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Secured Transaction History: The Impact of English Smuggling on the Chattel Mortgage Acts in the Spanish Borderlands

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SECURED TRANSACTIONS HISTORY: THE IMPACT OF ENGLISH SMUGGLING ON THE CHATTEL MORTGAGE ACTS IN THE SPANISH BORDERLANDS

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I. INTRODUCTION

Conventional history claims that Anglo-American law refused to enforce mortgages on personalty against third parties until the passage of the chattel mortgage acts in the eastern seaboard states beginning in the 1820s.[1] When debtors retained possession of the personalty serving as collateral under the chattel mortgage, subsequent lenders and purchasers had no way of discovering the prior ownership interests of the earlier secured creditors unless the debtor's honesty forced disclosure. Without that disclosure, the debtor could borrow excessively, possibly leaving some of the debtor's creditors without collateral sufficient to cover their loan upon the debtor's financial demise. So the chattel mortgage acts required a filing of the chattel mortgage in a public record before a court would enforce the chattel mortgage against third parties. Then potential subsequent lenders and purchasers could become aware of the debtor's prior obligation by examining the public files.

One might extend this historical interpretation to those portions of the United States once governed by Spain–the Spanish Borderlands of Florida, Louisiana, Texas, and the Mexican Cession. Spain used an entirely different legal system than the Anglo-American common law based on judges' prior decisions. In contrast, Spain's civil law system relied on legal codes. Some civil law prohibited chattel mortgages.[2] For example, the legal maxim for Louisiana during the nineteenth century

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1 *E.g.*, GRANT GILMORE, SECURITY INTERESTS IN PERSONAL PROPERTY 24 (1965).

2 *See infra* note 86 and accompanying text.

was that Lousiana did not recognize chattel mortgages.[3] Historians claim that chattel mortgages became viable in Louisiana only with a series of chattel mortgage acts following 1912.[4] A supposed prohibition of chattel mortgages by early Mexican legal codes also foreclosed chattel mortgages in Texas and in the Mexican Cession.[5] The resulting conclusion would credit Anglo-American settlers with introducing chattel mortgages through a validating chattel mortgage act in 1838 in Texas and in 1857 in California.[6] Some American historians have asserted that the northeastern chattel mortgage acts authorized the nonpossessory secured transaction for the first time and then the validating movement went west.[7]

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[3] McCan v. Bradley, 38 La. Ann. 482, 484 (1886) (recognizing that movable property is not able to be mortgaged and that "[t]here can be no doubt that such is the law"); Delop v. Windsor, 26 La. Ann. 185, 186 (1874) (noting that a "chattel mortgage is unknown to our law"); Franklin v. Warfield, 8 Mart. (n.s.) 441 (La. 1830) ("It is an hypothecation of personal property, which is not tolerated by law."); Herbert v. Smylie, 1 Gunby 73, 73 (La. Ct. App. 1885) ("A mortgage on personal property is null."); Harriett S. Daggett, *The Chattel Mortgage in Louisiana*, 16 TEX. L. REV. 162, 165-66 (1937) [hereinafter Daggett, *Chattel Mortgage*].

Louisiana had little need for chattel mortgages since its courts recognized a nonconsensual vendor's lien on credit sales of personalty. LA. CIV. CODE ANN. art. 3227 (West 1973) (Rev. Civ. Code of 1870, art. 3227; Civ. Code of 1825, art. 3194); *see McCan*, 38 La. Ann. at 484. The Napoleonic Code, from which Louisiana law derives, does not provide for vendor's liens. To remain competitive with the other states, Louisiana had to devise a security device similar to the chattel mortgage.

[4] Daggett, *Chattel Mortgage*, *supra* note 3, at 166-67 (recognizing nineteenth century exceptions for slaves, ships, and crops); Harriet Spiller Daggett, *The Chattel Mortgage in Louisiana*, 13 TUL. L. REV. 19 (1939) [hereinafter Daggett, *Louisiana*]; Hall T. Elder, *Comment: Recent Interpretation of the Chattel Mortgage Act*, 7 TUL. L. REV. 128, 128 n.1 (1933) (recognizing nineteenth century exception for ships); Gordon Ireland, *Comment: Conflict of Laws as to Chattel Mortgages in Louisiana*, 10 TUL. L. REV. 275, 276 (1936) (same). For the statutes, see 1912 La. Acts 75, No. 65 (adding lumber, logs, and livestock); 1914 La. Acts 271, No. 155 (adding vehicles, machinery, and oil well equipment); 1916 La. Acts 271, No. 151 (adding staves, crossties, and bricks); 1918 La. Acts 372, No. 198 (adding all other movable property).

[5] *See* GUSTAVUS SCHMIDT, THE CIVIL LAW OF SPAIN AND MEXICO 180, 187 (1851) (requiring mortgage only on immovables and pledge only on movables). Although some courts considered Schmidt a reliable translator of Mexican mortgage law, *see* Maxwell Land Grant Co. v. Dawson, 151 U.S. 586, 597 (1893) (New Mexico law), Merle v. Mathews, 26 Cal. 456, 477 (1864), Schmidt erred on this point. See *infra* notes 222-239 and accompanying note for Mexican law in the 1830s and 1840s.

[6] *See* Act of Apr. 29, 1857, ch. 264, 1857 Cal. Stat. 347; Act of May 15, 1838, 1838 Tex. Gen. Laws 12; *see also* Act of Apr. 19, 1850, ch. 114, sec. 17, 1850 Cal. Stat. 267 (voiding chattel mortgages without delivery); Act of May 11, 1853, ch. 108, 1853 Cal. Stat. 153 (allowing chattel mortgages for fixtures).

[7] *See* GILMORE, *supra* note 1, at 26.

Such an interpretation, however, lacks factual support. A Lousiana case decided in 1847 referred to abolishing chattel mortgages in 1808.[8] Moreover, an 1822 statute of the Territory of Florida referred to Spanish filings of mortgages and bills of sale.[9] This statute did not confine its application to real estate. Also, Anglo-Americans generally created security interests in personalty with "bills of sales."[10] This case and statute hinted that the Spanish recognized chattel mortgages, at least in Louisiana and the Territory of Florida, and even had a chattel mortgage act in the Territory of Florida, before any of the commercial northeastern states.[11]

Reformers have recently expressed dissatisfaction with the priority given to the Anglo-American nonpossessory secured transaction, both under bankruptcy[12] and nonbankruptcy law.[13] These reformers desire to

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[8] Shepherd v. Orleans Cotton Press Co., 2 La. Ann. 100 (1847) ("As early as the adoption of the Code in 1808, it succeeded in abolishing mortgages on movables . . . .").

[9] Act of Sept. 13, 1822, 1822 Fla. Terr. Laws 85.

> [A]ll deeds of conveyances, mortgages, bills of sale, and wills which may have been executed subsequent to the 17th July [1821] and which shall have been recorded in the offices of the alcades of St. Augustine and Pensacola shall be as good and valid in law as if the same had been executed according to the formalities prescribed by the Spanish laws then in force in said Territory.

Id.

[10] *See* Bill of Sale Act of 1854, 17 and 18 Vict., ch. 36, *reprinted in* 46 Great Britain, *The Statutes of the United Kingdom of Great Britain and Ireland, 17 & 18 Vict.* 140-43 (London, Her Majesty's Printer 1854) (the English chattel mortgage act).

[11] Act of May 29, 1832, ch. 7, 1832 Conn. Spec. Acts 377; Act of Mar. 22, 1832, ch. 175, 1832 Mass. Acts 460; Act of June 22, 1832, ch. 80, 1832 N.H. Laws 58; Act of Apr. 29, 1833, ch. 279, N.Y. Laws 402; Act of Jan. 1834, 1834 R.I. Pub. Laws 53; *see also* George Lee Flint, Jr., *Secured Transactions History: The Impact of Textile Machinery on the Chattel Mortgage Acts of the Northeast*, 52 OKLA. L. REV. 303 (1999).

[12] *See* Lucian Arye Bebchuk & Jesse M. Fried, *The Uneasy Case for the Priority of Secured Claims in Bankruptcy*, 105 YALE L.J. 857, 909 (1996) (a 25% carve out). A secured transaction insures that a lender gets repaid. In return for the loan, the lender gets an interest in the borrower's personalty. *See* U.C.C. § 1-201(37) (2002). Secured transactions do not include security interests in realty, the subject of mortgages. *See* U.C.C. § 9-104(j) (2002). Secured transactions differ depending on whether the creditor takes possession of the collateral, a pledge, or the debtor retains possession of the collateral, a nonpossessory secured transaction. *See* U.C.C. § 9-102(2) (2002).

[13] *See* Elizabeth Warren, *An Article 9 Set-Aside for Unsecured Creditors*, 51 CONSUMER FIN. L.Q. 323 (1997) (a 20% set aside in U.C.C. § 9-301); *see also* Lynn M. LoPucki, *Should the Secured Credit Carve Out Apply Only in Bankruptcy? A Systems/Strategic Analysis*, 82 CORNELL L. REV. 1483 (1997).

reserve a portion of the debtor's assets for general creditors,[14] most notably tort claimants with judgment liens won by handsomely paid plaintiffs' attorneys.

An eminent jurist once noted that lawmakers adopt legal rules, such as the priority rule, to solve a problem.[15] Centuries later, the original problem has vanished, yet the rule continues. So a new generation of lawmakers endeavor to justify the rule with a new rationale. If they succeed, the rule takes on a new life. If they fail, these lawmakers replace the rule to accommodate the new conditions. Current efforts to find an economic justification for the nonpossessory secured transaction have so far proven unhelpful.[16]

But before engaging in a search for a new justification and before deciding to emasculate the current law of secured transactions, an understanding of the original reason for the rule granting the nonpossessory secured transaction priority would prove helpful. This Article aims to provide a part of that understanding.

This Article begins to correct the view that chattel mortgage acts began in the northeastern United States. First, this Article investigates whether Spanish law recognized chattel mortgages against third persons.[17] Finding that Spanish law did, this Article then examines whether Spanish officials developed any filing requirements for them.[18] Concluding that these officials did not, this Article next delineates the application of this law in the various Spanish-Borderland provinces.[19] Several of these provinces, at various times, did have filing requirements for some types of chattel mortgages, contrary to the Spanish law otherwise applicable.[20] Next, this Article investigates the survival or replacement of these chattel mortgage acts under the Anglo-American regime.[21] Finally, this Article provides the source for the colonial

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14 *See, e.g.*, Benedict v. Ratner, 268 U.S. 353, 364-65 (1925) (rejecting chattel mortgage of accounts even though transaction has no ostensible ownership problem, effectively reserving accounts for general creditors).

15 OLIVER WENDELL HOLMES, JR., THE COMMON LAW 5 (1881).

16 *See, e.g.*, Lois R. Lupica, *Asset Securitization: The Unsecured Creditor's Perspective*, 76 TEX. L. REV. 595, 620 (1998); Bebchuk & Fried, *supra* note 12, at 862-63 n.23 (providing numerous citations).

17 *See infra* Part II.

18 *See infra* Part II.B.

19 *See infra* Part III.

20 *See infra* Part IV.

21 *See infra* Part V.

Spanish chattel mortgage acts–namely, the effort to eradicate English smuggling in a newly acquired province and thereby render the province a viable component in the Spanish mercantile system.[22]

The transaction of interest consists of using personalty as collateral and leaving its possession with the debtor. Whether the parties labeled the transaction a pledge, a mortgage, or a conditional sale is not of interest. For the English, a pledge required delivery of the collateral to the creditor and so would not fit the class of interest.[23] The distinction between a pledge and a mortgage or conditional sale lays with who had ownership. The debtor retained ownership of the collateral under a pledge and did not for a mortgage or conditional sale.[24] The difference between a mortgage and a conditional sale involved redemption of the collateral. For a mortgage, the debtor retained equitable title for purposes of reacquiring ownership of the collateral, a redemption in an equity court for a reasonable period after default. A conditional bill of sale eliminated this right of redemption. Instead, the debtor had a right to repurchase, provided the debtor satisfied the payment conditions.[25]

The statute of interest is a chattel mortgage act, one requiring that a mortgage on personalty must be filed with government officials for validity against third parties. Early chattel mortgage acts appeared as part of a statute also requiring the filing of mortgages on real estate[26] or as part of a statute also requiring the filing of sales and other transfers.[27] Statutes referred to as chattel mortgage acts in this Article may indeed be much broader, encompassing real estate as well as personalty and covering sales as well as mortgages. However, this Article focuses on the filing aspect of chattel mortgages.

Chattel mortgage acts also come in three types. Some allow permissive filing of the chattel mortgage, usually with a priority rule based on time of filing.[28] Others mandate a filing for validity of the

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22 *See infra* Part VI.

23 *E.g.*, Corteleyou v. Lansing, 2 Cai. Cas. 200 (N.Y. 1805).

24 *E.g., id.* at 202.

25 *See* LEONARD JONES, A TREATISE ON THE LAW OF MORTGAGES OF PERSONAL PROPERTY 7-13, 196 (1881).

26 *See, e.g., infra* note 184 and accompanying text (British West Florida).

27 *See, e.g., infra* note 184 and accompanying text (British West Florida).

28 *See, e.g., infra* note 184 and accompanying text (British West Florida).

chattel mortgage against third parties.[29] Still others void chattel mortgages entirely, even against the other party, if not filed.[30]

II. SPANISH LAW

The law applicable to the Spanish Borderlands derived from Roman law. Classical Roman law delineated two security devices: *fiducia*, where the creditor had ownership and possession, and *pignus*, where the creditor merely had possession.[31] Both could use movable and immovable property as collateral. *Fiducia* had the drawback that, if the creditor sold the collateral, the debtor could not get the property back but could only sue the creditor for damages. This disadvantage lead to *fiducia*'s demise and replacement by *pignus*. Under *pignus*, the creditor or the debtor could have possession of the collateral.[32] Roman law developed remedies under *pignus* covering the situations when the debtor sold the collateral to another and when the creditor seized the collateral and sold it upon default. This made the *pignus* without creditor possession resemble the old Greek *hupoth k*. Under the *hupoth k*, Athenian creditors placed mortgage stones on the land serving as collateral to warn subsequent potential purchasers that the creditors had encumbered the land.[33] During the post-classical period, the Latin term *hypotheca* (usually translated in English as "mortgage") became the *pignus* without creditor possession and *pignus* (usually translated in English as "pledge") became limited to creditor possession. But Justinian, whose *Corpus Juris Civilis* embodied the classical Roman law as of 534, saw no difference between *pignus* and *hypotheca*.[34] The *hypotheca* applied to both movables and immovables.[35] The *hypotheca* differed from the English mortgage in that, for the English, title lay with the creditor, while for the Romans, title lay with the debtor.[36] This distinction meant that the Romans needed to obtain a court order to foreclose.[37]

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29 *See, e.g., infra* note 431 and accompanying text (Jamaica).

30 *See, e.g., infra* note 152 and accompanying text (Spanish Louisiana).

31 *See* Alejandro M. Garro, *Security Interest in Personal Property in Latin America: A Comparison with Article 9 and a Model for Reform*, 9 HOUSTON J. INT'L L. 157, 163 (1987).

32 *See* Roger J. Goebel, *Reconstructing the Roman Law of Real Security*, 36 TUL. L. REV. 29, 34-40 (1961).

33 S. C. TODD, THE SHAPE OF ATHENIAN LAW 252-55 (1993).

34 *See* 3 CORPUS JURIS CIVILIS: THE CIVIL LAW 124 (Samuel Parsons Scott trans., 1973) [hereinafter CORPUS JURIS CIVILIS] (Justinian, *Digest*, Part IV, bk. 20, tit. 1, laws 15, 16).

35 *See id.* at 124.

36 *See* Ryall v. Rowle, 27 Eng. Rep. 1074, 1080 (1750) (explaining the difference between the Roman *hypotheca* and the English mortgage). *But see* 4 James Kent, *Commentaries on*

A. Ability to Hypothecate

The Castilians adopted Roman law. In 1265, King Alfonso X of Leon and Castile prepared the *Siete Partidas* to unify his kingdom.[38] The *Siete Partidas* was a compromise between Gothic and Roman sources, weighing in favor of Roman sources.[39] The heaviest borrowing came from the *Corpus Juris Civilis* of Justinian, with Part III, dealing with procedure and property, and Part V, dealing with obligations and maritime law, translated nearly verbatim. The Spanish students of law had come from Bologna, the center of classical Roman law studies based on the *Corpus Juris Civilis*, and returned to practice law in Spain. Due to resistance from Castilian cities with *fueros* and the nobles, the *Siete Partidas* did not become law until 1348 through the *Ordenamiento de Alcalá* and then only in a subsidiary fashion.[40] The *Siete Partidas* supplemented ellipses in the other codes.[41] Yet it possessed tremendous doctrinal influence on courts, jurists, and law students.

Some English translations suggested the *Siete Partidas* only allowed mortgages on real estate and pledges on movables.[42] The *Siete Partidas* had no discussion of the *hipoteca*, the old Roman chattel mortgage with debtor possession.[43] But, the *Siete Partidas* subsumed security interests in both movables and immovables into the *peño*, or "pledge."[44] Like the *pignus* of classical Roman Law, the *peño* provided for possession by either the creditor or the debtor: "[E]very description of property, whether movable or immovable, which is placed in the hands of another party as security, can be called a [*peño*], although it may not be delivered

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American Law n.136 (Boston, Little, Brown & Co. 1884) (noting the English mortgage derived from the Roman *hypotheca*).

37 *See* Goebel, *supra* note 32, at 51.

38 DON ALFONSO EL SABIO, LAS SIETE PARTIDAS (1767) [hereinafter SABIO, SIETE PARTIDAS]. For an English translation of the *Siete Partidas*, see LAS SIETE PARTIDAS (Samuel Parsons Scott trans., 1931) [hereinafter Scott, SIETE PARTIDAS].

39 KENNETH KARST & KEITH S. ROSENN, LAW AND DEVELOPMENT IN LATIN AMERICA: A CASEBOOK 25-26 (1975).

40 *Id.* at 26.

41 THOMAS PALMER, GUIDE TO THE LAW AND LEGAL LITERATURE OF SPAIN 32 (1915).

42 *E.g.*, SCHMIDT, *supra* note 5. Schmidt translated for Texas and Louisiana, which at the time, still used some Spanish law. *Id.* at preface. After 1808, Louisiana used the Napoleonic Code of 1804, which made the distinction between movables, which parties can only pledge, and immovables, which parties can only mortgage. *See infra* text accompanying note 89.

43 *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 12; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 12 (surety), 13 (*peño*), & 14 (payments).

44 *See infra* notes 45-59.

to the party to whom it is [*inpeñoed*] . . . ."[45] "Property can be [*inpeñoed*] where the owners of the same are present as well as the others who are to receive it, whether said property is in that place or elsewhere."[46] The *Siete Partidas* also provided for a description of the collateral so creditors could identify it, which would have been unnecessary if the debtor delivered the collateral, allowed *inpeñoing* of the property before the debtor obtained ownership or possession, a second *peño* on the same property, and permitted conditional delivery: "Where one man receives property of another in [*peño*], under a condition or for a specified time, he cannot demand that the said property be delivered to him in [*peño*] until the condition is complied with, or until the day which is designated arrives."[47]

Clearly the English translation of "pledge" for *peño* includes both debtor and creditor possession situations.[48] Spanish legal treatise writers agreed with this understanding. The *Febrero Novisimo* of 1828 of Eugenio de Tapia provided that

> In any contract and obligation, be it pure, conditional, or mixed, a special and general mortgage can be input, . . . [and since] this latter comprehends all classes of goods having and to be loaned, and also the fruit of the same . . . . All things of human commerce . . . can be pledged or mortgaged . . . .[49]

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[45] *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 1; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 1 ("[*T*]*oda cosa quier sea mueble ó raiz que es empeñada á otro, puede seer dicha peño, maguer non fuese entregado della aquel á quien la empeñasen.*"); *see also* Garro, *supra* note 31, at 167.

[46] *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 6; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 6 (*"Empeñadas pueden secr las cosas estando presentes los dueños dellas et los otros que las resciben á peños, quier sean las cosas en aquel logar ó en otro.*").

[47] *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, laws 6, 7, 10 & 17; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, laws 6, 7, 10 & 17 (*"Tomando . . . un home de otro alguna cosa en peños so condicion ó á dia cierto, non puede demandar que gela den por peño fasta que se cumpla la condicion ó que venga el dia que señalaron.*").

[48] *See* Scott, SIETE PARTIDAS, *supra* note 38, n.1126 (so stating for SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 2).

[49] *See* EUGENIO DE TAPIA, FEBRERO NOVISIMO 436-37 (9th ed. 1870) (bk. 2, tit. 4, ch. 19) (citing SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 2 (*"Empeñarse . . . puede toda cosa quier sea nascida ó por nascer, asi como el parto de la sierva . . . ."*)). José Febrero wrote on Spanish law between 1769 and 1781. WILLIAM BASKERVILLE HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES 151 n.136 (1953).

So the Spanish *hipoteca* before the nineteenth century included both movables and immovables.

Similar rules applied to conditional sales, another English mechanism to achieve a chattel mortgage. The *Siete Partidas* provided for sales by written bill of sale with a later delivery, allowed conditional sales and discussed who bore the risk of loss, provided for risk of loss on delayed deliveries, and allowed the sale of property for a fixed sum, under the condition that the vendor could recover the property by refunding the price.[50] In fact, Cubans used this form for the nonpossessory secured transaction on slaves in the late eighteenth century.[51] The English chattel mortgage similarly operated as a sale subject to a defeasance. Title passed upon entering the bill of sale, but with two conditions: (1) the debtor would have possession (deliver it later) until default on the note payment, and (2) the sale would be void upon complete payment.[52]

The *Siete Partidas* also permitted mortgages on slaves, the most valuable chattel in the Spanish-American colonies: "Everything can be [*inpeñoed*] . . . for instance, the offspring of a female slave."[53] And it allowed the sale of slaves: "When one man gives or sells a slave to another . . . ."[54]

Spanish law also provided for mortgages on ships. The *Siete Partidas* provided: "Where one man [*inpeños*] a ship . . . ."[55] Furthermore, several nations recognized a maritime hypothecation.[56] The Spanish prepared

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50 SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 5, laws 23, 26, 27 & 42.

51 *See* LAIRD U. BERGARD ET AL., THE CUBAN SLAVE MARKET 1790-1880, at 18 (1995) (describing the *venta con pacto de retro*).

52 *See, e.g.*, Robertson v. Campbell, 6 Va. 421, 428 (1800) (explaining the difference between a mortgage and a conditional bill of sale).

53 *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 2; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 2.

54 *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 5, law 45; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 5, law 45 (*"Dando ó vendiendo un home á otro algunt siervo . . . ."*).

55 *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 28; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 28 (*"Nave, ó casa ó otro edeficio habiendo empeñado un home á otro . . . ."*).

56 *See* WILLIAM TETLEY, MARITIME LIENS AND CLAIMS 206 (1985). In Anglo-American jurisprudence, some of these became the bottomry and respondentia bonds enforced in Admiralty Court. GRANT GILMORE & CHARLES L. BLACK, THE LAW OF ADMIRALTY 632-33 (2d ed. 1975).

their commercial code in 1737, the *Ordenanzas de Bilboa*.[57] That code included the contract of maritime interest, *cambio maritimo*, a maritime hypothecation.[58] This contract allowed a lending on the ship, or its cargo, on the condition of repayment with interest. The contract terms varied depending on the degree of risk and the probability of the ship's safe arrival. The *Ordenanzas de Bilboa* described the interest of the creditor as a *hipoteca* in the ship, its rigging, or its cargo.[59]

B. Registration of Hypothecations

Spanish law under the *Siete Partidas* had no requirement for filing mortgages. It merely provided a first-in-time priority amongst *peños*: "It is but proper and just, that the party who accepts property by way of [*peño*] in the first place, should have a better right to it than another who receives it afterwards."[60] In this case,

> [where the last creditor took the *peño* by a written instrument drawn up by a notary public,] the last creditor, if he can produce such an instrument, will have a better claim to the property [*inpeño*ed] than the first one who holds a note written by the hand of his debtor, or has the evidence of two witnesses, [unless the first has three witnesses who signed the note].[61]

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[57] The *Ordenances of Bilboa* were in force in the colonies. PALMER, *supra* note 41, at 63.

[58] TAPIA, *supra* note 49, at 718-23; 2 JOSEPH WHITE, A NEW COLLECTION OF LAWS, CHARTERS AND LOCAL ORDINANCES OF THE GOVERNMENTS OF GREAT BRITAIN, FRANCE AND SPAIN, RELATING TO THE CONCESSIONS OF LANDS IN THEIR RESPECTIVE COLONIES 216-17 (1839).

[59] TAPIA, *supra* note 49, at 719, 720 (citing *Ordenanzas de Bilboa*, ch. 23, laws 2, 6).

[60] *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 27; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 27 ("*Guisada cosa es et derecha que el que rescibe primeramiente . . . la cosa en peños, que mayor derecho haya en ella quel otro que la rescibe despues.*").

[61] *See* Scott, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 31; *see also* SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 31.

> *Escrebiendo algunt home carta de su mano mesma en que dixiese que conoscie que habie rescebido maravedis emprestados . . . de otro alguno et quel obligaba alguna cosa por ellos, ó faciendo tal pleyto como este ante dos testigos . . . , aquel á quien fuese obligada la cosa en alguna destas dos maneras, bien la podrie demandar al que gela hobiese empañada ó á otro qualquier . . . á quien la fallase, fueras ende si este que la tenie dixiese quelera obligada por carte que fuese fecha por mano de escribano pũblico . . . . Ca entonce este post remero, si tal carta mostrase, habrie mayor derecho en la cosa empeñada quel primero que toviese carta escripta de mano de su debdor ó prueba de dos testigos, asi*

The Toledo *cédula* of 1539, issued by Charles I of Spain, broke from this first-in-time rule due to the confusion caused by secret multiple liens on property. Thereafter, Spain required registration of *hipotecas* on land:

> By all that is reported to us, it would avoid much litigation, knowing those who buy life rents and feudal rents, those who have life rents and mortgages on houses and landed estates they bought, which the sellers and keep quiet, and to remove the inconveniences that thereby ensue, we order that in each city, village or place where there is a jurisdictional center, there be a person that has a book, in which he registers all contracts of the kind mentioned above.[62]

The Toledo *cédula* of 1539 called for the keeping of life rent and mortgage registers at all district capitals with a designated official and provided that courts would not enforce any mortgage contracts not registered within six days.[63] Prior law in 1528 provided a steep penalty

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> *como sobredichoes . . . . Pero si la carta de la debda et dei empañamiento fuese fech por mano del debdor . . . , et firmada con tres testigos que escrebiesen sus nombres en ella con sus marios mesmas . . . , entonce . . . mayor derecho habrie en la cosa empeñada el primero que el segundo que muestra la carta pública.*

SABIO, SIETE PARTIDAS, *supra* note 38, pt. 5, tit. 13, law 31. *See also* 14 SAMUEL PARSONS SCOTT, THE CIVIL LAW INCLUDING THE TWELVE TABLES, THE INSTITUTES OF ULPAN, THE OPINIONS OF PAULUS, THE ENACTMENTS OF JUSTINIAN, AND THE CONSTITUTION OF LEO 267 (Cincinnati, Central Trust Co. 1932) (1973) (Code of Justinian, bk. VIII, tit. 181 § 11) (same rule).

