Law no. 101 of the Alcabala Regulations of 1491, corresponding to R. 9.17.10, and to N.R. 10.12.15 and continued in abbreviated form in R.I. 8.13.29, discussed at notes 72-73, supra.

personal liability of the non-reporting escribano there spelled out, the nullity of the unreported conveyance itself. That question had been raised in the Taranco-Acinera case in Guatemala, and had been resolved by a 1791 cedula of the Council of the Indies to the effect that contracts and clandestine sales executed without public instrument were “genuine, real, and effective sales.”

It is thus clear that under Spanish rule, informal conveyances of immovables were valid in Spanish North America outside of Luisiana; and no change occurred in this respect in the Mexican era. An examination of the conveyances actually used at the time has shown, however, that throughout the region, from Nacogdoches in east Texas to Sonoma in northern Alta California, the standard form of conveyance was a fairly complex public instrument following Castilian form precedent dating from at least 1256, as refined by several centuries of Castilian notarial practice. There were no escribanos in Nuevo Mexico and in California at any time; and there was no escribano in Texas after 1757. This did not, however, pose an obstacle to the execution of conveyances in surrogate notarial form, since Castilian law authorized judicial officers pass such instruments with two witnesses de asistencia in places where there was no escribano.

This use of public instruments for conveyancing even when not required by law is most readily explained by the advantages thereby gained with respect to proof and its preservation. Furthermore, at least some of the warranties contained in the standard form could in all probability not be achieved without notarial form or its judicial surrogate. Moreover, the requirement of the participation of two witnesses de asistencia along with the local judicial officer, and the recording of the instrument in the judicial archives, assured the existence of a documented tradition of conveyancing among members of the local gentry, to whom less experienced persons might turn for advice in such matters. Finally, members of this local oligarchy were likely to be involved personally in a large number of real estate transactions, and no knowledgeable purchaser was likely to be satisfied with less than proof of title in the accustomed manner.

On the whole, then, despite the absence of escribanos and, at least until the last phases of Mexican rule, of university-trained letrados or

384. See text at notes 96-108, supra.
385. See text at notes 256-95, supra.
386. See text at notes 217-27, supra.
387. See text at notes 234-39, supra.
388. See text at notes 310-17, supra.
advocates, conveyancing practice in Texas, Nuevo Mexico, and California followed fairly sophisticated form precedent evolved in half a millennium of Castilian notarial practice. With respect to mortgages, however, the situation was different. The Mortgage Pragmatica was not, as we have seen, transmitted to the Indies at the time of its adoption. The ultramarine audiencias were directed to implement the new scheme some fifteen years later, in 1783, but there is no evidence of such implementation in the territory of the Audiencia of Guadalajara north of the present international boundary. The few mortgages that have been found in the various local records confirm this conclusion, and also suggest that real estate was not a significant source of credit in these regions under Spanish and Mexican rule. This is probably due to the ready availability of land grants at little or no cost, which kept down the value of real estate.\textsuperscript{389}

The one exception in this respect is Texas, where a fairly ambitious mortgage reform and registration system was enacted in 1810. That system is directly traceable to the Castilian pragmatica of 1768, without the intermediary of New Spain. It was also to some extent influenced by Luisiana legislation in point, which is explained by the professional and family connections of the then governor, Manuel de Salcedo.\textsuperscript{390} The Texas mortgage reform of 1810 appears to have perished, however, in the Hidalgo Revolution which broke out that year; and no trace of Texas Spanish or Mexican mortgage registers could be found. Later Texas mortgages, too, suggest discontinuity in this respect.\textsuperscript{391}

The conclusions to be drawn from the present study start with the basic proposition that private land transactions are an excellent key to the legal history of the area. This is hardly surprising, for it stands to reason that land sales, which at least cost something, were deemed to be more significant at the time than land grants, which cost little or nothing. It also seems apparent that county deed records and judicial and notarial archives, where extant, offer many insights into legal history, besides supplying a wealth of information on political, social, and economic conditions. This is increasingly recognized by legal historians,\textsuperscript{392} but not as yet, seemingly, as to the records of former sovereigns, or transcriptions therefrom.