[62] NOVÍSIMA RECOPILACIÓN DE LAS LEYES DE ESPAÑA bk. 10, tit. 16, law 1 (n.p., En la Imprenta de Sancha 1805) [hereinafter NOVÍSIMA RECOPILACIÓN].

> *Por quanto nos es hecha relacion, que se excusarian muchos pleytos, sabiendo los que compran los censos y tributos, los censos é hipotecas que tienen las casas y heredades que compran, lo qual encubren y callen los vendedores; y por quitar los inconvenientes que desto se siguen, mandamos, que en cada ciudad, villa ó lugar donde hobiere cabeza de jurisdiccion, haya una persona, que tenga un libro en que se registren todos los contratos de las qualidades suso dichas . . . .*

Id. See also LAS LEYES DE LA NUEVA RECOPILACIÓN bk. 5, tit. 15, law 3 (Madrid, En la Imprenta de Pedro Marin 1775) (laws authorized by King Philip II in 1567) [hereinafter NUEVA RECOPILACIÓN]. The *Novísima Recopilación* provided all the royal decrees prior to 1805, and so included those from the *Nueva Recopilación*. One can glean the identity of the earlier compilation from the date of the decree, and the later compilation usually had a cite to the earlier version.

[63] NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 16, law 1.

of twice the amount involved, paid to the lender, for failure to encumber life rents as required.[64] This *cédula* only applied to land.

Charles I, as Charles V of the Holy Roman Empire had done previously in 1529, issued a *placaat* for his Netherlander subjects, requiring public disclosure with respect to alienation and hypothecation of immovable property.[65] This *placaat* did not require registration in a book, but rather a public pronouncement before the proper official.[66] Registration for the Netherlanders came after their Union of Utrecht in 1579,[67] for mortgages on land in 1580,[68] and for land sales in 1598.[69]

Supplementation of the 1539 *cédula* came in 1713 and 1768.[70] Spaniards had not established registers, and Spanish courts had

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64 *Id.* bk. 10, tit. 15, law 2; NUEVA RECOPILACIÓN, *supra* note 62, bk. 5, tit. 15, law 2. The Law of 1528 provided:

> *Mandamos, que las personas que de aquí adelante pusieren censos ó tributos sobre sus casas ó heredades, ó posesiones que tengan atributados ó encensuados á otro primero, sean obligados de manifestar y declarar los censos y tributos, que hasta entonces tuvieren cargados sobre las dichas sus cases y heredades y posesiones; so pena que, si así no lo hicieren, paguen con el dos tanto la quantía que recibieron por el censo, que así vendieren y cargaren de nuevo, á la persona á quien vendieren el dicho censo.*

NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 15, law 2. In English, the Law of 1528 translates as:

> We command, that from now on those who place life rents or feudal rents on their houses or landed estates or possessions that they assign or encumber to another first, shall be olbigated to manifest and declare the life rents and feudal rents that until then they had consumed with respct to the said houses and landed estates and possessions; under penalty that if they do not do as obliged, they will pay two times the amount they received for the life rents, which in this way they sold and burdened again, to the person to whom they sold the life rents.

65 JOHANNES WILHELMUS WESSELS, HISTORY OF THE ROMAN-DUTCH LAW 217 (1908) (citing 1 GROOT PLACAATBOEK VAN UTRECHT, p. 373 for *placaat* of May 10, 1529).

66 *Id.* at 497. *Compare* 2 SIMON VAN LEEUWEN'S COMMENTARIES ON ROMAN-DUTCH LAW 104 (J.G. Kotzé trans., 1886) [hereinafter VAN LEEUWEN] (mortgage of immoveables under the 1529 placaat only required making the transfer of the property before the court where the property is located), *with* 2 *id.* at 83 (mortgage of immoveable under the 1580 placaat must be both testified in writing by the public authority where the property is situated and registered in a general register).

67 WESSELS, *supra* note 65, at 222.

68 *Id.* at 218-23 (*Placaat* of April 1, 1580 or *Ordonantie van de Policien binnen Hollandt*, arts. 35-37); *see also* VAN LEEUWEN, *supra* note 66, at 83.

69 WESSELS, *supra* note 65, at 497-500 (*Placaat* of December 22, 1598).

70 *See infra* notes 71-77.

continued to give effect to unregistered mortgages.[71] Philip V of Spain reiterated the Toledo *cédula* of 1539 in an *auto acordado* on December 11, 1713, providing penalties for officials ignoring it, requiring the filing at City Hall, specifying the clerk of the city council as the Registrar of Mortgages, imposing duty and financial standards on the Registrar of Mortgages, and providing for duplicate extracts. But the *auto acordado* also failed.[72] The 1713 *auto acordado*, however, also applied to sales of land, not just mortgages, since the registers were for all contracts of sales. This aspect eventually had success in Catalonia in 1774, when the Governor General of Catalonia extended registration to all immovables.[73]

The *pragmatica* of January 31, 1768, contained in the *Novísima Recopilación* of 1805, grew out of the realization that the Toledo *cédula* had remained ineffective.[74] Charles III of Spain, in the *pragmatica* of January 31, 1768, required the *Audencias* to provide rules for separate registers in each town; recording within twenty-four hours of submission; an executed original on file; specified data in the registration; notation of the effective date on the instrument; release notices annotated into the registers; an index book; specified the registration fees; the notaries to place a filing requirement legend on all contracts; duplicate lists provided by the notaries; designation of the filing centers; and authorization of judicial enforcement of official neglect.[75] The *pragmatica* of 1768, in section 4, specified the recording requirements:

> [T]he names of the parties, their residence, the type of contract, obligation, or foundation; saying if it is a life rent, sale, surety, entailment or other burden of this class, and the real estate burdened or mortgaged by the instrument, with expression of its name, extent, location and borders . . . .[76]

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[71] Hans W. Baade, *The Formalities of Private Real Estate Transactions in Spanish North America*, 38 LA. L. REV. 655, 687 (1978) [hereinafter Baade, *Formalities*].

[72] NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 16, law 2; NUEVA RECOPILACIÓN, *supra* note 62, bk. 5, tit. 9, auto 21.

[73] Baade, *Formalities*, *supra* note 71, at 672 (citing I.R. Roca Sastre, INSTITUCIONES DE DERECHO HIPOTECARIO 42 (1942)). See *infra* note 79 for rejection of filing for sales of land in other parts of Spain.

[74] NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 16, law 3.

[75] *Id.*

[76] *Id.* ("[L]*os nombres de los otorgantes, su vecindad, la calidad del contrato, obligacion ó fundacion; diciendo si es imposicion, venta, fianza, vínculo ú otro gravámen de esta clase, y los*

These passages from both the Toledo *cédula* and the *pragmatica* of 1768 only mentioned land. The *pragmatica* of 1768, however, contains ambiguous language that one could interpret as extending the filing requirement to mortgages of goods. It refers to *all* property:

> augmented each day, by the cause of inobservance, intentional frauds, lawsuits and damages to the purchasers and those interested in the *mortgaged property*, by the hiding and obscuring their charges .... And in precisely this way become effective of all the instruments of deposit, sales, and redemptions of life rents or feudal rents, sales of real estate, or the consideration for such, that reveals them to be burdened with any obligations, security in which they mortgaged specially such property, writings of entailed estates or pious works, *and generally all which has special and express mortgage or burden*, with expression of them, and their release and redemption.[77]

The index to the *Novísima Recopilación*, containing the *pragmatica* of 1768, made no further references to *hipotecas*.

Spain in Catalonia did have a filing requirement for some chattel mortgages. Due to ignorance, confusion, and informality that took place on the subject of maritime interest, the *consulado* of commerce of Barcelona proposed to establish a register of maritime interests, including mortgages, under eight articles, which the king approved by royal *cédula* on December 12, 1795.[78] So Catalonia had a ship mortgage

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bienes raices gravados ó hipotecados que contiene el instrumento, con expresion de sus nombres, cabidas, situacion, y linderos ....").

[77] *Id.* preamble & sec. 1 (emphasis added). The preamble provides: *"aumentándose cada dia, á causa de la inobservancia, estelionatos, pleytos y perjuicios á los compradores, é interesados en los bienes hipotecados, por la ocultacion y obscuridad de sus cargas ...."* *Id.* at preamble. Section 1 provides:

> *Y en ellos precisamente se tome la razon de todos los instrumentos de imposiciones, ventas, y redenciones de censos ó tributos, ventas de bienes raices, ó considerados por tales, que constare estar gravados con alguna carga, fianzas en que se hipotecaren especialmente tales biene, ecrituras de mayorazgos ú obra pia, y generalmente todos los que tengan especial y expresa hipoteca ó gravámen, con expresion de ellos, ó su liberacion y redencion.*

Id. at sec. 1. *Bienes* includes all kinds of property. 2 WHITE, *supra* note 58, n.93 (forfeiture of *Bienes* contained in the Royal Exchequer bk. 2, pt. 2, ch. 2).

[78] 2 WHITE, *supra* note 58, n.217. The Spanish Commercial Code of 1885 also required registration of ship mortgages. CÓDIGO DE COMERCIO [C.COM.] art. 22 (1973) (Spain).

filing requirement after 1795. But, in general, by 1800, Spanish law recognized chattel mortgages as valid against third parties but did not require their filing for court enforcement.[79]

III. EXTENSION OF SPANISH LAW TO SPANISH AMERICA

The *Siete Partidas* applied to the Spanish-American colonies. In addition, the *Nueva Recopilación* of 1567, a compilation of Spanish laws passed since the previous compilation and before 1567, provided that in all cases not covered by the *Nueva Recopilación*, the *Leyes de Toro* of 1505 governed.[80] The first Law of Toro was the *Ordenamiento de Alcalá*, which referenced the *Siete Partidas*. The colonies also used the *Recopilación de las Indias* of 1680,[81] a code of private laws and *cédulas* passed for the colonies before 1680. It provided that no Spanish ordinance after 1614 should apply to the colonies unless specifically made applicable by royal *cédula*.[82] An index of the *cédulas* applicable to Louisiana and Florida exists.[83] But the *Recopilación de las Indias* also provided that the general laws of Spain, in the order established by the *Leyes de Toro*, provided laws for questions not fully answered by the *Recopilación de las Indias*.[84]

This system of laws remained in force in the Spanish-American colonies until long after their independence from Spain. During the nineteenth century, Spain and her former colonies adopted codes along the French model,[85] the Napoleonic Code of 1804, which barred the chattel mortgage.[86] Louisiana (an American territory) became the first former colony to adopt the Napoleonic Code in 1808, followed by Haiti (a former French colony) in 1825, Bolivia in 1831, Costa Rica in 1841, Dominica in 1844, Chile in 1855 (providing the model for Ecuador in

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79 For Spanish law prior to 1800, see *supra* notes 61 to 78 and accompanying text (only requiring filing for land and Catalonian ships).

80 NUEVA RECOPILACIÓN, *supra* note 62, bk. 2, tit. 1, law 2; *see also* KARST & ROSENN, *supra* note 39, at 34-35.

81 RECOPILACIÓN DE LEYES DE LOS REINOS DE LAS INDIAS (Madrid, 1841) [hereinafter RECOPILACIÓN DE LAS INDIAS].

82 *Id.* bk. 2, tit. 1, law 40.

83 Baade, *Formalities*, *supra* note 71, at 669 n.59 (citing "Indice de las Reales Cédulas, dirigidas al Governador Politico y Militar de esta Provincia de la Luisiana, y Floridas, que se hallan en este Secretaria [de Gobeirno in New Orleans]," ARCHIVO GENERAL DE INDIAS, [hereinafter A.G.I.], Cuba, leg. 186B).

84 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 2, tit. 1, law 2; *see also* KATE WALLACH, BIBLIOGRAPHICAL HISTORY OF LOUISIANA CIVIL LAW SOURCES 72 (1955).

85 KARST & ROSENN, *supra* note 39, at 45-46.

86 CODE NAPOLEON art. 2118, 2119 (photo reprint 1960) (1804) (permitting mortgages only on immovables and usufruct, and, therefore, movables cannot be mortgaged).

1857, El Salvador in 1859, Panama in 1860, Nicaragua in 1867, and Colombia in 1873),[87] Venezuela in 1862, Brazil (a former Portuguese colony) in 1865 (providing the model for Uruguay in 1868), Argentina in 1869 (providing the model for Paraguay in 1876), Mexico in 1870 and 1884,[88] and Honduras in 1880.[89] Spain adopted a code for hypothecation of land in 1861 included within the civil code in 1889 (providing the model for the civil code of Puerto Rico, Cuba, and the Phillippines in 1890), which required public filing for validity.[90]

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[87] WAYNE D. BRAY, THE COMMON LAW ZONE IN PANAMA: A CASE STUDY IN RECEPTION 17 (1977).

[88] Modern Mexican law requires, for validity against third persons, registration of conditional sales, pledges without delivery of possession, and mortgages. *E.g.*, CÓDIGO CIVIL PARA EL DISTRITO FEDERAL [C.C.D.F.] arts. 2312, 2859, 2915 (1991) (Mex.) (conditional sales, pledges, and mortgages respectively). Parties can only pledge movables and pending fruits from real estate. *See, e.g.*, C.C.D.F. arts. 2312, 2859, 2915 (1991) (Mex.) (conditional sales, pledges, and mortgages respectively); CÓDIGO CIVIL PARA EL ESTADO DE GUANAJUATO C.C. GUANAJUATO arts. 2389, 2391 (1991) (Mex.); *see* John F. Bass, *Security Interests in Movable Property in Mexico*, 4 TEX. INT'L L. FORUM 96, 103 (1968). *See generally*, John F. Munger, *Rights and Priorities of Secured Creditors of Personalty in Mexico*, 16 ARIZ. L. REV. 767 (1974). These provisions have remained unchanged since 1928. *See* CÓDIGO CIVIL PARA EL DISTRITO Y TERRITORIOS FEDERALES arts. 2312, 2856, 2857, 2859, 2893, 2915 (1928) (Mex.). For an English translation, see JOSEPH WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 291, 346, 352 (2d ed. 1938).

Before 1928 under the Civil Code of 1884, parties could only pledge movables and mortgage immovables, both of which required registration. CÓDIGO CIVIL DEL DISTRITO FEDERAL arts. 1773, 1776, 1779, 1889 (1904) (Mex.) (pledges on movables, mandatory deliver of things pledged, registration of pledges, and registration of mortgages respectively). For an English translation, see JOSEPH WHELESS, COMPENDIUM OF THE LAWS OF MEXICO 215, 220, 227 (1910). For an English translation of part of the Mexican civil code of 1870, see FREDERICH HALL, THE LAWS OF MEXICO: A COMPILATION OR A TREATISE RELATING TO REAL PROPERTY, MINES, WATER RIGHTS, PERSONAL RIGHTS, CONTRACTS, AND INHERITANCES 586, 596 (1885) (art. 1942 for mortgages only on immovables and art. 2016 for required mortgage registration) (sections on pledges not included).

[89] Rolf Knutel, *Influences of the Louisiana Civil Code in Latin America*, 70 TUL. L. REV. 1445, 1452 (1996) (discussing Ecuador, El Salvador, and Costa Rica); Jorge A. Vargas, *Conflict of Laws in Mexico: The New Rule Introduced by the 1988 Amendment*, 28 INT'L L.J. 659, 662 n.20 (1994) (discussing Venezuela, Nicaragua, Uruguay, and Honduras).

[90] The Spanish Civil Code of 1889 allowed pledges only on movables and mortgages on immovables. CÓDIGO CIVIL [C.C.] arts. 1864, 1874 (1972) (Spain) (for pledges and mortgages respectively). Under a pledge, the debtor delivers the collateral to the creditor. *Id.* art. 1863. The creditor must register a mortgage. *Id.* art. 1875.

See also PALMER, *supra* note 41, at 37, 41; José Trias Morge, *Las Concessiones de la Corona y Propriedad de la Tierra en Puerto Rico Siglos XVI-XX: Un Estudio Juridico*, 63 REV. JUR. U.P.R. 351 (1993). Spain applied its mortgage code of 1869 to Cuba and Puerto Rico in 1880, which the United States War Department translated in 1899. WAR DEPARTMENT, TRANSLATION OF THE MORTGAGE LAW FOR CUBA, PUERTO RICO, AND THE PHILIPPINES 3 (Washington, Gov't Printing Off. 1899) (1893). Spanish mortgage law provided for mortgages only on realty

Not only did Spanish America possess the legal machinery for chattel mortgages, but its laws contained specific provisions for maritime hypothecations. Spanish America used these chattel mortgages, since the *Recopilación de las Indias* set a limit on the amount of such loans at a third of the value of the ship and cargo.[91]

As to registration of mortgages, the Council of the Indies did not adopt the Toledo *cédula* of 1539 applicable to mortgages on land. As a result, it did not apply in Spanish America.[92] The Council of the Indies also did not adopt the *pragmatica* of 1768 applicable to mortgages until their circular *cédula* of May 9, 1778, directing viceroys, presidents, *audencias*, and governors in Spanish America and the Philippines to follow the reform legislation.[93] A second *cédula*, issued on April 16, 1783, by the Council of the Indies, directed establishment of the mortgage registrar offices needed for compliance with the *pragmatica* of 1768, providing for variations in the time requirement for filing due to longer geographical distances.[94] The *Audencia* of Mexico City approved the matter, with a few changes, on September 27, 1784.[95] The major change extended the filing period a day for each four-leagues (twelve miles)

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and unrecorded instruments could not affect third-party rights. CC. art. 23, 106 (1972) (Spain). The civil code of 1889 does not require filing for land sales, but requires only that it be a public document. *Id.* 1280(1). Court decisions under this provision have upheld verbal contracts of sale for Spain, Arayadi, Repotorio de Jurisprudencia No. 16974 (Spain 1950), and her former colonies in the Philippines and Puerto Rico. *See, e.g.*, Hawaiian Phillippine Co. v. Hernaez, 45 Phil. 746, 749 (1924); Falero v. Falero, 15 P.R. 111, 118 (1909) (in other than public form).

91 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 9, tit. 39, law 6; 2 WHITE, *supra* note 58, at 217.

92 Baade, *Formalities*, *supra* note 71, at 677 n.89 (citing the failure to set it out in 1 ANTONIO MURO OREJON, CEDUARIO AMERICANO DEL SIGLO XVIII (1956)). In addition to the requirement of approval by the *Audencia* contained in the *Novísima Recopilación*, see NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 16, law 3, the *pragmatica* of 1768 specifically required approval by the *Audencia*. *See supra* notes 74-79 and accompanying text.

93 2 JUAN NEOMUCINO RODRIGUEZ DE SAN MIGUEL, PANDECTAS HISPANO-MEGICANAS Ó SEA CÓDIGO GENERAL 630 (1839) (No. 3250) [hereinafter RODRIGUEZ DE SAN MIGUEL]; Baade, *Formalities*, *supra* note 71, at 677 (citing a reproduction in 2 E. BENURA BELEÑA, RECIPILACIÓN SUMARIA DE TODOS LOS AUTOS ACORDADOS DE LA REAL AUDENCIA Y SALA DEL CRIMEN DE ESTA NUEVA ESPAÑA . . . DE VARIAS, REALES CÉDULAS Y ORDENES QUE DESPUÉS DE PUBLICADA LA RECOPILACIÓN DE INDIAS HAN PODIDO RECOGERSE . . . . 308 (1787)).

94 Baade, *Formalities*, *supra* note 71, at 677 (citing BELEÑA, *supra* note 93, at 309).

95 RODRIGUEZ DE SAN MIGUEL, *supra* note 93, at 630 (No. 3254); Baade, *Formalities*, *supra* note 71, at 678 (citing BELEÑA, *supra* note 93, at 310ff, 315 (section twenty of the instructions provided that mortgages not registered in accordance therewith were unenforceable and of no effect)).

distance from the registrar of mortgages.[96] The *Audencia* ordered creation of the registration books in thirteen Mexican cities, none of which were in the Internal Provinces of the North.[97] The *Audencia* selected thirteen cities along a line from Vera Cruz to Celaya, plus Oaxaca.[98] The *Audencia* of Mexico City, however, made it quite clear the *pragmatica* would only apply to real estate and not to movables within its jurisdiction, even providing penalties for registering mortgages on personalty:

> XXII. Only the writings and instruments, in which there is an express, special and notable mortgage of real estate or created by such, will be registered and become effective; and not the writings which mortgage generally real estate, or created by such, movables, animals, pay or salary in general, persons or whatever other things; the penalty for the *escribano*-registrar who registers or makes effective an instrument of general mortgage, [to be] twenty-five pesos for each event, applied in conformity with law, and in case of a reoccurrence, perpetual privation of office.[99]

The *Audencia* acknowledged the ambiguity, resolved it with this rule, and obtained royal approval for it on June 25, 1788.

> And since neither by law, *auto acordado*, nor by instruction of the Exchequer of the Supreme Council is any thing about effectiveness of general mortgages

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[96] RODRIGUEZ DE SAN MIGUEL, *supra* note 93, at 634 (No. 3254, sec. XVI); Maria del Refugio Gonzalez, *Preface to* JOAQUIN ESCRICHE, DICCIONARIO RAZONADO DE LEGISLACION CIVIL, PENAL, COMERCIAL Y FORENSE (1993) [hereinafter Gonzalez, *Preface*].

[97] Baade, *Formalities*, *supra* note 71, at 677-78 (citing BELEÑA, *supra* note 93, at 310, *et seq.*).

[98] RODRIGUEZ DE SAN MIGUEL, *supra* note 93, at 632 (No. 3254, sec. I) (naming Veracruz, Oajaca, Tohucan de las Granados, Puebla, Mégico, Toluca, Querétaro, Celaya, Guanajuato, Vallodid, Cuernava, Orizava, and Córdoba).

[99] *Id.* at 635 (No. 3254, sec. XXII).

> *Solo se registrarán y tomará razon de las escrituras é instrumentos en que haya hipoteca espresa, especial y señelada de lienes raices ó tenidos por tales; y no de las escrituras en que se hipotequen generalmente bienes raices, las tenidos por tales, muebles, semovientes, sueldos ó salarios en general, personas ó cualesquiera otra cosa; pena al escribano anotador que registre ó tome razon de instrumentos de hipotecas generales, de viente y cinco pesos por cada una, aplicados conform á la ley, y en case de reincidencia, de privacion perpetua de oficio.*

Id.

> commanded or arranged, it is declared they do not have to be registered for now,* while His Majesty in view of the testimony of these proceedings has resolved for the other type that an account must be given; and consequently Article XII is written not to give authority to one when touched by this . . .*. This was confirmed by *cédula* of June 25, 1788, published by edict on July 12, which appears above.[100]

This *Audencia* governed a small portion of the Spanish Borderlands–the Nueces Strip in Texas then a part of the Spanish Province of Nuevo Santander. There is no record of this *Audencia* instructing Laredo in the Nueces Strip about the 1783 Spanish-American *pragmatica*.[101]

The *Audencia* of Guadalajara received the 1783 Spanish-American *cédula*.[102] This *Audencia* commanded the rest of Texas and the Mexican Cession. There is no record of this *Audencia* instructing the Spanish Provinces of Tejas, Alta California, or Neuvo Mexico about the 1783 Spanish-American *pragmatica*.[103]

The *Audencia* of Santo Domingo administered Louisiana and the Floridas.[104] The Spanish Provinces of Louisiana, Occidente Florida, and

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[100] *Id.* at 637 (No. 3254, postscript).

> *Y respecto á que ni por la ley, auto acordado, ni por instruccion de los fiscales del supremo consejo se manda ó dispone cosa alguna en razon de las hipotecas generales, se declara no deberse registrar por ahora,* miéntras que S. M. otra cosa resuelva en vista del testimonio de este espediente con que se la ha de dar cuenta; y por consiquiente no dber correr lo que tocante á esto se dice en el artícula XXII . . . .*Esto se confirmó por cédula de 25 de enero de 1788, publicada en bando de 12 julio, que pondré adelante.*

Id. (footnotes omitted).

[101] Baade, *Formalities*, *supra* note 71, at 729; *see also* RODRIGUEZ DE SAN MIGUEL, *supra* note 93, at 702 (Laredo generally learned about *cédulas* from the viceroy.). The Laredo Archives do have one proclamation from the governor in San Carlos to all the Rio Grande Valley towns dated May 21, 1784, ordering registration of land; however, this was to insure ranchers possessed a village house as required by law. Laredo Archives, Folder 28, document 2 (St. Mary's University, San Antonio, Texas). Laredo also had a notary. *See* Ortiz v. De Benevides, 61 Tex. 60 (1884) (*Escribano* records in mayor's office all papers pertaining to land, whether by deed, devise, or grant, in Laredo in 1813; case deals with a will).

[102] Baade, *Formalities*, *supra* note 71, at 730 (citing CÉDULARIO DE LA NUEVA GALICIA (E. Lopez Jimenez ed., 1971)).

[103] *Id.* at 730-32; *see also id.* at 707 (no notary appointed in Tejas, Nueva Mexico, or Alta California).

[104] HUGH THOMAS, CUBA: THE PURSUIT OF FREEDOM 45 (1971).

Oriente Florida followed the registration process but for reasons other than the 1783 Spanish-American *cédula*.[105]

The Spanish slave code designed for the Spanish-American colonies originally implied a filing requirement for some chattel mortgages on slaves, namely those mortgaging simultaneously the land on which the slaves worked. Spanish America had several sources of slave law: (1) disjointed sections from the *Siete Partidas*, (2) the Ordinance of Caceres of 1574 in Cuba to handle self-employment and hiring out of slaves, (3) the *Recopilación de las Indias* to codify the slave trade laws and the fugitive slave laws, and (4) the *Codigo Negro Español* of 1789.[106] Spain never implemented the latter slave code in Spanish America.[107] Two of these legal sources mentioned filing.[108] After October 16, 1626, New Spain required registration of the sales of slaves to aid the collection of a tax:

> By instruction of the government of New Spain given to the officials of our royal household at the port of Acapulco be it ordered that they charge 400 *reales* for each slave that comes from the Philippines: and because these rights might bring much fraud without registration, we order that no scribe record the sale of a slave in New Spain, if it is not shown by certification of our officials in Acapulco or Mexico City, what belongs to us was paid for the rights, under penalty of losing the property. . . .[109]

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[105] For Louisiana, see *infra* notes 146-75 and accompanying text. For Florida, see *infra* notes 170-90 and accompanying text.

[106] HERBERT S. KLEIN, SLAVERY IN THE AMERICAS: A COMPARATIVE STUDY OF VIRGINIA AND CUBA 59-78 (1967).

[107] FRANKLIN W. KNIGHT, SLAVE SOCIETY IN CUBA *DURING THE NINETEENTH CENTURY* 125 (1970).

[108] For the two sources, see *infra* notes 109-115 and accompanying text.

[109] RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 18, law 4.

> *Por instrucciones del gobierno de la Nueva-España dadas á los oficiales de nuestra real hacienda del puerto de Acapulco está ordenado que cobren cuatrocientos reales de cada un esclavo que viniere de Filipinas: y porque defraudando estos derechos se traen muchos sin registro, ordenamos que ningun escribano haga escritura de venta de esclavo en la Nueva-España, si no le constare por certificacion de nuestros oficiales de Acapulco ó de la cuidad de Méjico, haber pagado á los derechos que á Nos pertenecen, pena de perdimiento de bienes . . . .*

Id.

But there is no evidence that this filing requirement extended to mortgages.

The *Codigo Negro Carolino* mentioned indirectly filing for mortgages on slaves. The Council of the Indies on December 23, 1783, directed the *Audencia* of Santo Domingo to draft a slave code modeled on the French *Code Noir* due to French economic success in Haiti compared to the Spanish Santo Domingo.[110] Don Augustin Emparan y Orbe presented his draft of the *Codigo Negro Carolino* on December 14, 1784.[111] The *Audencia* approved it on March 16, 1785, and forwarded it to the king. This code referenced national legislation on *hipotecas* for land, including a filing requirement:

> Slaves shall be deemed to have civil status, and their condition regulated by that for the other animate beings, capable of being mortgaged, unless devoted to a fund, residence or country estate in the capacity of an ascription, regulated by that pertaining to the other civil effects in line with the national legislation.[112]

This rule provides for mortgaging those slaves assigned to estates with mortgages of their land and consequent filing. It otherwise permits mortgaging of slaves without filing. The final *Codigo Negro Español* of May 31, 1789, issued by King Charles IV of Spain, retained only a filing requirement for ownership.[113] The former intendants of Caracas, Havana, and New Orleans prepared a report of January 3, 1792, recommending against enforcement of the proposed slave code due to its

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110 Hans Baade, *The Law of Slavery in Spanish Luisiana, in* LOUISIANA'S LEGAL HERITAGE 46 (Edward Haas ed., 1983) [hereinafter Baade, *Slavery*]; ALAN WATSON, SLAVE LAW IN THE AMERICAS 59 (1989).

111 WATSON, *supra* note 110, at 59.

112 3 RICHARD KONETZKE, COLECCÍON DE DOCUMENTOS PARA LA HISTORIA DE LA FORMACIÓN SOCIAL DE HISPANOAMÉRICA 1493-1810, at 553, 564 (1953) (ch. 17, law 4).

> *Los siervos en el concepto civil deben ser reputados, y regulada su condición por la de las demás cosas semovientes, no pudiendo ser hipotecados, a menos que no sea como adictos al fundo, habitación o hacienda en calidad de ascripticios, regulán dose por lo perteneciente a los demás efectos civiles conforme a la legislación nacional.*

Id.

113 3 *id.* at 643-52; JAVIER MALAGÓN BARCELÓ, CODIGO NEGRO CAROLINO 269-76 (Ediciones de Taller 1974) (1784).

perceived leniency.[114] The Council of the Indies suspended the *cédula* on March 17, 1794.[115]

Spanish law in New Spain did not provide for registering mortgages on chattels, with one *Audencia* expressly penalizing such a practice.[116] Spanish law in New Spain did not even require registration of mortgages on real estate until after the 1783 Spanish-American *cédula*.[117]

IV. THE VARIOUS PROVINCES

Although Spain had no chattel mortgage filing system applicable to Spanish America, this absence did not govern the entire Spanish Borderlands. The Spanish Provinces of Louisiana, Occidente Florida, and Oriente Florida adopted a filing requirement for chattel mortgages, as well as sales on slaves and ships and land, starting in 1770. The Spanish Province of Texas briefly adopted a similar chattel mortgage act on all goods for the year 1810 only. Provinces in the later Mexican Cession adhered to the absence rule, not even recording mortgages on real estate as required under the 1783 Spanish-American *cédula*.

A. *Louisiana*

Spain acquired Louisiana from the French. Although the French, like Spain, generally adopted Roman law, the Germanic prohibition against mortgages on movables of the Salic law of the Franks held greater influence in France than the corresponding provision of the Visigothic law did in Spain.[118]

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[114] *Informe del Consejo de Indias Acerca de la Observanca de la Real Cédula de 31 de Mayo de 1789 Sobre La Educación, Trato y Ocupaciones de los Esclavos, reprinted in* 3 JOSE ANTONIO SACO, HISTORIA DE LA ESCLAVITUD DE LA RAZA AFRICANA EN EL NUEVO MUNDO Y EN ESPECIAL EN LOS PAISES AMERICO-HISPANOS 247-78 (1938).

[115] 3 KONETZKE, *supra* note 112, at 720-32 (citing A.G.I., *supra* note 83, Indiferente, leg. 802).

[116] *See supra* note 99 and accompanying text.

[117] *See supra* note 94 and accompanying text.

[118] The Visigoths, a Germanic tribe, governed the Iberian peninsula from the fifth century to 711. King Chintasvintus and his son Recesvintus, co-regents from 649 to 652, had the Visigoth's third code, the Forum Judicum or the Visigothic Code, compiled in monkish Latin from ancient Visigothic law and Roman law with several of their decrees. THE VISIGOTHIC CODE (FORUM JUDICUM) xxiv (S.P. Scott trans., The Boston Book Co. 1910). One of the two earlier Visigothic codes, the surviving fragments of the *Code of Euric*, published about 475, clearly reflected assistance by Roman legal experts and amounted to vulgar Roman law rather than Germanic custom modified by Roman law. O.F. ROBINSON ET AL., AN INTRODUCTION TO EUROPEAN LEGAL HISTORY 11 (1985). The other, the Code of Alaric II,

The written law for France adopted the Roman *hypotheca* in its entirety. But the customs of many of the provinces applied the *hypothèque* only to immovables. This latter rule predominated in the customary law of northern France.[119] The customary law of Paris and Orleans banned mortgages on movables, that of Anjou, Maine, Normandy, and the South permitted them, while that of the *Coutoumes Notoires* and the customary law of Melun, Champagne, and Sens permitted them with no right to reclaim.[120] In the fifteenth and sixteenth centuries, the French compiled that customary law confirmed by court decision. Charles VII of France ordered the compilation of the customary law in 1453,[121] with the important laws for Paris completed in 1510 with 190 articles and in 1580 with 372 articles; Burgundy in 1459, 1570, and 1576; Brittany in 1539 and 1580; Normandy in 1583; Orleans in 1509 and 1583; Niverny in 1534; and Poitou in 1514 and 1560.[122]

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the *Breviary* or *Lex Romana Visigothorum* published in 506, consisted of an abbreviated version of the Roman *Theodosian Code*. *Id.* at 12. So the fifth book of *The Visigothic Code*, on business contracts, showed Roman domination, with the titles on contracts of sale, bailments, and pledges drawn mostly from Roman law. THE VISIGOTHIC CODE, *supra*, n.183. *The Visigothic Code* allowed pledges deposited with the creditor as the only security device, enforced only by judgment, and provided priority based on timing of judgments. *Id.* at 177-80 (bk. 5, tit. 6, laws 3, 5). So *The Visigothic Code* retained the Germanic abhorrence for security devices with debtor possession but had already begun substituting Roman law for business transactions. Chintasvintas had decreed the priority rule. Ferdinand III of Leon and Castile, father of Alfonso X, imposed *The Visigothic Code* on Castile in 1236. *Id.* at xxv.

The Salian Franks, the more western of the two Frankish tribes, began governing in Gaul with their defeat of the Romans in 486 followed shortly by their victories over other German tribes, the Ripuarian Franks, Burgundians, Alemanni, and Visigoths. KATHERINE FISCHER DREW, THE LAWS OF THE SALIAN FRANKS 5-7 (1991). King Clovis, eager to set down a code of Germanic customs for his subjects, issued the *Pactus Legis Salicae* between 507 and 511. *Id.* at 29. The *Pactus Legis Salicae*, written in Latin, focused primarily on those aspects of Germanic law that differed from Roman law–monetary penalties for various damaging acts and the rules of legal procedure. *Id.* at 30. Consequently, it failed to hold except in the Frankish portions of the kingdom, the north, where it held sway despite attempts of medieval French kings to revive Roman law until the French Revolution. *Id.* at 31. The *Pactus Legis Salicae* retained the Germanic abhorrence for security devices with debtor possession by banning the *pignis* except as part of the judgment process, *id.* at 147 (tit. 103, Decree of King Chlator, son of Clovis), for enforcing debts, *id.* at 114 (tit. 50) & 194 (*Lex Salica Karolina* (798), tit. 29).

119 *See* Daggett, *Chattel Mortgage*, *supra* note 3, at 164.

120 *See* JEAN BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW 301 (1912) (Customes of Paris, art. 170; of Orleans, art. 477; of Cout. Not., art. 23; of Melun, art. 313; of Champagne, art. 65; of Sens, art. 131).

121 *See* WALLACH, *supra* note 84, at 20-21.

122 *See* RENE DAVID, FRENCH LAW: ITS STRUCTURE, SOURCES, AND METHODOLOGY 6 (1972); GEORGE WILFRED STUMBERG, GUIDE TO THE LAW AND LEGAL LITERATURE OF FRANCE 59 (1931).

Napoleon had the Napoleonic Code devised to eliminate these varying customary laws.[123]

This development of French customary law came from Germanic law, which held that a transfer of a movable should transfer ownership.[124] This rule conflicted with the Roman idea of unrecorded interests in the movable. The North adopted this Salic law since it provided for a greater compensation for killing a Frank.[125] So in many parts of France, the customary law did not allow the mortgage of movables, except in the South where Roman influence still dominated. But even there, the jurists worked out an accommodation such that a court would enforce the mortgage of movables only so long as the debtor still had possession of the goods.

Jean Domat wrote in 1695 that the settled law of France provided that a mortgage on a movable lasted no longer than while the debtor had custody of it.[126] He expressed this rule as "[m]ovables have no sequel by a mortgage."[127] Domat claimed the rule developed from the inconvenience of subjecting the movable to a right of pursuit. The good faith buyer won. Domat also asserted that, when the creditor had the movable sold with the consent of the debtor, or by judge's order when he could not obtain that consent, the court preferred the executing creditor over others prior in time except privileges, unless the debtor became insolvent, in which case, all shared rateably.[128] In approximately 1761, Robert Joseph Pothier, commenting on those provinces retaining the Roman *hypotheca* on movables, said that it was imperfect since it lasted only so long as the debtor possessed the movable.[129]

Recordation of mortgages of immovables developed slowly in France.[130] Henry IV of England established recordation in Paris so long as he held it in 1424. Jean-Baptiste Colbert, minister of finance to King

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123 *See* HENRY P. DEVRIES, CIVIL LAW AND THE ANGLO-AMERICAN LAWYER 275-76 (1976).

124 *See* Harry R. Sachse, *Purchase Money Security Interest in Common Law and the French System of Civil Law*, 15 MCGILL L.J. 73, 74 (1969).

125 *See* CHARLES SERUZIER, HISTORICAL SUMMARY OF THE FRENCH CODES WITH FRENCH AND FOREIGN BIBLIOGRAPHICAL ANNOTATIONS CONCERNING THE GENERAL PRINCIPLES OF THE CODES FOLLOWED BY A DISSERTATION ON CODIFICATION 9-10 (1979).

126 1 JEAN DOMAT, CIVIL LAW IN ITS NATURAL ORDER 646-48 (William Strahan trans., 1850) (bk. III, tit. I, sec. 1).

127 *Id.* at 647 ("*Meubles n'ont pas de suite par hypothèque.*").

128 *Id.*

129 5 ROBERT JOSEPH POTHIER, DE L'HIPOTHÈQUE 440 (Rondonneau ed., 1831).

130 Sachse, *supra* note 124, at 75.

Louis XIV of France, tried again in 1673, but the nobility so opposed it that recordation lasted only two years.[131] So the Brumaire law of November 9, 1799, requiring recordation of mortgages on land for validity against third parties, became an innovation.[132]

For Louisiana, the 1712 charter to Anthony Crozet and the Company of the West from King Louis XIV decreed the Redaction of the Customs of Paris of 1580 as the law.[133] This customary law banned chattel mortgages.[134] But, in 1724 Louisiana adopted the *Code Noir de la Luisiane*.[135] That Code deemed slaves movables and provided that they could not have sequel by a mortgage.[136] The *Code Noir de la Luisiane* also provided that, when officials executed judgments on the land and slaves together, priority went on the basis of the *hypothèque*.[137]

The *Code Noir de la Luisiane* changed the rule in French Louisiana from a prohibition of all chattel mortgages to allowing a chattel mortgage on a slave to last as long as the debtor retained possession. The new rule came from the French Antilles where the French had experimented with deeming slaves part of the realty, in which case the rule for *hypothèques* differed.[138] In 1681, King Louis XIV had mandated preparation of the *Code Noir* by his two top officials in the Antilles, Governor-General Charles de Courbon, Comte de Blénac, and Jean-

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131 *See* BRISSAUD, *supra* note 120, at 618 & n.5 (1673 act and 1424 act).

132 1 MARCEL PLANIOL, TREATISE ON CIVIL LAW PART II 544-45 (12th ed. 1959). The Brumaire law overthrew the directorate and installed the consular regime dominated by Napoleon. The Napoleonic Code of 1804 eased off the filing requirement, leaving it voluntary, and otherwise returned to the customary law of no sequel by mortgage, jeopardizing creditors through a sale to a good faith purchaser. Creditors frequently gambled on not filing to avoid registration fees until the French Civil Code required registration in 1855.

133 Henry Planché Dart, *The Colonial Legal Systems of Arkansas, Louisiana, and Texas*, 12 A.B.A. J. 481, 482 (1926).

134 Gustavus Schmidt, *History of the Jurisprudence of Louisiana*, 1 LA. L.J. 1, 19-20 (No. 1, 1841) (1580 edition of the Customs of Paris).

135 For the Customes of Paris, see *supra* note 120 and accompanying text.

136 4 LOUISIANA HISTORICAL SOCIETY, PUBLICATIONS 75, 86 (1908) (*Code Noir de la Luisiane*, art. 40) ("*Voulons que les Esclaves soient réputez meubles et comme tels qu'ils entrent dans la Communauté, qu'il n'y ait point de suite part hypotheque sur eux ....*"). For an English translation, see 1 CHARLES GAYARRÉ, HISTORY OF LOUISIANA: THE FRENCH DOMINATION 531 (3d ed. New Orleans, Armand Hawkinss 1885).

137 4 LOUISIANA HISTORICAL SOCIETY, *supra* note 136, at 87-88 (*Code Noir de la Luisiane*, art. 47).

138 Vernon Valentine Palmer, *The Origins and Authors of the Code Noir*, 56. LA. L. REV. 363 (1995).

Baptiste Patoulet, both mariners, not lawyers.[139] Their instructions directed them to use primarily the rules from the parliaments of Martinique, Guadeloupe, and St. Christopher.[140] Ninety-five percent of their proposal became the *Code Noir*.[141] The key problem dealt with the status of slaves. Guadeloupe, as early as 1658, deemed them immovables.[142] The Guadeloupeans desired to tie their labor force to the land.[143] Others favored movable status to make slaves part of the community estate.[144] The final version of 1685 contained the rule.[145] And the French lacked any recordation of mortgages, especially on movables since the mortgage terminated upon transfer.

Spanish Louisiana, however, required filing of mortgages on land pursuant to the Spanish *pragmatica* of 1768, prior to its application to Spanish America in 1783. And Spanish Louisiana extended the filing requirement to include mortgages on both slaves and ships, as well as their sales, commencing on February 12, 1770, after General Alexander O'Reilly came to quell the French rebellion in New Orleans.[146] Spain obtained Louisiana in 1762 under the Cession of Fontainbleau.[147]

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139 *Id.* at 367-68.

140 *Id.* at 369. The French and British occupied St. Christopher, their first colony in the Caribbean settled in 1627 and 1623, respectively, until 1713, when it became entirely British.

141 *Id.* at 379.

142 *Id.* at 386 n.103.

143 *Id.* at 386. The problem involved seizure by creditors and the desire to prevent the breakup of plantations and their workforce. The solution deemed the workforce an immovable, transferred with the land when distrained. BRISSAUD, *supra* note 120, at 219 n.5.

144 Palmer, *supra* note 138, at 386. The problem involved equal inheritances among coheirs. French rules eliminated daughters as heirs for immovables. BRISSAUD, *supra* note 120, at 630-31.

145 RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANÇAISES DEPUIS L'AN 420 JUSQU' À LA RÉVOLUTION DE 1789; CONTENANT LA NOTICE DES PRINCIPAUX MONUMENTS DES MÉROVINGIENS, DES CARLOVIGIENS ET DES CAPÉTIENS, ET LE TEXTE DES ORDONNANCES, ÉDITS 494, 501 (1821-33) (*Code Noir*, art. 44) [hereinafter RECUEIL]. For an English translation, see 3 EDWARD LONG, THE HISTORY OF JAMAICA OR THE GENERAL SURVEY OF THE ANCIENT AND MODERN STATE OF THAT ISLAND 921, 931 (London, 1774).

146 Alexander O'Reilly, born in 1722, in Bellrasna, County Meath, Ireland, was a career army officer, beginning his service as a cadet in the Hibernia Regiment in the Spanish Army in 1732. DAVID KER TEXADA, ALEJANDRO O'REILLY AND THE NEW ORLEANS REBELS 22 (1973). O'Reilly fought for Spain in the Austrian Army in 1757, and in the French Army in 1759 during the early years of the Seven Year's War, becoming a lieutenant-colonel on his return to Spain due to his service at the Battle of Minden in 1759. *Id.* at 23. Due to his capture of several Portuguese cities in the Spanish invasion of Portugal, he became a major general in 1762, and contemporaries regarded him as one of Spain's most able officers. *Id.* O'Reilly went to Havana in 1763, as second in command of the reoccupation forces after the

The Royal Order of April 16, 1769, to O'Reilly directed him to set up political establishments according to the King's current and future instructions.[148] Under this authority, he abolished French law in the province and issued two sets of Spanish laws.[149] On November 25, 1769, O'Reilly issued the first set, comprised of the Ordinances of the Ayuntamento of New Orleans and the Instructions for Adjudicating Civil and Criminal Cases in Louisiana, recommended for royal approval by the Council of the Indies on February 27, 1772, and formally approved by royal *cédula* dated August 17, 1772.[150] Dr. Manuel Joseph de Urrutia and Lic. Feliz Rey, two academically trained creole lawyers from Havana, composed the two laws, the Ordinances from the *Recopilación de las Indias* and the Instructions from the *Nueva Recopilación* and the *Siete Partidas*.[151] The Ordinances of the Ayuntamento provided for mortgage registration books:

British conquest of Havana in the Seven Year's War. *Id.* He was assigned to rebuild the city's devastated fortifications, to organize and train the militia, and to report on the status of Cuba's economy and the policies needed to insure its security and profitability to the Crown. *Id.* In 1764, O'Reilly went to Puerto Rico on a similar mission. *Id.* at 24. In 1765, O'Reilly saved the life of Charles III during a Madrid insurrection by protecting the palace from a hostile mob. In 1769, O'Reilly was also sent to restore order in New Orleans following the rebellion of its French inhabitants. *Id.* at 25. Later O'Reilly led an expedition against Algiers in 1775, was banished to Galicia due to participation in intrigues, and died on his way to take command of the army of the East Pyrenees against the French in Catalonia in 1794. 2 DAN L. THRAPP, ENCYCLOPEDIA OF FRONTIER BIOGRAPHY 1087 (1990); *see also* WHO WAS WHO IN AMERICA, HISTORICAL VOLUME 1607-1896, at 387 (1963); 2 GAYARRÉ, *supra* note 136, at 286-88.

147 42 THE CONSOLIDATED TREATY SERIES 239, 241 (Clive Parry ed., 1969) [hereinafter Parry] (Cession of Fontainebleau).

148 Baade, *Formalities*, *supra* note 71, at 682 (citing A.G.I., *supra* note 83, Santo Domingo, leg. 2594, at 58).

149 3 GAYARRÉ, *supra* note 136, at 37.

150 Baade, *Formalities*, *supra* note 71, at 682 (citing A.G.I., *supra* note 83, Cuba, leg. 180A). For a reprint in Spanish, see BIBIANO TORRES RAMÍREZ, ALEXANDRO O'REILLY EN LAS INDIAS 187-225 (1969). For an English translation, see Gustavus Schmidt, *Ordinances and Instructions of Don Alexander O'Reilly*, 1 LA. L.J. 1, 1-65 (No. 2, 1841) [hereinafter Schmidt, *Ordinances*].

151 Baade, *Formalities*, *supra* note 71, 682-83; Schmidt, *Ordinances*, *supra* note 150, at 27-28; *see* NOVÍSIMA RECOPILACIÓN, *supra* note 62; RECIPILACIÓN DE LAS INDIAS, *supra* note 81; SABIO, SIETE PARTIDAS, *supra* note 38.

Manuel José de Urrutia was born in Havana in 1732, was educated at the University of Mexico and the University of San Gerónimo in Havana, was licensed by the *Audencia* of Santo Domingo to practice law, and became a professor at the University of Havana in 1761. Urrutia was named judge advocate for the fleet at Havana in 1764, special advisor to O'Reilly in 1769 (approving the judgment imposing the death penalty on six of the French rebels in New Orleans), judge of Santo Domingo in 1771, judge to the *Audencia* of Quito in 1779 and transferred to the *Audencia* of Guadalajara in 1783, *alcalde del crimen* of Mexico in

> The *Escribano* of the *Cabildo* and of the Government shall inscribe, in a separate book, the mortgages upon all contracts which may be made before him or any other; he shall certify, at the foot of each deed, the charge or mortgage under which the sale or the obligation may have been made, conformably to the intention of the law, in order to prevent the abuses and frauds which usually result therefrom.[152]

O'Reilly issued the second set of laws as two sets of instructions to underlings. The first issued on January 26, 1770, to the two Lieutenant Governors, one at St. Louis and one at Natchitoches.[153] The second on February 12, 1770, to the Commanders of the nine original posts of Ste. Genevieve, St. Charles, St. John-the-Baptist, Pointe Coupée, Opelousas, Iberia, La Fourche, Rapides, and St. James.[154] These two instructions, also written by Urrutia and Rey, comprised adaptations of the Instructions of November 25, 1769.[155] The February 12, 1770, instructions to the Commanders identified the source for the mortgage provision in its preamble as the *Nueva Recopilación*.[156] The *Nueva Recopilación* provided that vendors who conceal charges upon their house, heritages, or possessions from their purchasers must pay twice the amount realized by such mortgage.[157] It also reproduced the original *cédula* on real estate

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1791, and judge of Mexico in 1798. Urrutia died in 1803. MARK A. BURKHOLDER & D.S. CHANDLER, BIOGRAPHICAL DICTIONARY OF AUDENCIA MINISTERS IN THE AMERICAS, 1687-1821, at 336-37 (1982); 2 GAYARRÉ, *supra* note 136, at 339.

Felix del Rey y Boza was born in Havana and graduated from the University of Havana. Rey was licensed by both the *Audencia* of Mexico and Santo Domingo to practice law. In Louisiana, Rey served as the prosecutor of the twelve French rebels in New Orleans sent to trial. After serving his commission to Louisiana, Rey became legal advisor and judge advocate for the Governor of Havana. Rey became judge to Guatemala in 1779, *alcalde del crimen* to the *Audencia* of Mexico in 1784, and judge of Mexico in 1787. Rey died in 1787. BURKHOLDER & CHANDLER, *supra*, at 288; 2 GAYARRÉ, *supra* note 136, at 320. O'Reilly brought Urrutia and Rey to Louisiana for the purpose of the trials of the insurgents in New Orleans. TEXADA, *supra* note 146, at 35 (citing a letter of O'Reilly).

152 *See* 1 UNITED STATES CONGRESS, AMERICAN STATE PAPERS: DOCUMENTS, LEGISLATIVE, AND EXECUTIVE OF THE CONGRESS OF THE UNITED STATES, CLASS 10: MISC. 363 (1827) (Ordinances of the Ayuntamento, sec. IX 4 [English translation]); SCHMIDT, *supra* note 5, at 24 (same).

153 Baade, *Formalities*, *supra* note 71, at 683.

154 *Id.*

155 *Id.* at 683, 687 (citing A.G.I., *supra* note 83, Cuba, leg. 188A [in French]; *id.*, Santo Domingo, leg. 1223 [in Spanish], approved by *cédula* dated August 17, 1772; *id.*, Cuba, leg. 180A).

156 *Id.* at 687.

157 NUEVA RECOPILACIÓN, *supra* note 62, bk. 5, tit. 15, laws 2, 3.

mortgage registers given at Toledo in 1539.[158] These instructions, however, went beyond Spanish law and extended the filings to include chattel mortgages of slaves, as well as sales of land and slaves:

> 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 transaction 'subject to the penalties imposed by the said laws' [the above penalty 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.
>
> Fourthly, 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 Cabildo, of which mention shall be made in the said act (of sale).'[159]

So this instruction made unfiled chattel mortgages invalid on slaves between the parties, which was more severe than the contemporary Anglo-American chattel mortgage acts in the Southern English colonies, invalidating only the unfiled chattel mortgage with respect to third

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158 *Id.*; *see also* Baade, *Formalities*, *supra* note 71, at 687. For the *cédula* of Toledo in 1539, see NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 16, law 1.