\textsuperscript{389} See text at notes 356-66, \textit{supra}.
\textsuperscript{390} See text at notes 338-47, \textit{supra}.
\textsuperscript{391} See text at notes 350-55, \textit{supra}.
On a less abstract level, the most significant insight is, probably, that "Spanish" law, i.e., the law of Castile and of the Indies, was not uniform throughout North America, and that this lack of uniformity corresponded, in the main, to demographic and economic differences reflected in the relative maturity of regional or even local judicial and legal institutions. Luisiana was much more advanced in these respects than the Internal Provinces; the Lower Territory was ahead of the Upper; and New Orleans while under Spanish rule was the only place north of the present international boundary where all of the prerequisites for the smooth functioning of the legal system of the Indies were present.

Almost as remarkable, surely, is the actual operation of that legal system in the Internal Provinces without the aid of locally resident letrados, escribanos, or even professional judges, major repositories of legislation and law libraries. This demonstrates the viability of Castilian law as a "Honoratiorenrecht," in Max Weber's terminology, i.e., as a legal system grounded in popular conscience and administered, in the main, by a small number of distinguished and intelligent laymen.393

The picture here drawn is of course radically different from that suggested in judicial decisions after the change of sovereignty, which were discussed at the beginning of the present study.394 But so is the historical record: the alcabala did not go to the validity of land sales, but it was collected in Texas;395 there were no escribanos in nineteenth-century Texas, Nuevo Mexico, or California, but conveyances were routinely drawn in public form everywhere by judicial officers with the assistance of two witnesses;396 there was local legislation on the validity of conveyances in Luisiana, and it was known and judicially enforced under Spanish rule;397 there was a pervasive custom of conveyancing west of the Sabine river, including California, and it reflected sophisticated Castilian form precedent dating from Bracton's days.398 In terms of judicial historiography, the question to be faced is not whether

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394. See text at notes 3-49, supra.
the courts addressing the issues here discussed were right or wrong, but why they were persistently wrong on such a scale.

One explanation that has already been suggested further above is that the nineteenth-century judiciary in areas then freshly incorporated into the United States, and in the initial period after Texas independence, was recruited from among recent immigrants to the area, and that the courts frequently faced parties or at least counsel from the same generational stratum. To this, we must add in fairness that there were no Spanish or Mexican professional lawyers in residence to be consulted, and that for some time at least, the supply of sources of Spanish and Mexican law continued to be inadequate.

The informational aspect of the question just raised requires further study, but it seems unlikely that this will provide an adequate explanation for the persistently low quality of judicial work on such a scale. Another factor to be considered in this connection, and hardly a more flattering one, is that of ethnocentricity. A distinguished authority on the law of real property has recently concluded that after the change of sovereignty in California, judicial inquiry into Mexican law was impeded in part by “the superiority, assumed by many immigrants, of all things Anglo-American, over all things Spanish or Mexican.”

It would be tempting to conclude our remarks on this subject (and at long last, this study) by observing that such lapses in judicial taste and objectivity in bygone days should now cause regret, but not lamentation. For surely, the damage done to Castilian self-esteem was minimal. But the dramatis personae were not, or at least not usually, Castilian. Arocha came from the Canary Islands; Gilthomey, from the Philippines. Most of the alcaldes, judges, and witnesses de asistencia who figure in these pages were the descendants of the Hispanic pioneers of the region:

399. See note 322, supra, and accompanying text.
400. See text at notes 57-62, 211-17, supra. It is hoped that a study now in progress will supply more detailed information in this respect, especially concerning the quite puzzling failure to consult Mexican counsel or to take expert testimony from eminent Mexican lawyer-statesmen (e.g., Benito Juarez; Ignacio Vallarta) while they were in political exile in the United States.
403. F. Chabot, With the Makers of San Antonio 167 (1937).
404. Testimony of Joseph Manuel Gilthomey, Mogollon residencia, supra note 225, at f. 23r.
Isleños; conquistadores and pobladores from Mexico; Californios. Their descendants, in turn, the Spanish-speaking people of the continental United States, are entitled to a view of the whole record, free of ethnocentric bias. It will not be a source of disappointment.