159 See Baade, *Formalities*, *supra* note 71, at 687-88 for a brief extract.

parties,[160] but was less harsh than Spanish law by not including the double amount penalty.[161]

Although New Orleans had *escribanos*, with three in residence after 1788, the outlying districts did not.[162] So the instructions allowed certification in those districts by the lieutenant governor or commandant and two witnesses.[163]

On November 9, 1770, Governor Luis de Unzaga y Amerzaga issued a decree dealing solely with these recordable conveyances to the same effect, except he added ships:

> Make it known that having, from experience, become acquainted with the different frauds and malpractices which are apt to be committed in all sales, exchanges, permutations, barters, and generally 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; and wishing, first, 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:
>
> We order and decree that 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 an *escribano;* to which contracts and act of sale and alienation shall be annexed a certificate of the Registrar of Mortgages; that all other acts made under any other form shall be null and void, and as if they had never been made; that the sellers and buyers shall have no right to the things thus sold, bought or exchanged; that they cannot acquire any just

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160 *See infra* note 292 and accompanying text.

161 *See supra* note 64 and accompanying text.

162 Baade, *Formalities, supra* note 71, at 684, 690.

163 *Id.* at 685.

> and legitimate possession thereof; and that in cases of fraud, all parties therein concerned shall be prosecuted with all the severity of the law; that the *escribano* 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; and said *escribano*, 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; and 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.[164]

In Spanish Louisiana after 1770, chattel mortgages on slaves and ships required filing for validity. The O'Reilly instruction of February 12, 1770, represented an early attempt, paralleling the Spanish *pragmatica* of 1768, to put strength into the Toledo *cédula* of 1539 for Spanish America because it applied to slaves and ships.[165] All this occurred before the *pragmatica* of 1768 became applicable to Spanish America in 1784.[166] The Louisiana ordinance did operate in New Orleans, where the record books of the Registrar of Mortgages contain Spanish entries from March 15, 1788, to January 1804.[167] This is evidence that the mortgage register existed as early as February 1771 for slave mortgages.[168] By 1776, courts in New Orleans had cases involving foreclosing a mortgage

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164 3 GAYARRÉ, *supra* note 136, at 631-32 (English translation). Luis de Unzaga y Amerzaga, born about 1720, was a career army officer. Unzaga became a brigadier general in 1769, was appointed to succeed O'Reilly as Governor of Louisiana by O'Reilly, and was appointed Captain-General of Caracas in 1776 and Governor of Cuba in 1783. Unzaga died in Spain about 1790. 6 JAMES GRANT WILSON, APPELETON'S CYCLOPEDIA OF AMERICAN BIOGRAPHY 211 (1889).

165 Baade, *Formalities*, *supra* note 71, at 687.

166 *Id.*

167 *Id.* at 689.

168 *Id.* at 689 & n.137 (citing Mortgage Office, Civil District Court of New Orleans, Records Books 1 & 2; and for a slave sale on Feb. 16, 1771, citing Notorial Archives, Civil District Court, New Orleans, Juan Garic Book 2, at 18-19).

on a slave.[169] Compliance also occurred in St. Louis, New Madrid, and Natchitotches.[170]

Spain surrendered Spanish Louisiana to France during the early Napoleonic Wars through the Treaty of San Ildefonso of October 1, 1800.[171] France did not immediately assume power in Lousiana. The French prefect, Pierre Clément de Laussat, did not arrive in New Orleans until March 26, 1803, and received the province from the last Spanish Governor, Juan Manuel de Salcedo, on November 30, 1803.[172] On December 17, 1803, three days before his reign ended, Laussat issued a proclamation reenacting the *Code Noir de la Luisiane*,[173] which contained the provision for no succession by chattel mortgages on slaves. Nevertheless, Louisianians consistently ignored this proclamation and thereafter continued to use Spanish slave law rather than any contrary provision of the *Code Noir de la Luisiane*.[174] In November 1805, Judge John B. Prevost of the Superior Court of the Territory of Orleans ruled Spanish law, rather than French law, governed in Louisiana.[175]

B. The Floridas

On July 20, 1763, when England took over Florida, the Spanish transferred property through title deeds and permitted chattel mortgages but did not require a filing for their validity. The Treaty of Paris, of 1763, promised the Spanish their Catholic religion and permitted them to sell their estates to a British subject and leave Florida within eighteen months.[176] Of the 3000 Spaniards in St. Augustine,

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169 Laura A. Porteus, *Index to Spanish Judicial Records of Louisiana*, 11 LA. HIST. Q. 654, 676 (1928) (*Boure v. deLande* (1776) (creditor possession)).

170 Baade, *Formalities*, *supra* note 71, at 690-91 nn.145-46 (citing "F. Dorlac to A. Chouteau, 1785, paid and cancelled, 1786, Historical Society of St. Louis, St. Louis Judicial Archives, No. 1656; . . . A. Rees to P. Deroche, June 11, 1791, discharge noted on same instrument, September 15, 1792, New Madrid Judicial Archives; . . . Louis Menard to Niclas Laignon, mortgage, Natchitoches Courthouse, Conveyances No. 3, item 649").

171 55 Parry, *supra* note 147, at 377; JACK D.L. HOLMES, A GUIDE TO SPANISH LOUISIANA 1672-1806, at 32 (1970) [hereinafter HOLMES, GUIDE].

172 HOLMES, GUIDE, *supra* note 171, at 33-34.

173 Baade, *Slavery*, *supra* note 110, at 71.

174 *Id.* at 72-73 (describing ignoring the French requirement of government approval for manumission and continuing to allow self-purchase under Spanish law).

175 *Id.* at 73. Prevost, stepson of Aaron Burr, favored the English common law for Louisiana but realized sudden change could not occur. GEORGE DARGO, JEFFERSON'S LOUISIANA: POLITICS AND THE CLASH OF LEGAL TRADITIONS 113-14 (1975).

176 CHARLES LOCH MOWAT, EAST FLORIDA AS A BRITISH PROVINCE 1763-1784, at 5 (1943); 42 Parry, *supra* note 147, at 279, 331 (Treaty of Paris of 1763, art. 20).

Florida, all but a half dozen left due to Spanish inducements of Cuban land.[177] So the English had no need to continue Spanish law other than title upon the exiting sale.

The British divided Florida into two parts under the Proclamation of October 7, 1763.[178] The instructions of King George III to both his governors, James Grant in British East Florida and George Johnstone in British West Florida, eliminated the title matter in 1763. Spanish inhabitants would register their title deeds issued before November 3, 1762.[179] The Governor would judge the legality but forward them for a decision to the Privy Council if the deed covered too much or the grantee did not satisfy grant conditions. The Governor would forward all grants purchased by British subjects to the Privy Council.[180] As a result, Spain used no filing system in Florida. With respect to the laws, the instructions mandated they agree with the laws and statutes of Great Britain and the courts operate according to English law and equity.[181] English common law recognized chattel mortgages on slaves.[182] Among arguments against the death penalty for slaves, the Councilors of British East Florida listed strengthening chattel mortgages on slaves:

> Thirdly, the greater security the slave has for his life the more valuable he becomes to the owner, the greater security also has the money lender, and the merchant to whom the planter is indebted, and to whom Negroes are often mortgaged, and we humbly conceive, a very recent and striking instance, exists where by the cruelty of the master the creditor may be affected.[183]

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177 MOWAT, *supra* note 176, at 8-9.

178 *Id.* at 10.

179 2 ROYAL INSTRUCTIONS TO BRITISH COLONIAL GOVERNORS 1670-1776, at 514-15 (Leonard Woods Labaree ed., 1935) [hereinafter Labaree].

180 2 *id.*

181 *E.g.*, 570 GREAT BRITAIN, COLONIAL OFFICE PAPERS, CLASS 5: JOURNALS OF THE EAST FLORIDA COUNCIL 1764-1769 (microfilm of handwritten journal), vol. 1 frame 4, 5 [hereinafter GREAT BRITAIN] (to establish courts as in Georgia and to establish courts of common law, respectively); *see also* 571 *id.*, vol. 2, frame 105 (Council action April 9, 1774: instructions to Patrick Tonyn, Second Governor of British East Florida in 1773); 2 Labaree, *supra* note 179, at 829-30 (same).

182 *See* George Lee Flint, Jr., *Secured Transactions History: The Fraudulent Myth*, 29 N.M. L. REV. 363 (1999) [hereinafter Flint, *Myth*]; George Lee Flint, Jr., *Secured Transactions History: The Northern Struggle to Defeat the Judgment Lien in the Pre-Chattel Mortgage Act Era*, 20 N. ILL. U. L. REV. 1 (2000).

183 570 GREAT BRITAIN, *supra* note 181.

1. British West Florida

British West Florida's Assembly did not pass any law adopting the English common law as the rule since the instructions did. But the Assembly did adopt a chattel mortgage statute, as part of a general filing statute on sales and transfers of immovables and movables, providing for priority based on filing on May 19, 1770, a date after the passage of the Spanish chattel mortgage act in Spanish Louisiana:

> Whereas the registering of all deeds and conveyances of lands, tenements, Negroes, and other chattels will tend to the securing the titles of the proprietors and will prevent frauds being committed by evil-disposed and necessitous persons who may borrow money on security of their lands and Negroes before under mortgage to others without acquainting the lenders thereof, or otherwise for valuable considerations may sell and convey over their lands before disposed of, to the injury and loss of such second mortgagees and purchasers . . . be it enacted . . . [that] all and every deed and deeds of sale, mortgage, or conveyance of any lands, Negroes, or other goods and chattels within this Province which shall be first registered and recorded in the Registrar's office of this Province shall be deemed held and taken as the first deed or deeds of sale, mortgage, or conveyance, and as such shall be allowed, adjudged, and held valid in all courts of judicature within this Province, any former or other sale, mortgage, or conveyance being of the same lands, tenements, Negroes, or other goods and chattels and not recorded in the said office notwithstanding.[184]

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[184] WEST FLORIDA, GENERAL ASSEMBLY, THE MINUTES, JOURNALS, AND ACTS OF THE GENERAL ASSEMBLY OF BRITISH WEST FLORIDA 377-79 (Robert R. Rea & Milo B. Howard, Jr., eds., 1979). On March 2, 1770, William Godley introduced the bill in the Upper House, which was read the first time. After the bill's second reading on March 8, 1770, the bill was committed to a committee of the whole house. On March 10, 1770, after much discussion by the committee of the whole house, James Jones reported the committee had no amendments. The bill was ordered to be engrossed. On March 12, 1770, the engrossed bill was read the third time and passed. *Id.* at 210-11. That same day, the Lower House read the bill the first time. After the bill's second reading on March 13, 1770, the bill was referred to a committee of the whole house. After much discussion on March 13 and 15, 1770, David Waugh reported that the committee of the whole had made several

2. British East Florida

In British East Florida, legislative power lay with the Council until 1781 and then the Assembly. The Council, during its November 1764 meeting, created courts and mandated that they use the laws of England, namely the common law.[185] Subsequent council action confirmed this result.[186]

In 1781, the Assembly considered a "Bill for the Better Government of Negroes and Other Slaves within the Province and to Prevent the Inveigling and Carrying Away of Slaves from their Masters or Employers."[187] The bill provided for a controversial capital trial of slaves that defeated its passage,[188] declared slave status to follow the mother, and deemed slaves chattels personal.[189] The bill most likely did not contain a chattel mortgage filing requirement since the Lower House later considered, but did not reach, a "Bill for Obliging Persons to Record Deeds and to Prevent Fraudulent Conveyances."[190] And the Spaniards

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amendments, extending the bill to cover sales as well as mortgages and to cover slaves as well as goods, among other amendments. On March 15, 1770, the Lower House agreed to the amendments and on March 17, 1770, directed Waugh to report the bill's passage with the amendments to the Upper House. *Id.* at 228-30. Mr. Waugh and George Gauld carried the message to the Upper House on March 19, 1770. The Upper House approved the amendments the same day. *Id.* at 212-13. On May 19, 1770, the Lieutenant Governor, Elias Durnford, gave his assent to the bill. *Id.* at 222, 242.

185 570 GREAT BRITAIN, *supra* note 181, vol. 1, frame 13 (Council Action Nov. 3, 1764: courts to use law of the Kings Bench, Common Pleas, and Exchequer in London), frame 17 (Council Action Nov. 17, 1764: courts under laws and statutes of Great Britain); MOWAT, *supra* note 176, at 15.

186 571 GREAT BRITAIN, *supra* note 181, vol. 5, frame 184 (Council minutes of November 1, 1775: English laws are the standard and no other existed in the Province); 572 *id.* vol. 1, frame 3 (Minutes of Upper House of Assembly on March 29, 1781: Province laws must be as near as may be agreeable to Laws of England).

187 On April 1, 1781, Representative John Ross, seconded by Representative Robert Payne, moved for leave to bring the bill. 570 *id.*, JOURNAL OF THE LOWER HOUSE OF BRITISH EAST FLORIDA, vol. 1, frame 90.

188 The battle concerned lost labor. Most southern colonial laws paid compensation when a court condemned a slave in a capital proceeding. *See, e.g.*, 18 ALLEN D. CANDLER, THE COLONIAL RECORDS OF THE STATE OF GEORGIA 44-102 (1970) (Act of 1755); WALTER CLARK, THE STATE RECORDS OF NORTH CAROLINA 191-204 (1904) (Act of 1741, ch. 24); 6 WILLIAM W. HENING, THE STATUTES AT LARGE: BEING A COLLECTION OF ALL THE LAWS OF VIRGINIA FROM THE FIRST SESSION OF THE LEGISLATURE IN THE YEAR 1619, at 104-12 (1823) (Act of 1748, ch. 38); 1 WILLIAM KILTY, LAWS OF MARYLAND (1799) (not paginated) (Act of 1751, ch. 14).

189 570 GREAT BRITAIN, *supra* note 181, JOURNAL OF THE UPPER HOUSE OF BRITISH EAST FLORIDA, vol.1, at frame 47.

190 570 *id.*, JOURNAL OF LOWER HOUSE OF BRITISH EAST FLORIDA, vol. 1, frame 103 (May 21, 1781).

later complained that the British in East Florida transferred slaves without written bills of sale.[191] In 1782, the Assembly finally passed the Act "for the Better Government and Regulation of Negroes and Other Slaves."[192]

3. Spanish Florida

Spain regained British West Florida by conquest from 1779 to 1781 led by Bernardo de Galvez, Governor of Louisiana, and British East Florida by the Treaty of Paris in 1783. The fifth article of the treaty gave British subjects in both Floridas eighteen months to sell their estates, recover their debts, and remove.[193] Almost all the British population left.[194] So again there was little reason to continue prior laws. But shortly thereafter, the *cédula* of 1783, directing compliance with the mortgage filing requirement of the Spanish *pragmatica* of 1768, would apply.

a. Spanish Occidente Florida

Spain joined British West Florida to Louisiana, forming the Captaincy of Louisiana and Occidente Florida separate from the Captaincy of Cuba in 1781.[195] Louisiana and Occidente Florida existed until 1803 when the United States bought Louisiana and when the remainder became Spanish Occidente Florida.[196] Consequently,

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191 *See infra* notes 209-11 and accompanying text.

192 MOWAT, *supra* note 176, at 147.

193 MOWAT, *supra* note 176, at 141; 48 Parry, *supra* note 147, at 481, 484 (Treaty of Paris of 1783, art. 5).

194 MOWAT, *supra* note 176, at 147.

195 HOLMES, GUIDE, *supra* note 171, at 11; *see* JACK D.L. HOLMES, PENSACOLA: SPANISH DOMINION 1781-1821, *in* 1 COLONIAL PENSACOLA 91 (James R. McGovern ed., 1974) [hereinafter HOLMES, PENSACOLA] (describing commanders in Pensacola until the mid-term of Vicente Folch y Juan in 1804 as commandants subject to the Governor of Louisiana and Occidente Florida in New Orleans and citing several communications between them and the Governor of Louisiana and Occidente Florida); *e.g.*, A.G.I., *supra* note 83, Cuba, leg. 1443-B (Enrique White to Gov. Baron de Carondolet in 1795); *id.*, Cuba, leg. 23 (Gov. Baron de Carondolet to Enrique White in 1795); *id.*, Cuba, leg. 160-A (Vicente Folch to Gov. Marques de Someruelas); *see also* DOCUMENTS RELATING TO THE COMMERCIAL POLICY OF SPAIN IN THE FLORIDAS 224, 262, 267 (Arthur Preston Whitaker trans., 1931) [hereinafter Whitaker] (entitled Governors in New Orleans as Governors of Louisiana and Occidente Florida).

196 *See* Whitaker, *supra* note 195, at 203, 235 (explaining that Occidente Florida Governor Falch [1795-1811] received gubnatorial powers only after the *cédula* of September 16, 1803, and the 1782 *cédula* refers to Louisiana and Occidente Florida as one colony, with one governor, respectively).

O'Reilly's laws of 1769 and his instructions of 1770, as well as Unzaga's decree of 1770, applied to the posts in the conquered territory of British West Florida.[197] Pensacola had an office for registering mortgages.[198] So the Spanish chattel mortgage act applied in Spanish Occidente Florida. The archives of Spanish Occidente Florida, Baton Rouge District, have been translated and transcribed.[199] These records reveal acceptance of O'Reilly's laws since they include the laws for a Registrar of Mortgages,[200] for the three-year prohibition against mortgaging new land grants,[201] and for recording land sales.[202] These Baton Rouge records also have recorded mortgages on chattels,[203] livestock,[204] and slaves.[205] Mortgages on slaves also became a technique to commit fraud in remote posts such as Natchez, until 1791 when the Spanish governor acted against the fraud.[206]

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197 HOLMES, GUIDE, *supra* note 171, at 4-6; HOLMES, PENSACOLA, *supra* note 195, at 91; *see also* 1 RICHARD AUBREY MCLEMORE, A HISTORY OF MISSISSIPPI 158, 161 (1973); Jack D.L. Holmes, *Law and Order in Spanish Natchez, 1781-1798*, 25 J. MISS. HIST. 186-89 (1963).

198 *See infra* note 312 and accompanying text.

199 STANLEY CLISBY ARTHUR, INDEX OF THE ARCHIVES OF SPANISH WEST FLORIDA 1782-1810, at vi (1975); *see also* Baade, *Formalities*, *supra* note 71, at 691 (did not bother to search for Florida records).

200 12 SURVEY OF FEDERAL ARCHIVES IN LOUISIANA, ARCHIVES OF THE SPANISH GOVERNMENT OF WEST FLORIDA 32 (1937) [hereinafter LOUISIANA ARCHIVES].

201 6 *id.* at 165. O'Reilly redesigned Spanish Louisiana's land grant system. One of his provisions was the prohibition against a new grantee from mortgaging his property until he had held it for three years. RAMÍREZ, *supra* note 150, at 151. For an English translation of the rule, see SCHMIDT, *supra* note 5, at 62.

202 *See* 12 LOUISIANA ARCHIVES, *supra* note 200, at 223.

203 13 *id.* at 15 (Caleb Fowler to Jean Goujon).

204 5 *id.* at 403 (Benjamin Kimball to Barney Higgins with land); 6 *id.* at 223 (Knowles O'Rien to Hypolite Mallet).

205 2 *id.* at 20 (Francisco Poussett), 399; 3 *id.* at 13, 61 (Francois Poussett to Jean Baptiste Trahan and Nicholas Lamothe to Laroy Poilfere, respectively); 4 *id.* at 63, 105, 171 (Thomas William to Caty Turnbull, Philip Lewis Alston to Alexander Fulton & Co., and Francis Pousett to Juan Garcia, respectively); 6 *id.* at 36 (Benjamin Kimball to Robert Cochran & John Rhea); 11 *id.* at 50 (Philip Alston Gray to Alexander Stirling); 12 *id.* at 32, 64 (Francisco Collel to Joachim Scallan and James Kavanagh to Armand Duplanter, respectively); 15 *id.* at 173 (William Lee to Major Parson); 19 *id.* at 753 (Christopher Gayle to J.M. Cleveland and William Nash).

206 HOLMES, PENSACOLA, *supra* note 195, at 193.

b. Spanish Oriente Florida

Spain did not join British East Florida to Louisiana, but Spain did send Governor Vicente Manuel de Zéspedes.[207] Governor Zéspedes had served under, and was recommended for the governorship by, former Louisiana Governor Unzaga. Governor Zéspedes had also accompanied O'Reilly to Louisiana in 1769.[208]

When Governor Zéspedes arrived in British East Florida to receive the government from the English in July 1784, he issued two proclamations. The first, on July 14, 1784, aimed to end the problem of lawless elements and Loyalists plots by requiring registration of those British subjects who desired to become Spanish subjects, along with their families and slaves within twenty days, granting amnesty and exit passports to those accused of disturbing the peace under British law; the proclamation also set up British arbitrators to settle disputes among the British.[209] The second, on July 26, 1784, aimed to clarify the status of Negroes in Florida by forbidding embarkation without a license, requiring declaration of Negroes in white possession without title deeds within six (when executed in the city) or twenty (when executed in the country) days, subjecting harboring of runaways to Spanish law, and requiring vagrant Negroes to register within twenty days.[210] Zéspedes did not vigorously enforce the latter proclamation since the British sold slaves without formal bills of sale and vagrant Negroes were illiterate.[211] But again this merely recorded ownership, not encumbrances.

Like O'Reilly and Unzaga, Zéspedes introduced a filing system for interests in real estate and slaves.[212] The Archives of Spanish Oriente

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[207] Whitaker, *supra* note 195, at 155, 207, 228 (referring only to Governors of Oriente Florida); *id.* at 155 (Governor of Oriente Florida's superior in Havana, Cuba, not New Orleans.).

[208] HELEN HORNBECK TANNER, ZESPEDES IN EAST FLORIDA 1784-1790, at 10, 17 (1963). Vicente Manuel de Zéspedes, born in Spain in 1720, was a career military officer. Zéspedes came to Havana in 1741 to serve in the elite Havana Regiment, which O'Reilly took to New Orleans in 1769. Zéspedes became interim provincial governor of Santiago, Cuba, in 1780 and Governor of Oriente Florida in 1784 with the recommendation of Unzaga. Zéspedes returned to Havana in 1790 and died there in 1794. *Id.* at 2, 5, 13, 18, 220, 224.

[209] MOWAT, *supra* note 176, at 145 (citing A.G.I., *supra* note 83, Santo Domingo, leg. 2660); TANNER, *supra* note 208, at 38-39.

[210] TANNER, *supra* note 208, at 49.

[211] *Id.* at 50.

[212] For real estate records, see United States v. Wiggins, 39 U.S. (14 Pet.) 334 (1840) (1815 East Florida deed recorded in provincial *escribano*'s office); United States v. Perchman, 32 U.S. (7 Pet.) 51 (1833) (same).

Florida contain the Book of Mortgages for 1785-1821 with Domingo Rodriguez de Leon, Jose de Zubizarreta, and Juan Blas de Entratgo serving as the *escribanos*.[213] The notorial records for St. Augustine contain numerous slave sales, including purchases by would-be slaveowners who lacked cash and so were allowed possession of the slaves provided they guaranteed payment.[214]

C. Texas

Only one other Spanish Borderland Governor followed the lead of O'Reilly. Manuel Maria de Salcedo of Texas, with extensive connections to Louisiana, mandated it in 1810.[215] His father served as the last Governor of Spanish Louisiana. On January 4, 1810, Salcedo ordered the implementation of the registration scheme,[216] and issued the order on March 4, 1810.[217] As in Spanish Louisiana, it applied to goods as well, making reference to mortgaged property carried to Texas:[218]

> Consequently, for this principle I command it be communicated to all the judges that they carry out and must carry out this wise and superior foresight and that none proceed to authorize in their respective courts any sale of property whatever shown to be and liable of suffering some mortgage or burden, without ascertaining the presentation for the same parties of this certification in this province that the thing they brought

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213 P.K. Yonge Library (University of Florida), East Florida Papers, Section 90 (Book of Mortgages 1785-1821).

214 JANE LANDERS, BLACK SOCIETY IN SPANISH FLORIDA 173-74 (1999).

215 Baade, *Formalities*, *supra* note 71, at 731-34. Manual Maria de Salcedo lived with his father Juan Manuel de Salcedo until 1803, returned to Spain, and became Governor of Texas in 1807. To solve the problem of American squatters, Salcedo recommended settlement of Spaniards from Louisiana or Mexico. On an inspection of East Texas when the Hidalgo revolution began, he returned to San Antonio, was captured by rebels in 1811, and was restored as Governor. When the Gutierrez-Magee expedition captured Nacodoches and La Bahia in 1812, he unsuccessfully besieged La Bahia, withdrawing to San Antonio. After the defeat of Salcedo's forces in the Battle of Rosillio on March 29, 1813, he surrendered to Gutierrez, whose junta found him guilty of treason and ordered his execution, which was stopped by the Anglo-Americans. Mexican rebels took him and his staff outside of San Antonio and killed them on April 5, 1813. *See also* THE NEW HANDBOOK OF TEXAS 775 (Ron Tyler ed., 1996) [hereinafter Tyler].

216 Tyler, *supra* note 215, at 732 (citing Bexar Archives, January 4, 1810, and Nacogdoches Borradores de Oficios, Annos 1810 y 1811).

217 *Id.* at 731 (citing Bexar Archives, March 4, 1810, and Nacogdoches Archives, Part I, at 42-45).

218 *Id.* (based on sections 1, 2, and 10 of the *pragmatica* of 1768).

> to sell be free of life rent, mortgages, or surety, proving true the same by producing these and mortgaging any real estate and coming to an agreement about the tax owing to us the same in the amount of the surety mortgaged, and moreover about property outside this province that comes before the courts their instruments for taking effect further in this government in the above-mentioned limits must be presented free of mortgages in the offices where the property is for taking effect within the term of three months because in the contrary they remain suspended of function and they be subject to the rest of the penalties made ready in our decrees over the matter.[219]

But this ordinance did not have a lasting impact. In contrast to O'Reilly's ordinance, the Texas ordinance ceased when the Hidalgo Revolution temporarily removed Salcedo from the Governorship in January 1811 and involved him in the Gutierrez-Magee filibuster in August 1812. Consequently, only two mortgages filed in San Antonio in 1810 make reference to the mortgage books and registration within six days.[220] Later mortgages in San Antonio and Nacogdoches failed to include the certification.[221]

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[219] Bexar Archives, 1804-1821, reel 44, frame 420-21.

> *Conseq.te a este principio mando a todos los juezes ácquienes corresponda cumplian y hasan cumplir con esta sabia y sup.ior provid.a y que no procedense á authorizan in sus respectivos juzgados, venta alguno de vienes de qualesquiera expuse g.l sean y que pudan sufrir hipoteca ogarvamen alguno, sin prender la presentacion p.a los mismas partes de esta certificacion de est Prov.a de que la caso que se traen de vender esta libre de censos, hipoteca, o fianza, verificandose lo mismo al dar estas é hipotecan qualesquiera vienes raizes, é imposicion a senos debiendo entenderse lo mismo en quarto a las fianzas hipotecos, y demas que de vienes fuera de esta Prov. a se hicieran a los juzgados de ella cuyos instrumentos ademas de la toma de razon en este Gov. no en los precitados terminos deberian presentarse en los oficios gratis de hipotecas en donde estibieran los vienes p.a. la toma de razon en el termino de tres meses pues de lo contrario quedarien suspensos de ofices y sus eron a las demas penas prevenida en nuestros acordados sobre la materia.*

Id.

[220] Baade, *Formalities*, *supra* note 71, at 734 (citing "Maria de la Garza to Cipriano de la Garza, mortgage, September 1, 1810, Galan Protocolos, Bexar Archives, February 12, 1810, at 15r; Luciano Garcia to Ramon Martinex de Pinillo, mortgage, San Antonio, February 12, 1810, *id.* at 1, 2").

[221] *Id.* at 735 (mortgages failed to have certification or reference to mortgage books, citing "J. A. Zambrano to J. Casiano, mortgage, San Antonio, January 30, 1835, Bexar County

D. The Mexican Cession

On September 16, 1810, the Hildalgo Revolution arose in New Spain resulting in the new nation of Mexico in 1821.[222] The 1814 Constitution of Apatzingan, drafted by a constitutional congress organized by Hidalgo's revolutionary successor, José María Morelos, called for a body of laws to replace the ancient Spanish laws.[223] So upon independence, the Provisional Government in January 1822 named a commission to redact a civil code.[224] But the doctrine of federalism, adopted in the Constitution of 1824, thwarted any attempt to dictate codes for the whole republic.[225] Consequently, the laws of colonial New Spain continued under the Mexican Republic with only slight modification by subsequent Mexican legislation.

Nevertheless, several Mexican states continued the codification process, with three reaching some degree of success. Oaxaco promulgated a code in 1827 through 1829.[226] Zacatecas published one for discussion in 1829.[227] And Jalisco published part of a code in 1833.[228] Although these codes did not follow a model, they all showed the

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Transcribed Records C-1, at 196-98; E. Chirino to J. Durst, mortgage, Nacogdoches, December 15, 1831, Nacogdoches Archives, vol. B., at 54").

222 MICHAEL C. MEYER ET AL., THE COURSE OF MEXICAN HISTORY 274-86 (6th ed. 1999) (Mexican War for independence from Spain lasted from September 16, 1810, to September 1821).

223 MARÍA DEL REFUGIO GONZÁLEZ, EL DERECHO CIVIL EN MEXICO 1821-1871, at 83 (1988) (article 211) [hereinafter GONZÁLEZ, DERECHO].

224 *Id.*

225 *Id.*

226 *Id.* at 86 (citing Oaxaca, CODIGO CIVIL PARA EL GOBIENRO DEL ESTADO LIBRE DE OAXACA (1827-29, 3 vols.)). For a comparison of this Oaxacan Civil Code with the Napoleonic Code, see FERNANDO ALEJANDRO VAZQUEZ PANDO, NOTAS PARA EL ESTUDIO DEL "PRINCIPIO DE EFECTIVIDAD" (tesis de licenciatura) 127, 156-59 (1970). Since the Oaxacan Civil Code is not complete, it did not reach the provisions relating to privileges and mortgages corresponding to the Napoleonic Code. The Oaxacan Code cuts off at Book 3, Title IX, of the Napoleonic Code, while mortgages are at Book 3, Title XVIII, of the Napoleonic Code. Moreover, it is doubtful it had any influence on other codification attempts. *Id.* at 159.

227 GONZÁLEZ, DERECHO, *supra* note 223, at 86 (citing Zacatecas, *Proyecto de Codigo civil presentado al Segundo Congreso Constitucional del Estado libre de Zacatecas por la comision encargada de redactarlo* (Zacatecas, Mex.: Oficina del Gobierno, 1829)). For a comparison of this Zacatecan Civil Code with the Napoleonic Code, see PANDO, *supra* note 226, at 393-97.

228 *Id.* at 86 (citing Jalisco, *Proyecto de las parte primera del Codigo civil del Estado libre de Jalisco, o sea trabajos in que se ha ocupado la comision redactora desde su nombramiento y que presenta al honorable Congreso en cumplimiento del acuerdo del 5 de marzo de 1832* (Guadalajara, Mex.: Juan Maria Brambila, 1833)).

influence of the *Code Napoléon*.[229] But most of the Mexican states, including those in the Spanish Borderlands, Coahuila y Tejas, the Territories of Nueva Mexico, and Alta California continued to use the law of colonial New Spain.

The failure of the national legislature to work on a codification for all of Mexico prompted two individuals to compose private compilations. These two individuals were Vicente Gonzalez Castro, who was heavily influenced by the *Code Napoléon*, and Juan Nepomucino Rodriguez de San Miguel, who instilled the more conservative *Novisima Recopilación*.[230] Rodriquez merely recompiled, including recent legislation, but he did change laws altered by local custom.[231] Their efforts indicated that Mexico had made no serious changes to the colonial law by 1840.

In 1837, Rodriguez edited a dictionary of Mexican law prepared by a Spanish jurist, including the Mexican national legislation and practices of the courts in Mexico.[232] This dictionary makes it clear that in 1837 the law of *hipotecas* in Mexico remained that of the *Siete Partidas* and the 1768 Spanish *pragmatica*. Rodriguez described the office of *hipotecas* in the same terms and cited the 1768 Spanish *pragmatica*.[233] He referenced the changes allowed by the *Audencia* of Mexico City on September 27, 1784.[234] His entry for *hipotecas* recognized that they were often confused with pledges.[235] He conceded the influence of the *Code Napoléon* by remarking that pledges generally used movables as collateral while *hipotecas* generally used real estate.[236] But for the *hipoteca* he cited to the *Siete Partidas*. Thus, he recognized that sometimes movables served as collateral for *hipotecas*.[237]

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229 *Id.* at 88.

230 *Id.* at 94-95 (citing Vicente Gonzalez Castro, *Redaccion del Codigo civil de Mexico, que se continen en las leyes espanolas y demas vigentes en nuestra Republica* (Guadalajara: Manuel Melendez y Munoz, 1839) and Rodriguez de San Miguel's *Pandectas*; Juan Nepomucino Rodriquez de San Miguel, *Pandectas Hispano-Mejicanas o sea Codigo general comprensivo de las leyes generales, utiles y vivas de las Siete Partidas, Recopilación Novisima, la de Indias, Autos y Providencias conocidas por de Montemayor y Belena y Cedulas posteriores hasta el ano de 1820* (Mexico City, Mex.: Mariano Galvan Rivera, 1839-40, 3 vol.)).

231 *Id.*

232 Gonzalez, *Preface*, *supra* note 96, at 7.

233 *Id.* at 483.

234 *Id.*

235 *Id.* at 291.

236 *Id.*

237 *Id.* at 292-94 ("*El acreedor que tiene hipoteca legal puede ejercer su derecho en los bienes presentes y futuros del deudor, sin distincion alguna de muebles, raices, semovientes, derechos y*

Although Mexico still recognized chattel mortgages, Mexican officials, like the Spanish ones before them, made no effort to provide for filing them in the Spanish Borderlands. American courts noted that San Francisco in California and Santa Fe in New Mexico lacked *escribanos*.[238] Mexican officials did not adopt alternate procedures as did O'Reilly in Louisiana to counter the absence of *escribanos*. The Mexicans, however, did extend real estate mortgage filings into regions immediately south of the Spanish Borderlands.[239]

Therefore, prior to America's acquisiton of the Spanish Borderlands, their laws recognized chattel mortgages with only Louisiana and the Floridas providing for filing on those using slaves and ships as collateral.

V. THE AMERICAN DOMINATION

The United States acquired the Spanish Borderlands through several treaties and annexations of rebellious regions from 1795 to 1853. With respect to the Spanish Borderlands, the United States followed a rule that the prior law continued until replaced by treaty, Congress, or the legislature.[240] This meant Spanish law and later Mexican law were followed. All Borderland states, except Louisiana, eventually replaced this law with English common law.

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acciones . . ." and "*Estan sin embargo esceptuadas de la hipoteca general las cosas necesarias para el servicio diario de la persona y familia del deudor, cuales son el lecho, vestidos, ropa, utensilios de concina, armas, caballo de su uso, y otras semejantes;. . .*") (citing *Siete Partidas, supra* note 31, pt. 5, tit. 13, law 5.) ("*La hipoteca tacita o legal es siempre general, y comprende toda clase de bienes, asi muebles como raices, . . .*" and "*Pueden hipotecarse todas las cosas del comercio humano, en que el hombre tiene pleno dominio, cuasi dominio o algun derecho, de cualquier naturaleza que sean, muebles o raices, corporales o incorporales, presentes o futures . . . .*").

238 Maxwell Land Grant Co. v. Dawson, 151 U.S. 586, 597 (1893) (N. Mex.); Woodworth v. Guzman, 1 Cal. 203, 205 (1850).

239 *See* Baade *Formalities, supra* note 71, at 731 (citing a July 25, 1862, mortgage made in Pima, Arizona, of property in Sonora recorded August 25, 1862, in the *Rigistro de hipotecas* of the *juzgado* of Magdalena, Sonora.)

240 United States v. Thomas Power's Heirs, 52 U.S. (11 How.) 570 (1850) (holding that the 1781 Galvez grant was invalid in Occidente Florida as authority from the Spanish king not given until after cession by British in 1783); Strothers v. Lucas, 37 U.S. (12 Pet.) 410, 436 (1838) (holding that Spanish land title rules govern in Missouri for questions relating back to the Spanish dominion); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (holding that Spanish salvage law in East Florida was overruled by the 1823 territorial act).

A. Louisiana

The United States acquired Louisiana through the Treaty of Paris on April 30, 1803.[241] Governor William C.C. Claiborne, named governor with all power of the Spanish governor on October 30, 1803, received Louisiana for the United States on December 20, 1803, from the French prefect only twenty days after he had assumed power.[242] The United States promised to respect property rights. Those locals becoming U.S. citizens would also enjoy the rights of U.S. citizens with free exercise of religion.[243] Since the treaty did not specify any law, this meant that the laws of Spain continued in the ceded territory since the French had made no lasting alterations to the Spanish law in effect in Spanish Louisiana.[244]

The courts in the three states, Louisiana,[245] Missouri,[246] and Arkansas,[247] formed from the portions of Louisiana occupied during

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241 HOLMES, GUIDE, *supra* note 171, at 34; 57 Parry, *supra* note 147, at 29, 32 (art. 3).

242 HOLMES, GUIDE, *supra* note 171, at 34. Spanish Governor Salcedo delivered Louisiana to the French prefect on November 30, who in turn delivered Louisiana to the Americans on December 20, 1803. *Id.*

243 57 Parry, *supra* note 147, at 32 (art. 3).

244 1 UNITED STATES CONGRESS, *supra* note 152, at 344 (President Jefferson's November 14, 1803, message to Congress); HOLMES, GUIDE, *supra* note 171, at 34. See also *supra* notes 169-73 and accompanying text for the French failure.

245 *E.g.*, Duchrest v. Bijeau, 8 Mart. (n.s.) 192 (La. 1829) (using Spanish community property laws for a 1787 marriage to determine slave ownership); Lanusse v. Lanna, 6 Mart. (n.s.) 103 (La. 1827) (using Spanish paraphernal law to deny tacit mortgage on crop proceeds); Gonzales v. Sanchez, 4 Mart. (n.s.) 657 (La. 1826) (refusing to apply Unzaga's ordinance for land title deeds since supposedly no copy existed of the ordinance and it supposedly applied only to aid collection of the *alcabala* tax from which the king had exempted Louisiana); Sanchez v. Gonzales, 11 Mart. (o.s.) 207 (La. 1822) (using Spanish prescription law for grant in La Fourche); Cottin v. Cottin, 5 Mart. (o.s.) 93 (La. 1817) (using Spanish inheritance law since the 1808 Code does not repeal Spanish law if it is not contrary). The most prominent issue in these cases dealt with the supposed recognition of parol transfers of land under Spanish law. *E.g.*, Choppin v. Michel, 11 Rob. 233 (La. 1845) (1774 sale in Pounte Coupee); Devall v. Choppin, 15 La. 566 (1840) (same); Sacket v. Hooper, 3 La. 104 (1831) (sale in Rapides); Maes v. Gilland, 7 Mart. (n.s.) 314 (La. 1828) (1795 sale in Pointe Coupee); Le Blanc v. Viator, 6 Mart. (n.s.) 253 (La. 1827) (sale in Iberia). Spanish law governed in Louisiana until replaced by a civil law code in 1808. *See infra* notes 253-57 and accompanying text.

246 *E.g.*, Strothers v. Lucas, 37 U.S. (12 Pet.) 410 (1838) (applying Spanish land grant law for lots in St. Louis); Lindell v. McNair, 4 Mo. 380 (1836) (applying Spanish paraphernal law for 1820 conveyance since 1816 act did not repeal Spanish law if not inconsistent). The most prominent issue, as in Louisiana, *see supra* note 219, dealt with the supposed recognition of parol transfer of land under Spanish law. Langlois v. Crawford, 59 Mo. 456 (1875) (1806 sale in St. Louis); Long v. Stapp, 49 Mo. 506 (1872) (1810 sale in St. Francois County); Allen v. Moss, 27 Mo. 354 (1858) (1815 sale in St. Louis); Mitchell v. Tuckers, 10 Mo. 260 (1846) (sale in New Madrid); *see also* Gibson v. Chouteau, 39 Mo. 536 (1866)

Spanish rule, followed the law of Spain at the time of the Treaty of Paris of 1803, not modified by subsequent statute as the law of their states. Courts in Louisiana, Missouri, and Arkansas routinely applied the law of Spain in suits involving pre-1803 transactions arising before the time the respective legislature replaced Spanish law. This law extended to the 1768 Spanish *pragmatica*. Although Spanish Louisiana had established offices of *hipotecas*, the Louisiana state court claimed the Spanish mortgage filing requirement did not apply to the state since that requirement applied to a sales tax from which the King had exempted Louisiana.[248] On March 23, 1774, Charles III had approved O'Reilly's proposal to exempt property from the *alcabala*, a sales tax on exports and imports between Louisiana and Havana, for a period of ten years in order to promote the trade needed for the colony's survival as a bulwark against Anglo-American intrusion towards New Spain.[249] The Arkansas federal courts recognized that O'Reilly's laws applied there.[250]

Congress created two jurisdictions from the Louisiana Purchase. On March 26, 1804, the southern portion became the Territory of Orleans, while the northern portion became the District of Louisiana, renamed the Territory of Louisiana in 1805.[251] Congress specified the laws in force would continue in both Territories.[252] Thus, Spanish laws not abrogated continued. Both territories recognized early on the legitimacy of chattel mortgages constructed in the fashion of Spanish law with recording for

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(mentioned sale rule as in effect before 1816). Spanish law governed in Missouri until replaced by English common law in 1816. *See infra* notes 263-67 and accompanying text.

247 *E.g.*, Muse v. Arlington Hotel Co., 168 U.S. 430 (1897) (rejecting 1788 grant in Hot Springs for failure to satisfy conditions as required by Spanish law); De Vilemont v. United States, 54 U.S. (13 How.) 261 (1851) (rejecting 1795 grant to commandant of Arkansas for failure to satisfy conditions as required by Spanish law); Glenn v. United States, 54 U.S. (13 How.) 250 (1851) (same for 1796 grant from commandant of New Madrid in Arkansas); Winter v. United States, 30 Fed. Cas. 350 (D. Ct. Ark. 1848) (same for 1797 grant in Arkansas for failure to comply with O'Reilly's laws); Low v. United States, 15 Fed. Cas. 17 (D. Ct. Ark. 1848) (same for 1718 grant in Arkansas for failure to comply with French law). *But see* Grande v. Foy, 10 Fed. Cas. 954 (Sup. Ct. Terr. Ark. 1831) (holding that 1807 territorial enactments cumulatively abrogated Spanish law). Arkansas abrogated Spanish law when a part of Missouri Territory in 1816. *See infra* notes 263-67.

248 *Gonzales*, 4 Mart. (n.s.) at 659-60.

249 2 WHITE, *supra* note 58, at 462-63 (Report of the Council of the Indies) (English translation); *see infra* Part VI.C. New Orleans traded with Havana so the *alcabala* related to the tax back and forth with Havana, as well as the *almojorifazgo*, a tax on exports.

250 *Winter*, 30 Fed. Cas. at 350.

251 2 Stat. 331, ch. 31 (1805); 2 Stat. 283, ch. 38 (1804).

252 2 Stat. 283, 286, 289, ch. 38 (1804).

chattel mortgages on slaves. But both later passed statutes altering that law, affecting chattel mortgages in their territories.

1. State of Louisiana

The Territory of Orleans never adopted English common law, other than for crimes in 1805.[253] However, it passed a slave code in 1806.[254] That code made it clear that debtors could grant chattel mortgages on slaves as part of the real estate with a recording, a modified continuation of the Spanish law for chattel mortgages on slaves.[255] Then in 1808, the Territory of Orleans adopted a civil code modeled after the *Code Napoléon*.[256] Nevertheless, the Louisiana Code made two significant changes to the *Code Napoléon*. Rather than ban all chattel mortgages, as did the *Code Napoléon*, the corresponding provision allowed mortgages on slaves, land, and ships with the required filing for validity against third parties:

> The only property capable of being mortgaged are:
>
> 1st, the immoveables which are in commerce and their accessories which are deemed immoveable;
>
> 2nd, slaves in general;
>
> 3rd, the usufruct of the said property and its accessories for the time it lasts . . . .
>
> The present disposition no way alters or affects the dispositions of the maritime or trade laws, respecting ships and sea vessels . . . .
>
> Though it is a rule that the conventional mortgage is acquired by the sole consent of the parties . . . never-the-less, in order to protect the good faith of third persons

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253 Xiques v. Bujac, 7 La. Ann. 498 (1852) (holding that English feudal land title law never had a place in Louisiana); Abat v. Whitman, 7 Mart. (n.s.) 162 (La. 1828) (reasoning that use of English words of procedure in a statute does not mean the adoption of English common law); Agnes v. Judice, 3 Mart. (o.s.) 182 (La. 1813) (same); *see also* 1805 Orleans Terr. 36, 37, ch. 4, sec. 3 (common law crimes).

254 1806 Orleans Terr. 150.

255 *Id.* at 154, ch. 33, sec. 10 ("And be it further enacted, That slaves shall always be reputed and considered real estates, shall be, as such, subject to be mortgaged, according to the rules prescribed by law, and they shall be seized and sold as real estate.").

256 1808 Orleans Terr. Code.

> who may be ignorant of such covenants and to prevent fraud, law directs that the conventional and judicial mortgages, shall be recorded or entered in a public folio book kept for that purpose in the City of New Orleans as is hereafter directed . . . .
>
> The recording of the mortgages which are by law subject to that formality, shall be made in an office kept for that purpose in the City of New Orleans for the whole territory, by a public officer whose title shall be the register of mortgages of the Territory of Orleans.[257]

Rather than merely permit filing, the Louisiana Code voided unfiled chattel mortgages with respect to third parties. "Conventional or judicial mortgages can not operate against third persons except from the day of their being entered in the office of the register of mortgages in the manner and form hereafter directed."[258] The Territory of Orleans became the State of Louisiana on April 8, 1812.[259] Consequently, Louisiana recognized mortgages on at least two valuable chattels during the nineteenth century[260] and possessed a chattel mortgage act for slaves, until abolished by the Civil War,[261] and for ships. But Louisiana had no pre-chattel mortgage act opinions since its reported appellate opinions began in 1809.[262]

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257 *Id.* arts. 36, 38, 52, 55.

258 *Id.* art. 14.

259 2 Stat. 701, ch. 50 (1812).

260 Malcolm & Wood v. Schooner Henrietta, 7 La. 488 (1835) (holding that ship exception allows only mortgages under maritime law); Loze v. Dimitry, 7 La. 485 (1835) (holding that one cannot mortgage a schooner except by commercial custom); Verdier v. Leprete, 4 La. 41 (1831) (holding a Florida chattel mortgage on slaves brought into Louisiana invalid unless recorded again in Louisiana); Miles v. Oden, 8 Mart. (n.s.) 214 (La. 1821) (holding a Kentucky chattel mortgage on slaves brought into Louisiana invalid unless recorded again in Louisiana); Roussel v. Dukelus, 4 Mart. (n.s.) (La. 1816) (holding chattel mortgage on slaves invalid as within fraudulent conveyance period under insolvency law).

261 *See* LA. REV. CIV. CODE art. 3289 (1870). The Secretary of State of Louisiana published the Revised Civil Code of 1870, essentially the same as the Civil Code of 1825, but with the elimination of the articles pertaining to slavery and including amendments since 1825. WIN-SHIN S. CHIANG, LOUISIANA LEGAL RESEARCH 35 (1990).

262 Appellate opinions for Louisiana began in 1809 and became available in 1811. 1 FRANCOIS XAVIER MARTIN, ORLEANS TERM REPORTS OR CASES ARGUED AND DETERMINED IN THE SUPERIOR COURT OF THE TERRITORY OF ORLEANS (1811).

2. States of Missouri and Arkansas

The Territory of Louisiana early recognized chattel mortgages as legitimate in the fashion of Spanish law. An act of October 1, 1804, referred to recorded mortgages on chattels that needed marginal notation in the records when satisfied.[263] After its name change to the Territory of Missouri, when Louisiana became a state with its laws to continue in force,[264] the Territory on January 19, 1816, adopted the English common law as of 1606.[265] That English law, as understood by the courts of the States of Missouri and Arkansas, enforced chattel mortgages before the passage of the respective states' chattel mortgage acts, but did not require any filing.[266] The Territory of Missouri then, on

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263 1804 La. Acts. 102-03.

264 2 Stat. 743, 747, ch. 95, sec. 16 (1812).

265 1816 Mo. Laws 436, ch. 154; Grande v. Fay, 10 Fed. Cas. 954 (Sup. Ct. Terr. Ark. 1831) (holding that the 1816 statute abrogated Spanish law); Reaume v. Chambers, 22 Mo. 36 (1855) (same).

266 *E.g.*, Porter v. Clements, 3 Ark. 364 (1841) (declaring secured party under conditional sales contract for slave must sue third party at law, not in equity); Dean v. Davis, 12 Mo. 112 (1848) (allowing creditor recovery of a slave under an unrecorded chattel mortgage from a good faith purchaser); Glasgow v. Ridgeley, 11 Mo. 34 (1847) (allowing a senior mortgage on foreclosure of unrecorded chattel mortgage on furniture only); King v. Bailey, 8 Mo. 332 (1843) (allowing creditor recovery of a slave under an unrecorded chattel mortgage from a good faith purchaser and holding that the 1835 act permitting recording of chattel mortgages is not mandatory); Shepherd v. Trigg, 7 Mo. 151 (1841) (allowing creditor to prove good faith under rebuttable rule of English common law under chattel mortgage on articles of personalty); Sibly v. Hood, 2 Mo. 290 (1834) (adopting absolute-conditional rule of English common law for chattel mortgage on slaves with debtor possession and finding it fraudulent as unrecorded and secret); Foster v. Wallace, 2 Mo. 231 (1830) (adopting absolute-conditional rule of English common law for chattel mortgage on slaves with debtor possession); Berry v. Burkhartt, 1 Mo. 418 (1824) (declaring a court authorized to issue writ to prevent debtor from absconding with mortgaged slaves in debtor's possession). The rebuttable rule and the absolute-conditional rule were Anglo-American common law, pre-chattel mortgage act rules for determining the validity of a chattel mortgage against a third party. *See* Flint, *Myth*, *supra* note 182, at 381-87.

For unrecorded chattel mortgages between the parties under English common law, otherwise invalid under Spanish Louisiana law, see *Johnson v. Clark*, 5 Ark. 321 (1844) (declaring that a debtor cannot redeem under a conditional sale on slaves); *Montany v. Rock*, 10 Mo. 506 (1847) (holding that under parol evidence rule, debtor cannot contradict absolute bill of sale on slave); *Robinson v. Campbell*, 8 Mo. 615 (1844) (denying debtor redemption for slave under unrecorded chattel mortgage due to lapse of time); *William v. Rorer*, 7 Mo. 556 (1842) (denying debtor redemption for horse under unrecorded chattel mortgage due to lapse of time); *Desloge v. Ranger*, 7 Mo. 327 (1842) (allowing debtor to redeem slave under unrecorded chattel mortgage); *Perry v. Craig*, 3 Mo. 516 (1834) (denying debtor redemption for slaves under unrecorded chattel mortgage due to lapse of twenty years); *O'Fallon v. Elliott*, 1 Mo. 364 (1823) (recognizing the recording feature of the 1804 act

January 20, 1816, required recordings of some chattel mortgages, as it did previously under Spanish law for all chattel mortgages on slaves and ships, by requiring creditors to file on those without adequate consideration.[267]

After the recognition of English common law as the law of the territory, Congress split the territory into two. On March 2, 1819, Congress created the Territory of Arkansas from the southern portion of the territory with the laws to continue.[268] The Territory of Arkansas specifically named these laws as the laws of the Territory of Missouri.[269] On March 6, 1820, Missouri became a state.[270] This left the remainder of the old Missouri Territory, the unsettled parts that became much later the states of Minnesota, Iowa, Kansas, Nebraska, North Dakota, South Dakota, Colorado, Wyoming, and Montana, unorganized.[271] On May 26,

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for a chattel mortgage on slaves, but denying its foreclosure since no statute provides such a procedure).

Appellate opinions for Missouri began in 1821 and became available in 1828. 1 LOUIS HOUCH, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF MISSOURI (St. Louis, Gilbert Book Co. 1890) (1828).

Appellate opinions for Arkansas began in 1837 and came available in 1840. 1 ALBERT PIKE, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF ARKANSAS (1840).

267 1816 Mo. Laws 439, ch. 157 (Fraudulent Conveyance Statute).

268 3 Stat. 493, 495, ch. 49 (1819).

269 1820 Ark. Acts 70.

270 3 Stat. 545, ch. 22 (1820).

271 What became Iowa and Minnesota, Congress added to Michigan Territory in 1834. 4 Stat. 701, ch. 98 (1834). In 1838, Congress created the Iowa Territory from this region, continuing the laws of Wisconsin Territory. 5 Stat. 235, 239, ch. 96 (1838). Congress had earlier created Wisconsin Territory, continuing the laws of Michigan Territory. 5 U.S. Stat. 10, 15, ch. 54 (1834). Michigan had no chattel mortgage act until 1846. Flint, *Myth, supra* note 182, at 363 n.6. Iowa Territory adopted a chattel mortgage act in 1840. 1840 Iowa Acts 75-77, ch. 54. Congress created Minnesota Territory from Wisconsin Territory in 1849, continuing the laws of Wisconsin Territory. 9 Stat. 403-04, 407, ch. 121 (1849). Wisconsin Territory had earlier adopted a chattel mortgage act. 1838 Wis. Laws p. 163-64.

Congress split the remainder of the unorganized territory into the Territories of Kansas and Nebraska in 1854, 10 Stat. 277, ch. 59 (1854), with both territories adopting a chattel mortgage act shortly thereafter. 1860 Kan. Sess. Laws 89, ch. 25; 1855 Neb. Laws 62, sec. 32. Kansas Territory had one pre-chattel mortgage act opinion. *See* Golden v. Cockril, 1 Kan. 247 (1862) (using per se fraud rule for unrecorded 1859 chattel mortgage). The per se fraud rule was one of the Anglo-American common law, pre-chattel mortgage act rules for determining the validity of a chattel mortgage against a third party. *See* Flint, *Myth, supra* note 182, at 389-92. Congress created Dakota Territory from Nebraska Territory in 1861, 12 Stat. 239, ch. 86 (1861); Montana from Dakota Territory in 1864, 13 Stat. 85, ch. 95 (1864); and Wyoming Territory from Dakota Territory in 1868 continuing the laws of Dakota Territory, 15 Stat. 178, 183, ch. 235 (1868). These latter three territories confirmed

1824, Congress set apart the unsettled western half of Arkansas Territory, which much later became the State of Oklahoma.[272] Since these unsettled portions never used Spanish or French law, this Article will not follow their legal development further, except that portion added to the Mexican Cession. On June 15, 1836, Arkansas became a state.[273] Both the States of Missouri and Arkansas finally adopted chattel mortgage acts. Arkansas, on February 20, 1838, voided all unrecorded chattel mortgages against third parties:

> Sec. 1. All mortgages, whether for real or personal estate, shall be acknowledged before some person authorized by law to take the acknowledgment of deeds, and shall be recorded, if for lands, in the county or counties in which the lands lie; and if for personal property, in the county in which the mortgagor resides.
>
> Sec. 2. Every mortgage, whether for real or personal property, shall be a lien on the mortgaged property from the time the same is filed in the recorder's office for record, and not before; which filing shall be notice to all persons of the existence of such mortgage.[274]

Missouri, on March 4, 1845, voided unrecorded chattel mortgages with respect to third parties:

> Sec. 8. No mortgage or deed of trust of personal property hereafter made, shall be valid against any other

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their chattel mortgage acts through their first legislatures. 1862 Dak. Law 399, ch. 61; 1864 Mont. Laws 339; 1869 Wyo. Sess. Laws 434, ch. 66.

Spain, prior to its surrender under the Nootka Sound Convention in 1790, also claimed the Oregon Country, which became the Territories of Oregon, Washington, and Idaho, formed in 1848. 12 Stat. 808, ch. 117 (1863); 10 Stat. 172, ch. 90 (1853); 9 Stat. 323, ch. 177 (1848). Of these territories, only Oregon adopted an early chattel mortgage statute. *See* 1853 Or. Laws 18, 481, 484; 1875 Idaho Sess. Laws 661; 1875 Wash. Laws 43.

272 4 Stat. 40, ch. 155 (1824). Congress created Oklahoma Territory from Indian Territory in 1890, continuing the laws of Nebraska Territory. 26 Stat. 81, 87, ch. 182 (1890). Oklahoma Territory adopted a chattel mortgage act in 1890. 1890 Okla. Sess. Laws 697, ch. 54. Oklahoma Territory had one pre-chattel mortgage act opinion. *See* Pyeatt v. Powell, 51 Fed. 551 (8th Cir. 1892) (declaring Oklahoma laws had a rebuttable rule for unrecorded 1889 chattel mortgages). The rebuttable rule was one of the Anglo-American common law, pre-chattel mortgage act rules for determining the validity of a chattel mortgage against a third party. *See* Flint, *Myth*, *supra* note 182, at 384-87.

273 5 Stat. 50, ch. 100 (1836).

274 1838 Ark. Rev. Stat. 578, ch. 101.

> person than the parties thereto, unless possession of the mortgaged or trust property be delivered to, and retained by, the mortgagee or trustee, or cestui que trust, or unless the mortgage, or deed of trust be acknowledged or proved, and recorded in the county in which the mortgagor or grantor resides, in such manner as conveyances of lands are by law directed to be acknowledged, or proved and recorded.[275]

So Louisiana continued its Spanish chattel mortgage act, easing up on recording only with respect to validity between the parties in 1808. Arkansas and Missouri expanded the chattel mortgage act to include all personalty in 1816 and authorized a permissive filing, rather than the mandatory filing requirement of Spanish law, from 1816 to 1838 and 1845 respectively, with Arkansas and Missouri then voiding unrecorded chattel mortgages only with respect to third parties.[276]

B. Florida

The United States acquired the Floridas between 1795 and 1821 through two treaties and conquest. The United States acquired the northern portion of former British West Florida, the Natchez Trace, through Pinckney's Treaty on October 27, 1795, which contained no provision for continuing laws.[277] Although the treaty did not specify any law, this did not mean that the laws of Spain continued in the territory. The United States did not view this acquisition as one of cession, but as recovering land conquered during, and wrongfully occupied by Spain following, the American Revolution. Under the Treaty of Paris of 1783, Britain awarded this land to the new United States.[278] Unfortunately, Britain did not control this region at the time. This region was controlled by Spain. So from the American view, the applicable law of this area remained English as in any other former British colony that became a part of the United States. Proponents of extending English common law

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275 1845 Mo. Laws 525, 527-28, ch. 67.

276 *See supra* notes 274-75.

277 53 Parry, *supra* note 147, at 11.

278 48 *id.* at 487, 491-92.

to the Mississippi Territory, the ceded region, argued that it came from Georgia, which did not relinquish its claim to the region until 1802.[279]

1. States of Mississippi and Alabama

The Treaty of Paris of 1783 created a problem by not defining the border but merely ceding the Floridas to Spain. Britain enlarged British West Florida with the Natchez Trace subsequent to the Proclamation of 1763 on May 9, 1764, contingent upon extinguishing Indian titles.[280] However, Britain never bothered to alter the territorial instructions to the royal governor of Georgia, James Wright, dated January 20, 1764, nor began to extinguish Indian titles until 1777, after the American Declaration of Independence.[281] Thus, Georgia's claim to the territory became superior as the valid claim upon July 4, 1776, effectively recognized in the Treaty of Paris of 1783 and later specifically confirmed in the Pinckney's Treaty. The United States Supreme Court followed this conclusion.[282] Georgia extended her law to the Natchez Trace on February 17, 1783, which law included a permissive chattel mortgage statute,[283] organized the area as the County of Bourbon on February 7, 1785,[284] and ceded the county to the United States on April 24, 1802, effective as of October 27, 1795, contingent upon recognition of all British West Floridian and Spanish grants actually occupied before October 27, 1795.[285] So Georgian law officially governed the Natchez Trace after 1783, with British and Spanish grants after that date recognized only by Georgian law pursuant to the congressional act of March 3, 1803.[286] The courts in the state formed from this region and settled during the

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279 1 REPORTS OF THE SUPREME COURT OF MISSISSIPPI 52-54 (R. J. Walker ed., 1834) [hereinafter Walker]; ELIZABETH GASPAR BROWN, BRITISH STATUTES IN AMERICAN LAW 1776-1836 (1964). This theory denied a post-1783 Spanish claim.

280 HAMILTON, *supra* note 49, at 134 n.68.

281 *Id.*

282 *See* Hickie v. Starke, 26 U.S. (1 Pet.) 94 (1828) (declaring a 1791 Spanish grant invalid and 1794 Spanish grant valid under Spanish law and 1803 act), *overruling* Stark v. Mather, 1 Miss. 181 (1824); Henderson v. Poindexter, 25 U.S. (12 Wheat.) 530 (1827) (declaring 1795 Spanish grant in Natchez Trace invalid under Treaty of Paris of 1783 and Pinckney's Treaty); Harcourt v. Gaillard, 25 U.S. (12 Wheat.) 523 (1827) (declaring 1777 British West Florida grant in Natchez Trace invalid as after date of independence); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (upholding a Georgia grant in Natchez Trace).

283 *See infra* note 291.

284 1785 Ga. Laws, No. 273, § 13, *reprinted in* THE FIRST LAWS OF THE STATE OF GEORGIA 258, 264 (Cushing, 1891) [hereinafter Cushing]; 1783 Ga. Laws, No. 296, *reprinted in* Cushing, *supra*, at 304.

285 1802 Ga. Laws 3.

286 2 Stat. 229, ch. 27 (1803).

Spanish dominion, Mississippi, followed this result, recognizing British law and Spanish law for title under the 1803 federal act.[287] But these same state courts recognized Spanish law during the period 1779 to 1798 when the Spanish soldiers left.[288]

On April 7, 1798, Congress created the Territory of Mississippi from this area, specifying that the citizens had the same rights as those in the Northwest Territory.[289] Before the legislature met, the governor, Winthrop Sargent of Massachusetts, and his two judges, Daniel Tilton of New Hampshire and Peter Bryan Bruin of Mississippi, passed a recording statute, which was mandatory for realty mortgages but permissive for chattel mortgages.[290] This followed the tradition of Greater Carolina. The Provinces of South Carolina, North Carolina,

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[287] *See, e.g.*, Montgomery v. Doe on the demise of Ives, 21 Miss. (13 S. & M.) 161 (1849) (declaring a 1772 British West Florida grant near Natchez invalid as Indian title not extinguished); Nevitt v Beaumont, 7 Miss. (6 Howard) 237 (1841) (upholding 1783 Spanish grant in Natchez under 1803 act); Doe ex dem. Martin v. King's Heirs, 4 Miss. (3 Howard) 125 (1839) (upholding 1794 Spanish grant in Natchez under 1803 act).

[288] Stark v. Mather, 1 Miss. (1 Walker) 181 (1824) (finding a 1791 Spanish grant in Natchez upheld over 1794 Spanish grant obtained by collusion despite noncompliance with 1803 act); Winn v. Cole, 1 Miss. (1 Walker) 119 (1824) (upholding a 1795 Spanish grant in Natchez over 1796 Spanish grant); Chew v. Calvert, 1 Miss. (1 Walker) 54 (1818) (using Spanish descendent administration law for 1790 will and holding Spanish law governs Natchez to 1799); Griffing v. Hopkins & Elliott, 1 Miss. (1 Walker) 49 (1818) (upholding Spanish guardianship law in Natchez Trace); Davis v. Foley, 1 Miss. 43 (1818) (upholding Spanish community property laws under 1794 Spanish decree in Natchez); HAMILTON, *supra* note 49, at 134-35 (discussing decisions of Thomas Rodney in 1804 and 1809).

[289] 1 Stat. 549, 550, ch. 28 (1798); *see also* Michael Hoffheimer, *Mississippi Courts: 1790-1868*, 65 MISS. L.J. 99 (1995).

[290] 1799 Miss. Laws 64, 70-71, 73-74 (requiring recorder to file mortgage of personal estate when presented and requiring filing for land conveyances, respectively); *see* 1 MCLEMORE, *supra* note 197, at 178, 181. The Mississippi Territory statute set up, among others, the office of recorder for which it quoted almost verbatim all ten sections of the act of the Northwest Territory setting up the recorder's office. *Compare* 1795 N.W. Terr. Laws 102-06 (Maxwell's Code), *with* 1799 Miss. Laws 64, 73-77. This statute came directly from colonial Pennsylvania. *Compare* 1795 N.W. Terr. Laws 102-06, *with* 1715 Pa. Laws 51-57, ch. 203, *and* 1775 Pa. Laws, 412-415, ch. 706. Many of the provisions of the 1715 act were transferred to the 1775 act: section 1 is still section 1; section V became section 2; section VI became section 3; section VIII became sections 4 & 5; section IX became sections 6 & 7; section 1 was also incorporated into section 8; section IV became section 9; and section VI became section 10. The term "personal estate" in the Pennsylvania statute of 1715 meant only realty leaseholds since the earlier sections only named "lands, tenements, herediments" and "estate for life or years." *See* Bismark Bldg. & Loan Ass'n v. Bolster, 92 Pa. 123 (1879). It is doubtful that the Northwest Territorial and Mississippi Territorial acts were similarly limited. They deleted each of the offending sections.

Georgia, and British West Florida all initially passed permissive chattel mortgage acts, providing only for priority by time of filing.[291]

Under this statute, Alabama courts recognized that there was no filing requirement for the validity of a pre-chattel mortgage act chattel mortgage against third parties.[292] But Alabama courts also enforced those chattel mortgages that were voluntarily filed.[293] Mississippi courts, however, provided no similar opinions.[294] The territorial legislature passed a statute requiring the recording of those chattel mortgages without adequate consideration in 1803.[295] In 1804, Congress added to Mississippi Territory the portion of the Territory South of the River Ohio remaining in 1796 when Tennessee became a state, again with citizens possessing the same rights as those in the Northwest Territory.[296] The joining statute did not provide for any law.

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[291] *See* Cushing, *supra* note 284, at 25, 44-45. For British West Florida, see *supra* note 184 and accompanying text.

[292] *See* Standefer v. Chisholm, 1 Stew. & P. 449 (Ala. 1832) (holding that a secured party's unrecorded deed of trust on slaves to secure liabilities as a surety not invalid against judgment lien on ground not filed); Killough v. Steele, 1 Stew. & P. 262 (Ala. 1832) (reversing judgment for judgment lien over secured party's 1827 unrecorded conditional bill of sale taken for valuable consideration on a Negro for judge's failure to use the rebuttable rule); *see also* Bates v. Murphy, 2 Stew. & P. 165 (Ala. 1832) (no reference to filing for holding 1823 second mortgage on slaves to secure $4,000 loan has priority over judgment lein, but must surrender excess on foreclosure). The rebuttable rule was one of the Anglo-American common law, pre-chattel mortgage act rules for determining the validity of a chattel mortgage against a third party. *See* Flint, *Myth*, *supra* note 182, at 384-87. Appellate opinions for Alabama began in 1820 and became available in 1829. 1 HENRY MINOR, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF ALABAMA FROM MAY 1820 TO JULY 1826 (1829).

[293] *See* Dewoody v. Hubbard, 1 Stew. & P. 9 (Ala. 1831) (upholding secured party's unsigned, but recorded 1827 deed of trust on a slave securing a $1,000 debt against a judgment lien).

[294] Appellate opinions for Mississippi began in 1818 and became available in 1834. 1 Walker, *supra* note 279. The judicial notes of a territorial judge, Thomas Rodney of Delaware, for cases from 1804 to 1809, were published in 1953. HAMILTON, *supra* note 49, at 136.

[295] 1803 Miss. Laws 9-10 (Fraudulent Conveyance Statute). *See* Baker v. Washington, 5 Stew. & P. 142 (Ala. 1833) (refusing to invalidate secured party's recorded 1826 deed of trust taken for valuable consideration on a Negro held by a third party because it lacked the official seal required for deeds of trust without valuable consideration under the 1803 fraudulent conveyance statute).

[296] 2 Stat. 303, ch. 61 (1804); *see* 1 Stat. 123, ch. 14 (1790). Congress created the Territory south of the River Ohio on May 23, 1790, with citizens having the same rights as those in the Northwest Territory subject to the North Carolina Cession Act of April 2, 1790, which provided for the law of North Carolina until repealed. *See* 1 Stat. 106, 108, ch. 6 (1790).

Harry Toulmin of Kentucky, born in England and a judge in the eastern portion of the Territory, believed English common law extended to the region. So when the General Assembly commissioned him to prepare a digest of the territorial law, he wrote in a number of English rules he considered useful to have in effect in the Territory.[297] The legislature adopted this code as the law of the Territory, replacing Spanish law, and specifically repealing all prior satutes of England and Mississippi Territory not contained therein on February 10, 1807.[298] Both the 1799 and 1803 acts were included in the Toulmin digest.[299]

After the American rebellion in western Spanish Occidente Florida in 1810, from Baton Rouge to Mobile, Congress added a portion of Spanish Occidente Florida to Louisiana on April 14, 1812, and the remainder to the Territory of Misssissippi, providing it with access to the sea, on May 14, 1812.[300] The United States recognized Spanish law as effective in this coastal region before its annexation and addition to Louisiana and Mississippi Territory.[301] That Spanish law included a chattel mortgage act for slaves and ships.[302] On March 1, 1817, Congress divided the Territory of Mississippi, with the western part becoming the State of Mississippi[303] and the eastern part becoming the Territory of Alabama on March 3, 1817, and with the laws of the Territory of

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297 BROWN, *supra* note 279, at 183; HAMILTON, *supra* note 49, at 127.

298 *See* STATUTES OF THE MISSISSIPPI TERRITORY, REVISED AND DIGESTED BY THE AUTHORITY OF THE GENERAL ASSEMBLY 19 (Harry Toulmin ed., 1807) (Act of February 10, 1807).

299 *Id.* at 250, 260 (ch. 28, restating the 1799 recording statute and ch. 31, restating the 1803 fraudulent conveyance statute, respectively).

300 2 Stat. 734, ch. 84 (1812); 2 Stat. 708, ch. 47 (1812); *see also* FREDERICK E. HOSEN, UNFOLDING WESTWARD IN TREATY AND LAW: LAND DOCUMENTS IN UNITED STATES HISTORY FROM THE APPALACHIANS TO THE PACIFIC, 1783-1934, at 79-111 (1988) (October 27, 1810, proclamation of President Madison).

301 *See* United States v. Powers, 52 U.S. (11 How.) 570 (1850) (invalidating 1781 Galvez grant in Biloxi since he lacked authority from Spanish king in the conquered territory); Keene v. McDonough, 33 U.S. (8 Pet.) 308 (1834) (holding 1804 Spanish execution sale in Baton Rouge valid since Spain controlled region); Hall v. Doe ex dem. Root, 19 Ala. 378 (1851) (holding that title from Spain for land in Baldwin County would defeat United States title); Pollard v. Greit, 8 Ala. 930 (1846) (holding 1809 Spanish grant in Mobile invalid for failure to comply with Spanish law); Hallett v. Doe ex dem. Hunt, 7 Ala. 882 (1845), *appeal dismissed*, 48 U.S. (7 How.) 586 (1849) (holding 1807 Spanish grant in Mobile valid); Hagan v. Campbell, 8 Port. 9 (Ala. 1838) (holding 1767 British grant in Mobile valid); Lewis v. Goquette, 3 Stew. & P. 184 (Ala. 1833) (holding 1800 Spanish grant in Mobile valid); Richardson v. Hobart, 1 Stew. 500 (Ala. 1828) (1800 Spanish grant in Mobile valid); Nixon's Heirs v. Carco's Heirs, 28 Miss. 414 (1854) (validating Spanish land grant in Biloxi).

302 *See supra* notes 150-75 and accompanying text.

303 3 Stat. 348, ch. 23 (1817).

Mississippi continuing.[304] On March 2, 1819, Alabama become a state.[305] In 1822, Alabama passed a statute requiring refiling of chattel mortgages when moving from county to county.[306] Both Mississippi and Alabama passed a mandatory chattel mortgage statute in the 1820s, voiding chattel mortgages with respect to third parties. Mississippi passed its mandatory chattel mortgage act on June 13, 1822:

> Sec. 3. All bargains, sales, and other conveyances whatsoever, of any lands, tenements or hereditaments whether they be made for passing any estate of freehold or inheritance, or for a term of years, and all deeds of settlement upon marriage, wherein either lands, slaves, money, or other personal things shall be settled or covenanted to be left or paid at the death of the party or otherwise; and all deeds of trust and mortgages whatsoever, which shall hereafter be made and executed shall be void as to all creditors and subsequent purchasers, for valuable consideration without notice, unless they shall be acknowledged or proved, and lodged with the clerk of the County Court of the proper county, to be recorded according to the directions of this act; but the same as between the parties and their heirs, and as to all subsequent purchasers with notice thereof, or without valuable consideration, shall nevertheless be valid and binding.
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> Sec. 4. Every deed respecting title of personal property hereafter executed, which by law ought to be recorded, shall be recorded in the court of that county in which such property shall remain: and if afterwards, the person claiming title under such deed, shall permit any other person in whose possession such property may be, to remove with the same or any part thereof out of the county in which such deed shall be recorded, and shall not within twelve months after such removal, cause the deed aforesaid to be certified to the County Court of that county, into which such other person shall have so removed, and to be delivered to the clerk of such County

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304 3 Stat. 371, 372, ch. 59 (1817).

305 3 Stat. 489, ch. 47 (1819).

306 1823 Ala. Acts 21, sec. 1.

> Court to be there recorded, such deed, for so long as it shall not be recorded in such last mentioned county, and for so much of the property aforesaid as shall have been so removed, shall be void in law as to all purchasers thereof for valuable consideration, without notice, and as to all creditors.[307]

Alabama passed its act on January 11, 1828:

> Sec. 1. Be it enacted by the Senate and House of Representatives of the State of Alabama in General Assembly convened. That hereafter all deeds and conveyances of personal property in trust to secure any debt or debts shall be recorded by the office of the clerk of the county court of the county wherein the person making such deed or conveyance shall reside within thirty days or else the same shall be void against creditors and subsequent purchasers without notice . . . .[308]

2. State of Florida

After Jackson's invasions of Spanish Occidente Florida in 1814 and 1818, the United States acquired the remainder of the Floridas under the Adams-Onis Treaty, ratified on February 22, 1821.[309] The treaty allowed only for the continuation of religious practices.[310] As a result, the Spanish laws continued.

The courts in the Territory of Florida followed this principle. They recognized the law of Spain at the time of the Adams-Onis Treaty, not modified by subsequent statute, as the law of the Territory of Florida.[311]

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307 1822 Miss. Laws 299, 300, secs. 3, 4 (An Act concerning Conveyances).

308 1828 Ala. Acts 40, sec. 1 (An Act, more effectually to prevent frauds and fraudulent conveyances and for other purposes).

309 70 Parry, *supra* note 147, at 2.

310 70 *id.* at 7.

311 *See* United States v. Wiggins, 39 U.S. (14 Pet.) 334 (1840) (voiding 1815 Spanish grant on St. George pond under Spanish law); United States v. Arredondo's Heirs, 38 U.S. (13 Pet.) 88 (1839) (holding 1817 Spanish grant on Suwanee River valid under Spanish law); United States v. Clarke, 33 U.S. (8 Pet.) 436 (1834) (holding 1816 Spanish grant on St. John's River valid under Spanish law); Am. Ins. Co. v. Canter, 26 U.S. (1 Pet.) 511 (1828) (holding Spanish salvage law valid); Doe on demise of Commyns v. Latimer, 2 Fla. 71 (1848) (holding 1817 Spanish grant at Pensacola void under Spanish law).

Both the Spanish Province of Occidente Florida and the Spanish Province of Oriente Florida had established an office of *hipotecas*, so the Spanish colonial mortgage filing requirement was the law of the territory.[312]

Congress created the Territory of Florida from this area in 1822, providing for the continuation of the laws.[313] The first territorial legislature passed a law adopting the English common law as of 1606 as the law of the Territory of Florida, a statute allowing the recording of those chattel mortgages without adequate consideration, and an act referring to Spanish filings of mortgages and bills of sale.[314] Similar to Mississippi and Alabama, Florida passed another chattel mortgage statute on November 5, 1828.[315] But as did the Spanish chattel mortgage act, Florida's act voided all unrecorded chattel mortgages:

> Sec. 5. Be it further enacted that no mortgage of personal property shall be effectual or valid for any purposes whatever unless such mortgage shall be recorded in the office of records for the county in which the mortgaged property shall be, at the time of execution of the mortgage, unless the mortgaged property be delivered at the time of execution of the mortgage, or, within twenty days thereafter to the mortgagee and shall continue to remain truly and bona fide in his possession; and mortgages of personal property shall be admitted to record, upon proof of the execution thereof being made and exhibited to the recording officer, in any of the ways herein before prescribed for proving the execution of conveyances, transfers and mortgages of real property, or by proof being made upon oath by a least one credible person, before the recording officer, of the hand writing of the mortgagor or mortgagors, in cases in which there shall be no attesting witnesses to the mortgage.[316]

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312 Sullivan v. Richardson, 14 So. 692, 703-04 (Fla. 1894); *see also supra* notes 198-206, 212 and accompanying text.

313 3 Stat. 654, 659, ch. 13 (1822).

314 1822 Fla. Laws 58, 65, secs. 2, 85.

315 1828 Fla. Laws 150.

316 *Id.*

Florida had no pre-chattel mortgage act opinions since its reported appellate opinions began in 1846.[317]

So Mississippi and Alabama expanded the chattel mortgage act to include all personalty, made filing permissive from 1799 to 1822 and 1828, respectively, and then only voided unrecorded chattel mortgages with respect to third parties. Florida eliminated the filing requirement between 1822 and 1828, when it reimposed and expanded the chattel mortgage act to include all personalty, voiding all unrecorded chattel mortgages.

C. *Texas*

Texas and the Mexican Cession remained a part of New Spain when the Hidalgo Revolution forged the Mexican nation in 1821.[318] Mexico passed legislation bearing on a valuable personalty, the object of many early southern chattel mortgages. The Mexican Empire decreed, on January 4, 1823, in its colonization law, that no sales or purchases of slaves could occur and children of slaves born in the empire became free at age fourteen.[319] The State of Coahuila y Tejas, on March 24, 1825, decreed in its colonization act that the settlers were subject to existing and subsequent laws on the introduction of slaves.[320] On March 11, 1827, the Mexican State of Coahuila y Tejas, through its state constitution, provided for the eventual abolition of slavery.[321] That constitution provided that those born of slave parents in the future would not become slaves and prohibited the importation of slaves six months after the adoption of the constitution.[322] Then, for all of Mexico, a Presidential Decree of Vicente Guerrero on July 29, 1829, supported by an act of

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317 Appellate opinons for Florida began in 1846 and became available in 1847. 1 JOSEPH BRANCH, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF FLORIDA (1847).

318 MEYER ET AL., *supra* note 222, at 303 (map of Mexico in 1824 includes upper California, New Mexicao, and Texas).

319 1 JOHN & HENRY SAYLES, EARLY LAWS OF TEXAS 42, 46 (1888) (Imperial Decree No. 5 of the national junta of the Mexican Empire).

320 *Id.* at 64, 72 (Decree No. 16, colonization law).

321 1 H.P.N. GAMMEL, THE LAWS OF TEXAS 1822-1897, at 423, 425 (1898) (Coah. y Tej. Const., Preliminary Provisions, art. 13).

322 1 *id.*

September 15, 1829, abolished slavery.[323] If enforced, this emancipation proclamation would end chattel mortgages on slaves.

Texas courts before the Civil War contended that both the Coahuila y Tejas Act and abolition decree did not apply in Texas. The Texas Supreme Court claimed in 1847 that the Mexican authorities never published the 1827 act in the department of Texas.[324] The Texas Supreme Court also argued that Mexicans always questioned the constitutionality of the 1829 decree since Guerrero issued it under his extraordinary powers.[325] Moreover, the court decided that subsequent legislation abrogated it.[326] Based on a report of Lucas Alamand, Secretary of State of Mexico, detailing stiff resistance to the law in Texas such that enforcement could not succeed, the Congress of Mexico passed a law on April 6, 1830, providing:

> No variation shall be made in the colonies already established, nor in relation to the slaves which may be in them. But the General Government and the Special Government of each state shall, under strictest responsibility, require the fulfillment of the law of colonization, and that no slaves be thereafter introduced.[327]

The court held this Act made slaves of those introduced before 1830. Then, by the Act of February 15, 1831, the Congress of Mexico revoked the abolition decree,[328] only to pass another after Texas' independence in 1837.[329]

On March 2, 1836, Texas declared its independence from Mexico.[330] Quickly, the Republic of Texas reversed the abolition of slavery with its

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323 Gonzales, *Preface, supra* note 96, at 230 (Act of September 15, 1829); 2 JOHN CODMAN HURD, THE LAW OF FREEDOM AND BONDAGE IN THE UNITED STATES 195 (N.Y., Negro Universities Press 1968) (1863) (decree of July 29, 1829).

324 *See* Clapp v. Walters, 2 Tex. 130 (1847). *But see* Honey v. Clark, 37 Tex. 686 (1873) (1827 act freed a mulatto brought to Texas in 1828).

325 Guess v. Lubbock, 5 Tex. 535, 547 (1851).

326 *Id.*

327 *Id.*

328 *Id.*

329 Gonzalez, *Preface, supra* note 96, at 230.

330 1 GAMMEL, *supra* note 321, at 1063 (Declaration of Independence adopted by the Convention at Washington-on-the-Brazos March 2, 1836).

first constitution of March 17, 1836.[331] Since the Republic of Texas Constitution of 1836 only specified that the legislature should adopt English common law as soon as practicable,[332] the law of Mexico continued.

Courts in Texas followed the law of Mexico at the time of independence, not modified by subsequent statute, as the law in Texas. Courts in Texas routinely applied Mexican law in suits involving transactions arising before the time their legislature replaced Mexican law.[333] This law extended to the Spanish-American *pragmatica* of 1783. Without examining whether the Spanish province of Coahuila y Tejas had established an office of *hipotecas*, state courts claimed the Spanish, and later Mexican, mortgage filing requirement did not apply to the state.[334]

Then on January 20, 1840, the Republic of Texas legislature repealed Mexican law and imposed English common law of 1840.[335] Previously, on May 15, 1838, the Republic of Texas legislature had passed a chattel mortgage act, voiding chattel mortgages with respect to third parties:

> Sec. 3. And be it further enacted, that all mortgages upon real estate shall upon the usual proof be recorded

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331 1 *id.* at 1069, 1079 (Constitution of the Republic of Texas, General Provision, sec. 9).

332 1 *id.* at 1069, 1074 (Constitution of the Republic of Texas, art. IV, sec. 13).

333 *E.g.*, Sparks v. Spence, 40 Tex. 693 (1874) (1836 Mexican law of descent and distribution); Barrett v. Kelly, 31 Tex. 476 (1868) (1830 Mexican land title law in McLennan County); Burr v. Wilson, 18 Tex. 367 (1857) (Spanish emancipation law); Duncan v. Rawls, 16 Tex. 478 (1856) (Spanish [Mexican] prescription laws); Egery v. Power, 5 Tex. 501 (1851) (plea of reconvention); White v. Gay, 1 Tex. 384 (1846) (Spanish law for sale of litigious right); Holdeman v. Knight, Dallam 566 (1844) (Spanish [Mexican] partnership law); Scott v. Maynard, Dallam 548 (1843) (Spanish [Mexican] ganatial law).

A prominent issue, as in Louisiana, dealt with the supposed recognition of parol transfer of land under Mexican law. *E.g.*, Downs v. Porter, 54 Tex. 59 (1880) (1839 sale in Kaufman County under civil law); Sullivan v. Dimmit, 34 Tex. 114 (1871) (1834 sale in Karnes County under Mexican law); Monroe v. Searcy, 20 Tex. 348 (1857) (1834 sale in Lavaca County under Spanish [Mexican] law); Ferris v. Parker, 13 Tex. 385 (1855) (1838 sale in Walker County); Herndon v. Casiano, 7 Tex. 322 (1851) (1737 sale in San Antonio under Spanish law); Lynch v. Baxter, 4 Tex. 431 (1849) (1834 sale in Washington County under Mexican law); Briscoe v. Bronaugh, 1 Tex. 326 (1846) (1838 sale in Houston under Mexican law); Scott v. Maynard, Dallam 548 (1843) (1839 sale in Matagorda County under Spanish [Mexican] law).

334 *See Scott*, Dallam at 551 (citing Louisiana cases).

335 1840 Rep. Tex. Laws 3, secs. 1, 2; *see* 1836 Repub. Tex. Laws 148, 156-57 (English common law for juries and evidence); *see also* Joseph Webb McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEX. L. REV. 24 (1959).

> in the county where the land is situated, within ninety days from the passage of this act, or from the date of the execution of such mortgage, and upon personal property in the county where the mortgager lives. No mortgage shall take lien upon property mortgaged unless so recorded.[336]

Texas had no pre-chattel mortgage act opinions since its reported opinions began in 1840.[337]

The United States acquired Texas through annexation of the independent republic on December 29, 1845.[338] The Treaty of Guadalupe Hidalgo, on February 2, 1848, confirmed the Nueces Strip as a part of Texas.[339] On September 9, 1850, Congress added the western and northern portions of Texas to the Territory of New Mexico.[340] So Texas continued enforcing chattel mortgages under Mexican law and imposed a filing requirement in 1838, but only against third parties.

D. Mexican Cession

The United States acquired the Mexican Cession following the Mexican War through the Treaty of Guadalupe Hidalgo on February 2, 1848.[341] That treaty permitted the local citizens to remove or stay and become U.S. citizens, allowing election of their choice within one year.[342] The United States promised to respect their property and that those becoming U.S. citizens would also enjoy the rights of U.S. citizens with free exercise of religion.[343] Since the treaty did not specify any law, this meant that the laws of Mexico continued in the ceded territory. The Code of Stephen Kearney in New Mexico, issued upon his conquest in 1846, specified that the laws of Mexico were to continue.[344]

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336 1838 Repub. Tex. Laws 12, 13 (an act to provide for the foreclosing of mortgages on real and personal estates).

337 Appellate opinions for Texas began in 1840 and became available in 1845. JAMES WILMER DALLAM, OPINIONS OF THE SUPREME COURT OF TEXAS FROM 1840 TO 1844, INCLUSIVE (St. Paul, Gilbert Book Co. 1883) (1845).

338 9 Stat. 108 (1845) (joint resolution).

339 102 Parry, *supra* note 147, at 29.

340 9 Stat. 446, ch. 49 (1850).

341 102 Parry, *supra* note 147, at 29.

342 102 *id.* at 41 (art. VIII).

343 102 *id.* at 41-42 (art. VIII).

344 1846 N.M. Laws 82 (Kearney's Code).

The courts in the two states formed from the portions of the Mexican Cession settled during Mexican rule, California and New Mexico, followed the law of Mexico at the time of the Treaty of Guadalupe Hidalgo, not modified by subsequent statute, as the law of their state. Courts in California[345] and New Mexico[346] routinely applied Mexican law in suits involving transactions arising before the respective legislatures replaced Mexican law. This law extended to the Spanish-American *pragmatica* of 1783. But since the Mexican Territory of Alta California had not established an office of *hipotecas*, the state courts claimed the Mexican mortgage filing requirement did not apply to the state.[347] Without even examining whether the Mexican Territory of Santa Fe de Nueva Mexico had established an office of *hipotecas*, the Territorial Court

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345 *E.g.*, Merle v. Mathews, 26 Cal. 456 (1864) (Mexican deed law); Homes v. Castro, 5 Cal. 109 (1855) (community property laws of Mexico before 1850); Call v. Hastings, 3 Cal. 179 (1853) (mortgage law); Vanderslice v. Hanks, 3 Cal. 47 (1853) (title law before 1848); Leese v. Clarke, 3 Cal. 17 (1852) (title law); Fowler v. Smith, 2 Cal. 568 (1852) (Mexican contract law before 1850); Panaud v. Jones, 1 Cal. 488 (1851) (Mexican will law in 1846); Woodworth v. Guzman, 1 Cal. 203 (1850) (*pragmatica* of 1768). A major issue dealt with the nonrecognition of parol transfers of land. *E.g.*, Stafford v. Lick, 10 Cal. 12 (1858) (holding parol land contract invalid under Mexican law); Hayes v. Bona, 7 Cal. 153 (1857) (same); Tohler v. Folsom, 1 Cal. 207 (1850) (holding parol land contract valid under Mexican law); Hoen v. Simmons, 1 Cal. 119 (1850) (holding parol land contract invalid under Mexican law).

346 *E.g.*, Moore v. Davey, 1 N.M. 303 (1859) (*pragmatica* of 1768); Martinez v. Lucero, 1 N.M. 208 (1857) (Mexican divorce law); Chavez v. McKnight, 1 N.M. 147 (1857) (marital *hipotecacion* under Mexican statute); Pino v. Hatch, 1 N.M. 125 (1855) (Mexican land grant law). The most prominent issue, as in Louisiana, dealt with the supposed recognition of parol transfer of land under Mexican law. Maxwell Land Grant Co. v. Dawson, 34 P. 191 (N.M. 1893) (holding parol land contract valid under Mexican law), *rev'd on other grounds*, 151 U.S. 586 (1894) (expressing doubts that Mexican law allowed parol land contracts); Grant v. Jaramillo, 28 P. 508 (N.M. 1892) (invalidating parol land grant under Mexican law); Salazar v. Longwill, 25 P. 927 (N.M. 1891) (holding unrecorded deeds of 1807 and 1821 valid under Mexican law).

347 *See Call*, 3 Cal. at 181 (mortgage on land); *Woodworth*, 1 Cal. at 205 (mortgage on land); *see also Hayes*, 7 Cal. at 156 (no *escribanos* in Alta California). Californians concocted a legal theory that Mexican law did not apply in most of California for two reasons. First, California was so far from Mexico City that the locals used their own customs, sometimes at variance with civil law. *See* CALIFORNIA STATE JUDICIARY COMMITTEE, REPORT ON CIVIL AND COMMON LAW (Feb. 27, 1850), *reprinted in* 1 Cal. 588, 600. Second, the Americans captured northern California from the Indians, not Mexico, so Mexican law never applied there. So when Americans in northern California entered into business transactions, they used English common law, not Mexican civil law. THE ALCALDE SYSTEM OF CALIFORNIA, *reprinted in* 1 Cal. 559, 576-77. The Federal Constitution of the Mexican States listed Coahuila y Tejas as a state and Alta California and Santa Fe de Nueva Mexico as territories. 2 WHITE, *supra* note 58, at 387, 388 (Constitution of the United Mexican States, tit. II, art. 5 (October 4, 1824)).

proclaimed the mortgage filing requirement as the law of the territory.[348] But a territorial act of January 12, 1852, changed the place of filing from the county where the property lay to where the parties executed the instrument.[349] So the court invalidated a filing in the place mandated by Mexican law for a June 3, 1853, mortgage on land.[350] The United States Supreme Court, however, expressed doubt as to whether the Spanish-American *pragmatica* of 1768 applied to New Mexico since Santa Fe de Nueva Mexico had no *escribanos*.[351]

The courts in the Territory of Utah claimed that, although the Treaty of Guadalupe Hidalgo did not mandate a source of law, Mexican law did not apply since the Utah settlers did not come to the area until 1847 and neither accepted nor used Mexican law. Instead, they used the English common law of their home states, which the courts accepted, making that the source of law in the Territory of Utah.[352]

On September 9, 1850, Congress created three jurisdictions from the Mexican Cession.[353] The western portion became the State of California.[354] Congress specified that the laws of the United States extended to California.[355] The southern portion between the States of California and Texas became the Territory of New Mexico.[356] On August 4, 1854, Congress added the territory from the Gadsden Purchase to New Mexico.[357] Congress did not specify any particular laws for the Territory of New Mexico, other than to specify that the courts had common law and equity jurisdiction and that the laws of the United States extended to the territory.[358] The northern portion became the Territory of Utah.[359] Similarly, Congress did not specify any particular laws for the Territory of Utah, other than to specify that the courts had common law and equity jurisdiction and that the laws of the United States extended to the

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348 *Moore*, 1 N.M. at 305.

349 *Id.* at 306.

350 *Id.* at 304.

351 *Maxwell Land Grant Co.*, 151 U.S. at 597.

352 First Nat'l Bank of Utah v. Kinner, 1 Utah 100 (1873); *see also infra* notes 359-61 and accompanying text.

353 9 Stat. 446-53, chs. 49-51 (1850).

354 9 *id.* 452, ch. 50.

355 9 *id.* 521, ch. 86.

356 9 *id.* 446, ch. 49.

357 9 *id.* 575, ch. 141.

358 9 *id.* 450, 450 (sec. 10 and sec. 17, respectively).

359 9 *id.* 453, ch. 51.

Territory.[360] The courts in the Territory of Utah claimed this provision meant that English common law became the law of the Territory of Utah.[361]

Congress later created three additional jurisdictions from the Mexican Cession by subdividing the Territories of Utah and New Mexico. On February 28, 1861, Congress created the Territory of Colorado from the Territory of Utah and a portion of the Louisiana Purchase, again specifying that the laws of the United States extended to the Territory.[362] On March 2, 1861, Congress created the Territory of Nevada from the Territory of Utah and a portion of the Territory of New Mexico, once again specifying that the laws of the United States extended to the Territory.[363] On February 24, 1863, Congress created the Territory of Arizona from the Territory of New Mexico, specifying the laws of New Mexico to continue.[364] Courts in two of the three states formed from these territories, Arizona[365] and Colorado,[366] followed the law of Mexico at the time of the Treaty of Guadalupe Hidalgo, not modified by subsequent statute as the law of their state.

All six jurisdictions eventually replaced Mexican law with English common law. California acted immediately after statehood, on April 13, 1850.[367] The Territories of Colorado, on October 11, 1861, Nevada, on October 30, 1861, and Arizona, in 1864, replaced Mexican law with English common law immediately after their formation.[368] Only Colorado specified the English common law as of 1606.[369] New Mexico

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360 9 *id.* 455, 458.

361 People v. Green, 1 Utah 12 (1876); Thomas v. Union Pac. R.R., 1 Utah 232 (1875).

362 12 Stat. 172, 176, ch. 59, sec. 15 (1861).

363 12 *id.* 209, 214, ch. 83, sec. 16.

364 12 *id.* 664, 665, ch. 56, sec. 2.

365 Ainsa v. New Mexico & Ariz. R.R. Co., 78 P. 1108 (Ariz. 1894) (holding 1825 Mexican land grant invalid under Mexican law); United States v. Cameron, 21 P. 177 (Ariz. 1889) (holding that validity of Mexican land grant detetermined by Mexican law); Astiazaran v. Santa Rita Land & Mining Co., 20 P. 189 (Ariz. 1889) (holding that validity of 1844 Mexican land grant determined by Mexican law); Clough v. Wing, 17 P. 453 (Ariz. 1888) (Mexican water law adopted as the local custom).

366 De Mares v. Gilpin, 24 P. 568 (Colo. 1890) (holding that validity of 1843 Mexican land grant determined by Mexican law); Bd. of County Comm'ns v. Cent. Colo. Improvement, 2 Colo. 628 (1875) (holding that validity of 1843 Mexican land grant determined by Mexican law); Tameling v. U.S. Freehold Land & Emigration Co., 2 Colo. 411 (1874) (holding validity of 1844 Mexican land grant determined by Mexican law).

367 1850 Cal. Stat. 219, ch.95.

368 1864 Ariz. Terr. Laws (Howell Code); 1861 Colo. Sess. Laws 35; 1861 Nev. Stat. 1, ch. 1.

369 1861 Colo. Sess. Laws 35.

Territory passed the legislation on January 7, 1876.[370] Utah enacted the statute in 1898.[371]

Under American domination, chattel mortgage statutes came late to the western portion of the Mexican Cession. The State of California at first barred chattel mortgages in 1850 and then allowed them for fixtures in 1853, before requiring filing for validity against third persons on April 29, 1857:

> Section 1. Chattel mortgages may be made on the following property, to secure payment of just indebtedness: [business furniture, machinery, professional equipment, books, possessory claims to land, mining improvements, and corporate stock] . . . .
>
> Section 2. All mortgages made in pursuance of this Act (with affidavit attached,) shall be recorded in the county where the mortgagor lives, and also in the county or counties where the property is located [or used] . . . .
>
> Section 3. No chattel mortgage shall be valid, (except between the parties thereto,) unless the same shall have been made, executed and recorded, in conformity to the sections of this Act . . . .[372]

So California pre-chattel mortgage act opinions void the chattel mortgage.[373]

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370 1876 N.M. Laws 31, ch. 2.

371 1898 Utah Rev. Stat. sec. 2488; *see* UTAH CODE ANN. § 68-3-1 (1996). *But see* First Nat'l Bank of Utah v. Kinner, 1 Utah 100, 106-07 (1873) (holding that common law applies in Utah not because of a statute or source of immigrants but because the citizens have tacitly agreed).

372 1857 Cal. Stat. 397, ch. 264 ("An Act Amendatory of and supplementary to an Act in relation to Personal Mortgages in certain cases, passed May 11, 1853"); *see also* 1853 Cal. Stat. 153, ch. 193 (chattel mortgages allowed for fixtures); 1850 Cal. Stat. 267, ch. 114, sec. 17 (chattel mortgages without delivery void).

373 For pre-chattel mortgage act cases, see *Sands v. Pfeiffer*, 10 Cal. 258 (1858) (upholding firmly affixed engine and boilers as realty); *Mitchell v. Steelman*, 8 Cal. 363 (1857) (holding ship mortgage recorded under 1850 United States act valid despite 1850 act); *Meyer v. Gorham*, 5 Cal. 322 (1855) (holding 1854 chattel mortgage invalid under 1850 act). *See also* Ede v. Johnson, 15 Cal. 53 (1860) (finding 1857 act overrules 1853 corporation act requiring stock book recording of pledges). Appellate opinions for California began in 1850 and became available in 1852. 1 NATHANIEL BENNETT, REPORTS OF CASES ARGUED AND

The Territory of Nevada similarly first banned chattel mortgages in 1861 except for crops and then required filing for the crop chattel mortgage in 1869, before requiring filing for validity against third persons on February 17, 1887:

> Section sixty-six. No mortgage of personal property shall be valid for any purpose against any other person than the parties thereto, unless possession of the mortgaged property be delivered to, and retained by, the mortgagee, or, unless the mortgage shall be recorded in the office of the County Recorder of the county where the property is situated, and also in the county where the mortgagor resides . . . .[374]

Nevada pre-chattel mortgage act opinions similarly void the chattel mortgage.[375]

But in the other states of the Mexican Cession, chattel mortgages survived with the filing requirement coming later.[376] The Territory of Colorado passed a chattel mortgage act requiring filing for validity against third persons on August 15, 1862:

> Section 1. No mortgage on personal property shall be valid as against the rights and interests of any third person or persons unless possession of such personal property shall be delivered to and remain with the

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DETERMINED IN THE SUPREME COURT OF THE STATE OF CALIFORNIA (San Francisco, Bancroft-Whitney Co. 1886) (1852).

374 1887 Nev. Stat. 66, ch. 57 ("An Act to amend an Act entitled 'An Act concerning mortgages' approved November 5, 1861"); *see also* 1869 Nev. Stat. 55-56, ch. 11 (filing statute for chattel mortgages on crops); 1861 Nev. Stat. 11, 20, ch. 9, sec. 66.

375 For pre-chattel mortgage act cases, see *Moresi v. Swift*, 15 Nev. 215 (1880) (holding chattel mortgage on mule team invalid without delivery); *Cardinal v. Edwards*, 5 Nev. 36 (1869) (upholding conditional sale on horses despite statute); *Reed v. Ash*, 3 Nev. 116 (1867) (holding lien agreement on cattle invalid without delivery under statute); *Carpenter v. Clark*, 2 Nev. 243 (1866) (conditional sale of mule under statute); *Doak v. Brubaker*, 1 Nev. 218 (1865) (holding chattel mortgage on cattle invalid without delivery under statute). Appellate opinions for Nevada began in 1865 and became available in 1866. 1 THOMAS P. HAWLEY, REPORTS OF DECISIONS OF THE SUPREME COURT OF THE STATE OF NEVADA (San Francisco, A. L. Bancroft & Co. 1877) (1866).

376 Only Utah had a pre-chattel mortgage act case, and the territorial court applied the rebuttable rule, recognizing the chattel mortgage. Ewing v. Merkley, 4 P. 244 (Utah 1884) (an 1883 chattel mortgage).

> mortgagee, or the said mortgage be acknowledged and recorded as hereinafter directed . . . .
>
> . . . .
>
> Section 3. Any mortgage of personal property, so certified, shall be admitted to record, by the recorder of the county in which the mortgagor shall reside at the time when the same is made, acknowledged and recorded, and shall, thereupon, if bona fide, be good and valid from the time so recorded, for a space of time not exceeding two years, notwithstanding the property mortgaged or conveyed by deed of trust, may be left in the possession of the mortgagor . . . .[377]

Colorado had no pre-chattel mortgage act opinions since its reported appellate opinions began in 1864.[378] The Territory of Arizona passed its chattel mortgage act on February 7, 1871:

> Section 1. Chattel mortgages may be made on the following property to secure payment of just indebtedness: [business furniture, machinery, professinal equipment, books, crops, and livestock] . . . .
>
> Section 2. All mortgages made in pursuance of this act (with affidavit attached) shall be recorded in the county where the mortgagor lives, and also in the county or counties where the property is located or used . . . .
>
> Section 3. No chattel mortgage shall be valid (except between the parties thereto), unless the same shall have been made, executed and recorded in conformity to the sections of this act . . . .[379]

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377 1862 Colo. Sess. Laws 12 (an act concerning chattel mortgages); *see* Machette v. Wanless, 1 Colo. 225 (1870) (1867 chattel mortgage on crops under 1861 act).

378 Appellate opinions for Colorado began in 1864 and became available in 1872. 1 MOSES HALLETT, REPORTS OF CASES AT LAW AND IN CHANCERY DETERMINED IN THE SUPREME COURT OF COLORADO TERRITORY TO THE PRESENT TIME (Callaghan & Co. 1911) (1872).

379 1871 Ariz. Sess. Laws 33 ("An Act in relation to personal mortgages in certain cases"); *see* Mooney v. Broadway, 11 P. 114 (Ariz. 1886) (court erred in finding 1889 chattel mortgage invalid).

Arizona had no pre-chattel mortgage act opinions.[380] The Territory of New Mexico passed its chattel mortgage act on January 14, 1876:

> Sec. 2. Every mortgage, or conveyance intended to operate as a mortgage if personal property, which shall not be accompanied by an immediate delivery, and be followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void, as against creditors of the mortgagor, and as against subsequent purchasers, and mortgages in good faith, unless the mortgage or a true copy thereof shall be forthwith deposited in the office of the county recorder of the county where the property shall be situated . . . .
>
> . . . .
>
> Sec. 4. Every mortgage so filed shall be void as against the creditor of the person making the same, or against subsequent purchasers, or mortgages in good faith after the expiration of one year after the filing thereof; unless . . . .[381]

The Territory of New Mexico had no pre-chattel mortgage act opinions.[382]

The Territory of Utah similarly banned nonpossessory chattel mortgages in 1876, before requiring filing for validity against third persons on March 13, 1884:

> Section 1. . . . That no mortgage of personal property shall be valid as against the rights and interests of any person, (other than the parties thereto), unless the possession of such personal property be delivered to, and retained by the mortgagee, or unless the mortgage

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380 Appellate opinions for Arizona began in 1866 and became available in 1884. REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE TERRIOTRY OF ARIZONA (San Francisco, A.L. Bancroft & Co. 1905) (1884); *see also* KATHY SHIMPOCK-VIEWEG & MARIANNE SIDORSKI ALCORN, ARIZONA LEGAL RESEARCH GUIDE (1992).

381 1876 N.M. 112, ch. 36 ("An Act in regard to mortgages of personal property").

382 Appellate opinions for New Mexico began in 1852 and became available in 1881. 1 CHARLES H. GILDERSLEEVE, REPORTS OF CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF NEW MEXICO FROM JANUARY TERM, 1852, TO JANUARY TERM, 1879 (1881).

> provide that the property may remain in possession of the mortgagor . . . .
>
> . . . .
>
> Section 3. Every mortgage of personal property, together with affidavit and acknowledgment thereto, shall, to constitute notice to third parties, be filed for record in the office of the recorder of the county where the mortgagor resides, or, in case he is a non-resident of this Territory, then in the respective offices of the recorders of each and every county where the personal property may be at the time of the execution of the mortgage . . . .[383]

Utah had previously recognized chattel mortgages by providing for their foreclosure in 1870 but did not require their filing.[384] Utah pre-chattel mortgage act opinions, appearing between 1876 and 1884, voided the chattel mortgage for nonpossession.[385]

So the states derived from the Mexican Cession, except California and Nevada, continued to permit chattel mortgages, first under Mexican law and then under United States law, until passage of their chattel mortgage acts requiring filing for validity against third parties in Colorado in 1862, Arizona in 1871, New Mexico in 1876, and Utah in 1884. California banned chattel mortgages from 1850 to 1857 when California passed the Mexican Cession's first chattel mortgage act, as did Nevada from 1861 to 1887, when it passed its chattel mortgage act.

VI. THE ORIGIN OF THE SPANISH CHATTEL MORTGAGE ACT

The American chattel mortgage acts came earlier in those states formed from those provinces subject to the Spanish chattel mortgage act

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383 1884 Utah Laws 28, ch. 21 ("An Act in relation to Mortgages of Personal Property"); *see also* 1876 Utah Laws, 341, sec. 7 (without delivery presumed fraud, adopted February 18, 1876).

384 1870 Utah Laws 17, 66, ch. 1, sec. 246; *see also* Eddy v. Ireland, 21 P. 501 (Utah 1889) (holding 1883 second chattel mortgage on stock of goods valid against judgment lien even though second mortgage provides priority to first mortgage).

385 *See* Ewing v. Merkley, 4 P. 244 (Utah 1884) (1883 chattel mortgage). Appellate opinions for Utah began in 1856 and became available in 1877. 1 ALBERT HAGAN, REPORTS OF CASES DETERMINED IN THE SUPREME COURT OF THE TERRITORY OF UTAH FROM ORGANIZATION OF THE TERRITORY UP TO AND INCLUDING THE JUNE TERM, 1876 (1877).

on slaves and ships. Louisiana continued the chattel mortgage, at least for third parties.[386] In 1799, Mississippi and Alabama extended it to all personalty but made it permissive before making it mandatory in 1822 and 1828, respectively.[387] Arkansas and Missouri continued it until 1816, when the territorial legislature removed the filing requirement.[388] The state legislatures made it mandatory for all personalty in 1838 and 1845, respectively.[389] Similarly, the Territory of Florida made in permissive in 1822 and mandatory in 1845.[390] In contrast, those states formed from areas where the Spanish chattel mortgage act never applied, or only briefly applied, were either hostile to chattel mortgages or in no hurry to adopt a chattel mortgage act. The Republic of Texas reimposed a mandatory one on all personalty in 1838 after a twenty-eight year hiatus.[391] California and Nevada, joined by the Territory of Utah, from 1876 to 1884, banned chattel mortgages until passing a mandatory chattel mortgage act in 1857, 1887, and 1884, respectively.[392] The Territories of Colorado, Arizona, and New Mexico adopted a mandatory chattel mortgage act in 1862, 1871, and 1876, respectively.[393]

The Spanish chattel mortgage act comes from O'Reilly's February 1770 instructions to his outlying commandants. O'Reilly's hand-picked successor, Unzaga, restated it for Louisiana and added ships.[394] One of Unzaga's successors as Governor of Louisiana, Gálvez, imposed the act on Occidente Florida through conquest in the early 1780s.[395] Unzaga's lieutenant, Zéspedes, carried it to Oriente Florida when Spain regained Oriente Florida in the mid-1780s.[396] And a distant successor to Unzaga, Salcedo, the son of the last Spanish Governor of Louisiana, briefly imposed it in Texas before his downfall in the Hildalgo Revolution.[397]

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386 1804 La. Terr. Laws 101.

387 1828 Ala. Laws 40; 1822 Miss. Laws 299; 1799 Miss. Laws 70-71. For the Mississippi Territorial law prior to 1799, see note 288 and accompanying text.

388 1816 Mo. Terr. Laws 439. For Missouri Territorial laws prior to 1816, see notes 263-67 and accompanying text.

389 1838 Ark. Rev. Stat. 578; 1845 Mo. Laws 525.

390 For the Florida rules, see notes 313-16 and accompanying text.

391 1838 Tex. Rep. Laws 12-13. For the Texas rule prior to 1838, see notes 333-36 and accompanying text.

392 1857 Cal. Laws 348; 1887 Nev. Laws 66; 1884 Utah Laws 28.

393 1871 Ariz. Laws 34; 1862 Colo. Laws 12; 1876 N.M. Terr. Laws 112.

394 JAMES ALTON JAMES, OLIVER POLLOCK: THE LIFE AND TIMES OF AN UNKNOWN PATRIOT 53 (1937); 2 WHITE, *supra* note 58, at 464.

395 *See supra* notes 193-206 and accompanying text.

396 *See supra* notes 207-14 and accompanying text.

397 *See supra* notes 215-31 and accompanying text.

Legal historians have propounded at least two theories for the source of legal rules. One eminent jurist noted that lawmakers adopt a legal rule, such as the recording requirement, to solve a problem.[398] Centuries later, the original problem has vanished, yet the rule remains. So new lawmakers determine if some new rationale justifies the rule, and, if so, the rule continues. The second theory suggests that new legal rules come from adopting rules from other, more developed legal systems.[399] So much of the western European customary legal system contains gap-filling rules adopted from the Roman legal system.[400] For the Spanish chattel mortgage act, both of these theories played a role.

Several clues exist indicating the origin of the Spanish chattel mortgage act. The Louisiana courts in 1826, fifty-six years after passage of the Spanish chattel mortgage act, claimed that the O'Reilly recording statute was a fiscal measure to aid the collection of the *alcabala*.[401] Louisianans had lived with the recording statute in its original form for thirty-three years and should have some idea of its origin. Other clues come from the Spanish chattel mortgage acts' preambles. The preamble to O'Reilly's instructions to his commandants refers to the 1539 Toledo *cédula*, which speaks of the confusion at court caused by secret liens.[402] The preamble to Unzaga's restatement refers to frauds and malpractices that threaten the rights of citizens and cause confusion in the courts.[403] The Spanish chattel mortgage act encompassed the same basic elements as did recording statutes from the economically stellar British Caribbean colonies, namely coverage for all conveyances of land and slaves and a penalty of voidness, albeit only with respect to third parties.[404]

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398 *See* HOLMES, JR., *supra* note 15, at 5.

399 *See, e.g.*, ALAN WATSON, THE EVOLUTION OF LAW 116 (1985) (describing French rural southern towns adopting laws from the customs of Paris, Polish settlements from Madgeburg, and German tribes from Roman law).

400 *See id.* at 77-91, 98-104, 109-11 (discussing pre-Justinian Roman law as supplementing German customs in the fifth through seventh centuries, making Scots law in the seventeenth and eighteenth centuries, and recognizing German and French Codes in the eighteenth and nineteenth centuries, respectively).

401 Gonzalez v. Sanchez, 4 Mart. (n.s.) 657, 659 (La. 1826).

402 *See supra* notes 155-58 and accompanying text.

403 *See supra* note 164 and accompanying text.

404 See *infra* Part V.A-B for the British Caribbean statutes.

A. Alcabala

The *alcabala* was a sales tax payable by the seller "on raw materials, consumer goods, chattels, and real and personal property."[405] Spanish officials collected the *alcabala* on every change of ownership.[406] The *alcabala* originally was set at 2% of the value of the item but rose to 6% by 1776.[407] Spanish America had a special rule making certain that the *alcabala* covered barter, exchanges, payment in kind, donations, and *empeños*.[408] Sales of slaves were specifically included.[409] But not everyone paid the *alcabala*. The law exempted Indians, the Crown, the clergy, and the Court of the Crusade.[410] Similarly, the law exempted certain goods from the *alcabala*. The law exempted baked bread, horses, coins, books, birds of falconry, metal and materials of the mint, dowries, inheritances, finished arms, grain and seed sold at registered markets and from public granaries, and sustenance for the poor.[411]

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405 Robert S. Smith, *Sales Taxes in New Spain, 1575-1770*, 28 HISP. AM HIST. REV. 2, 14 (1948). For the *alcabala* provisions applicable to Spain, see NOVISIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 12, law 11-12. For the *alcabala* provisions applicable to Spanish America, see RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13.

406 Smith, *supra* note 405, at 14.

407 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 14; *see also* 2 THE CAMBRIDGE HISTORY OF LATIN AMERICA 245 (Leslie Bethel ed., 1984) [hereinafter Bethel] (explaining the delay in the imposition of the *alcabala* in Spanish America).

408 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 3.

> *Y ordanamos que el receptor este advertido de lo saber y averiguar, cobrando del encomendero lo que con juramento declarare haber contrado en esta forma, y el y las demas personas examinadeas [los vecinos, encomenderos, y otros conocidos y hacendados que tienen labranzas y granjerias] digan asimismo si han hecho venta de algunas cosas por via de donacion, empeño ó menosprecio del que en la realidad hubiere intervenido; y si constare del fraude ó suposicion incurran los contraventes en las penas impuestas por leyes de estos reinos de Castilla.*

Id. The English translation provides:

> And we order that the receiver be authorized to find out and to ascertain it, recovering from the encomendero that which under oath he declared to have contracted in this form, and he and the rest of the persons examined [the citizens, encomdnederos, and other well-knowns and landowners that have farms and farm earnings] say in like manner if they have made a sale of any things by way of donation, incumbrance or contempt of that which in reality has similarity; and if it consists of fraud or imposture they incur the antidote of the penalty imposed by the laws of this kingdom of Castile.

409 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 25.

410 *Id.* bk. 8, tit. 13, laws 17, 18, 24 (clergy, Court of the Crusade, Indians, respectively).

411 *Id.* bk. 8, tit. 13, laws 19, 20, 21, 22, 23 (corn, grain, seed, sustenance, bread, horses, coins, books, birds, mint, dowry, inheritance, and arms).

The *alcabala* did not mesh well with the Spanish mercantile system. To rise above subsistence, the colonies depended on trade. But under the mercantile system, Spain funneled all trade through monopolies operating at specified ports, both in the colonies and in Spain, with no intercolonial trade.[412] These legal ports were few in number: Callao, Panama, Portobello, Cartegena, Veracruz, and Havana for Spanish America, and Cadiz and Seville for Spain.[413] Therefore, exports from and imports to the colonies went through several hands before reaching their final destination, paying the *alcabala* on each exchange. Moreover, the monopolies kept supplies low to further drive up prices paid by the colonials.[414] Consequently, prices in the interior of the colonies could be quite high, thereby spawning smuggling activities to reduce prices through tax evasion.[415]

The *alcabala* laws, however, already had a sort of registration process to aid collection. Notaries turned in monthly statements to the tax collectors of the sales they witnessed, and only registered notaries could attest transfers of real property, chattels, and livestock.[416] The registration would enable the tax collector to seek out those not paying the tax, similar to the Alcapulco slave registration.[417] This registration process had its own penalty that fell on the *escribano*, not the seller as with the O'Reilly recording statute:

> So that contracts may better be made and ascertained, and to avoid fraud, we command that all sales or exchanges made of any land, chattels and livestock which involves the *alcabala*, come before the registered *escribanos* of the place of contract, and if there is none, before the *escribano* of the city, village or nearby place, and before no other *escribanos* or notaries, the said are obligated to give a copy and account of the writings and contracts that pass before them, which gives rise to the

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412 *See, e.g.*, MICHAEL C. MEYER & WILLIAM L. SHERMAN, THE COURSE OF MEXICAN HISTORY 254 (4th ed. 1991).

413 *See, e.g.*, 2 Bethel, *supra* note 407, at 244 (the reason was the collection of the *almojarifazgo*, a customs duty, was easier at a trade bottleneck controlled by a merchant guild).

414 *See, e.g.*, THOMAS, *supra* note 104, at 30-31 (slave monopoly).

415 *See, e.g.*, MEYER & SHERMAN, *supra* note 412, at 182.

416 RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 27-30 (brokers and middlemen, auctions, Registered Notaries, and notaries).

417 *See supra* note 109 and accompanying text.

> *alcabala* to the receiver each month, with the day, month and year in which they granted, declaring the seller and buyer, and the item and the price for which it was sold or exchanged, with an oath that no other contracts passed before them; and if later it appears to the contrary, besides paying the *alcabala* to the fourth, they will incur so much of the other penalties as established by law.[418]

The states from the Mexican Cession and Texas, where the Spanish chattel mortgage act did not apply, recognized this registration process as assisting the collection of the *alcabala*.[419] The registration by the *escribano* alerted the tax collector.

Modern historians, however, have focused on one aspect of the *alcabala* registration process to suggest that O'Reilly's recording statute did not have anything to do with the *alcabala*.[420] That aspect was that the transaction remained valid even if not registered, unlike the situation with O'Reilly's recording statute. The Spanish tribunals never accepted improper documentation as a method of avoiding the *alcabala*. The Guatemala *Audencia* later considered this issue in connection with a Guatemalan transaction.[421] The result was the *cédula* of September 5,

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[418] RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 29; *see also* NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 12, law 14 (Spanish version of the same law applicable to the Indies); NUEVA RECOPILACIÓN, *supra* note 62, bk. 9, tit. 17, law 10.

> *Para que mejor se puedan sacar y averiguar los contratos, y evitar fraudes, mandamos que todas las ventas ó trueques que se hicieren de cualesquier bienes raices, muebles y semovientes en que intervenga alcabala, se hagan ante los excribanos del numero de los lugares del contrato, y si no los hubiere, ante los excribanos de la ciudad, villa ó lugar mas cercano, y no ante otros escribanos y notarios, los cuales sean obligados á dar copia y relacion de las exrituras y contratos que ante ellos pasaren, de que se cause alcabala cada mes al receptor, con el dia, mes y año enque se otorgaron, declarando el vendedor y comprador, y la cosa y precio en que se vendió ó trocó, con juramento de que no pasaron ante ellos otros ningunos contratos; y si despues pareciere lo contrario, demas de pagar la alcabala con el cuatro tanto incurran en las demas pans en derecho establecidas.*

RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 29.

[419] Hayes v. Bona, 7 Cal. 153, 157 (1857) (citing RECOPILACIÓN DE LAS INDIAS, *supra* note 81, bk. 8, tit. 13, law 29, for land); Hoen v. Simmons, 1 Cal. 119, 121 (1850) (same); Maxwell Land Grant Co. v. Dawson, 34 P. 191, 197 (N.M. 1893) (same), *rev'd on other grounds*, 151 U.S. 586 (1894); Monroe v. Searcy, 20 Tex. 348 (1857) (same by citing NUEVA RECOPILACIÓN, *supra* note 62, bk. 9, tit. 17, law 10, for land).

[420] Baade, *Formalities*, *supra* note 71, at 678.

[421] *Id.* at 678-80.

1791, sent to all the dominions in the Indies, providing that clandestine sales without formal public instruments nevertheless were effective sales and subject to the *alcabala*.[422] O'Reilly's recording statute's enforcement provision, in contrast, invalidated nonregistered sales contracts. Fear of losing the sale might encourage a seller to ensure the proper registration. But the process could provide a large loophole for those interested in evading the *alcabala*. Noncomplying sales on which no *alcabala* was paid, if detected, would no longer be valid transactions, and hence not subject to the *alcabala*.[423] The tax evader would win either way.

Two additional considerations offer further support for these historians' suggestion. O'Reilly's recording statute varied considerably from this *alcabala* law. O'Reilly's recording statute did not cover everything that was subject to the *alcabala*. It covered only land and slaves, albeit the most valuable property in Louisiana at the time. Moreover, O'Reilly endeavored to reduce the amount of taxes charged on Louisianans and their products, including those on Negroes, not to raise them.[424] The report of the Council and Chamber of the Indias of February 27, 1772, concerning O'Reilly's ideas for imposing the Spanish mercantile system on Louisiana, show that O'Reilly recommended that the produce of Louisiana pay no duty on entry to Havana, that no *alcabala* be levied on goods leaving Havana for Louisiana, and that no *almojarifazgo*, a duty on goods imported and exported, be paid.[425] The Crown set the *almojarifazgo* at 7.5% of the value of the item, so when coupled with the *alcabala* of 6%, the value of the tax on goods moving between Spain and its colonies was almost 15%.[426] O'Reilly's theory was that revenues would rise with the increased commerce. O'Reilly instead imposed taxes on buildings, namely coffee houses, boarding houses, slaughter houses, taverns, and billiard halls.[427]

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422 Laredo Archives, Folder 36, Document 2 (Nueces Strip: July 8, 1792, decree from Viceroy concerning paying taxes and illegal sales of land); Baade, *Formalities*, *supra* note 71, at 48 (Mexican Cession and Texas), 681 (citing CEDULARIA DE LA NUEVA GALICIA (Eucario Lopez Jimenez ed., 1971)).

423 See *supra* note 132 for Frenchman's use of this method to avoid filing fees.

424 *See infra* note 425 and accompanying text.

425 2 WHITE, *supra* note 58, at 462, 463.

426 *See, e.g.*, MEYER & SHERMAN, *supra* note 412, at 181.

427 JAMES, *supra* note 394, at 16; WHITE, *supra* note 58, at 464.

B. British Caribbean Laws

The second possible origin for the Spanish chattel mortgage act fares better. O'Reilly's recording statute first appears in instructions to outlying posts and not the major centers where the Governor and the two lieutenant governors resided. The problem appears to be knowledge of who has title of the key items of property, land and slaves, and thereby has the right to use them as security for loans. Until such ascertainment, no lender dared lend inexpensively, expecting collateral protection by land or slaves. They could easily have lost to an earlier, unrecorded mortgage.

O'Reilly's recording statute, requiring registration of land sales and slave sales, contains provisions strange in Spanish territory. Spain only had mortgages on land registered, which requirement was not extended to the Indies until 1783.[428] Catalonia had land registration subsequent to 1774 and ship registration subsequent to 1795, both later than O'Reilly's recording statute.[429] Spaniards did not fear the multiple secret lien problem unless it involved a mortgage on land. But one major nation, Great Britain, did have land and slave registration in its colonies.[430] And these laws aimed at the problem of fraudulent conveyances to the detriment of unsuspecting creditors, the secret multiple lien problem apparently referenced in the preambles to the Spanish chattel mortgage acts. Jamaica's 1731 law, entitled "An Act for the better preserving of the Records in the Several Public Offices of this Island, supplying and remedying Defects in several former Laws for preventing fraudulent Deeds and conveyances and recording old Wills in a prefixed Time" provided:

> Section 4. And be it further enacted, that all and every deed or deeds heretofore made of any lands, tenements, Negroes or hereditaments whatsoever on this island, that has or have been duly proved or acknowledged before the governor or commander-in-chief, or some judge or judges of the grand court, or any other court of record in this island, such deed and deeds shall be, and hereby enacted, declared and adjudged to be, good and

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428 For registration of mortgages in the Indies after 1783, see *supra* notes 92-99 and accompanying text.

429 For registration in Catalonia, see *supra* notes 73, 78-79 and accompanying text.

430 For British slave registration laws, see *infra* notes 432-42 and accompanying text.

> valid in the law to pass and convey a just title for all such lands, tenements, Negroes and hereditaments, to all and every purchaser and purchasers, grantee and grantees, where no second sale shall appear to be or to have been proved and recorded as directed by the said law.
>
> Section 5. And be it enacted, that all deeds which shall be made or executed on this island, after the 1st of May 1732 for any lands, tenements, Negroes or hereditaments whatsoever, shall be duly proved or acknowledged and recorded, within 90 days after the dates of such deeds, or otherwise to stand void and of no effect against all other purchasers or mortgagees bona fide for valuable consideration of the said lands, tenements, Negroes or hereditaments, who shall duly prove and record their deeds within the time specified by this act, from the dates of their respective deeds.[431]

Almost all British Caribbean Colonies adopted such statutes during the eighteenth century: St. Christopher in 1727,[432] Antigua in 1746,[433] Montserrat in 1754,[434] Nevis before 1762,[435] the Bahamas before 1764,[436] Barbados in 1799,[437] and the newly acquired islands from the French and Spanish during the Seven Years' War, Grenada in 1767,[438] Tobago in 1768,[439] St. Vincent in 1770,[440] and Dominica in 1770.[441]

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431 1 JOHN HENRY HOWARD, THE LAWS OF THE BRITISH COLONIES IN THE WEST INDIES AND OTHER PARTS OF AMERICA CONCERNING REAL AND PERSONAL PROPERTY AND MANUMISSION OF SLAVES 48, 49 (London, Negro Universities Press 1970) (1827) (Jamaica act of 4 Geo. ii, c. 5). The previous act was the 1681 land recordation act. *Id.* at 39 (33 Car. ii c. 12).

432 1 *id.* at 475.

433 1 *id.* at 400, 415 (1668 land recordation act and 19 Geo. ii n.c., amending 1668 act to allow recordation of slave sales, respectively).

434 1 *id.* at 456.

435 1 *id.* at 504.

436 1 *id.* at 338.

437 1 *id.* at 112, 140 (1668 act exempting slaves from real estate recordation act and 39 Geo. iii n.c., amending the 1668 act to allow slave sale recordation the same as land, respectively).

438 1 *id.* at 162.

439 1 *id.* at 300.

440 1 *id.* at 222.

441 1 *id.* at 250.

These laws, similar to O'Reilly's recording statute, covered sales and mortgages of land and slaves, not all goods, as did those of the British mainland colonies.[442] But unlike O'Reilly's recording statute, the Jamaican law voided unregistered deeds with respect to only third parties. Spanish law, however, did not void unrecorded mortgages on land, but merely provided a steep penalty of twice the amount involved paid to the lender.[443] O'Reilly merely grafted the British subject matter, all conveyances of land and slaves, and an elaborated English penalty, void in all cases, onto the standard Spanish mortgage recordation statute.

O'Reilly's recording statute was the product of two Havana lawyers, Urrutia and Rey, both working as lawyers in Havana before and after their service with O'Reilly. They had an opportunity for first-hand experience with British mercantile law. Near the end of the Seven Years' War, a British force led by George Keppel, third earl of Albemarle, with Sir George Pocock commanding the naval forces, captured Havana after a short siege.[444] The surrender terms gave Albemarle Havana and the western end of Cuba, with the inhabitants remaining Catholic but with the right to return to Spain within four years.[445] Albemarle made himself the Governor, allowed the *peninsulares* to return to Spain, and set up a government mostly of the local Creoles.[446]

In 1760, Cuba was not a sugar colony. Cuba had about 100 sugar plantations near Havana but none of the water-driven mills of the English.[447] Without the use of fertilizer, the sugar plantations depleted the land's resources within forty years and denuded the nearby forests for fuel.[448] These plantations also lacked a sufficient slave workforce. Spain, without trading posts on the African slave coasts, relied on foreign slave suppliers to the Spanish monopoly company, the Royal Havana Company, which kept the supply small to ensure high prices.[449] Cubans also lacked the money to purchase clandestinely from Jamaican

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442 *E.g.*, WEST FLORIDA, *supra* note 184; *supra* note 184 and accompanying text.

443 NUEVA RECOPILACIÓN, *supra* note 62, bk. 5, tit. 15, law 2; NOVÍSIMA RECOPILACIÓN, *supra* note 62, bk. 10, tit. 15, law 2; *see* Baade, *Formalities*, *supra* note 71, at 687.

444 THOMAS, *supra* note 104, at 1, 3, 10.

445 *Id.* at 10.

446 *Id.* at 43-44.

447 *Id.* at 27-28.

448 *Id.* at 29.

449 *Id.* at 30-31.

or Liverpool merchants, the major slave traders.[450] The planters purchased their few slaves on credit, usually on the basis of a mortgage on the future sugar crop, or by barter for tobacco.[451] Consequently, Cuba and the other Spanish Caribbean colonies differed from the British and French West Indies in that the Blacks made up less than 50% of the population, not 90%, and 40% of the Blacks were free, not slaves.[452]

All this changed with the capture of Havana by the British. John Kennion, the expedition's commissary, from Liverpool, the premier slaving port of Europe, had interests in ten slave ships, had plantations in Jamaica, the main English sugar colony, and was a member of the Jamaica Council in 1760.[453] Kennion got the exclusive right to import slaves, 2000 per year.[454] But Kennion was unable to maintain his monopoly. The capture of Havana, and the consequent removal of the Spanish taxation system with export and import taxes, was the signal for British merchants to descend on the city.[455] During the eleven-month occupation, 700 British ships arrived, with 5% being slave ships, when normally only fifteen Spanish ships would arrive.[456] The result was the dumping on the Cuban market of 4000 slaves, the creation of long-term planter and Havana shopkeeper debts with the English, mostly in Jamaica, and the delivery of so much sugar equipment, mostly machetes, cauldrons, and ladles cheaper than those made in Havana, that Havana shopkeepers took years to sell off the stock.[457] Moreover, in the years before the invasion, sugar for export had accumulated on the docks awaiting ships from Cadiz to transport it to market.[458] The English ability to exploit this market so impressed Havana natives that not all Cubans viewed the British occupation as a disaster.[459] O'Reilly later

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450 *Id.* at 32.

451 *Id.*

452 *Id.* at 33, 36.

453 *Id.* at 3-4.

454 *Id.* at 49.

455 *Id.*

456 *Id.* at 51. The English returned Cuba to Spain under the treaty ending the war in exchange for Florida since the Jamaican planters with influence in London feared the budding Cuban sugar competition to their mature sugar plantations. *Id.* at 54.

457 *Id.* at 52-53.

458 ALLAN J. KUETHE, CUBA, 1753-1815: CROWN, MILITARY, AND SOCIETY 54 (1986).

459 *Id.*

used these English successes as evidence that his recommended reforms in 1764 would succeed.[460]

The legal underpinnings of the English economic system could hardly have gone unnoticed. It is doubtful that Albemarle imposed a chattel mortgage recording statute. Antonio Maria de Bucareli, Governor of Cuba after the reestablishment of the Spanish government in Cuba under Ambrosio Funes de Villapando, Conde de Ricla,[461] did not carry any such recording act to Mexico City when he became Viceroy.[462] But later, when Spain desired to come up with a new slave code, the *Code Negro Carolina*, the Spanish turned to examine the French *Code Noir* because of its success in making St. Dominique (Haiti) a highly successful sugar economy. So when O'Reilly entered New Orleans to restart an economy shattered by French rebellion, he naturally would turn to a system designed to ensure the credit system necessary to obtain slaves and supplies from the merchants, hopefully Spanish but if need be, English. As a result, O'Reilly's recording statutes show a British Caribbean connection.

C. *Smuggling in Louisiana*

But there is a third possible origin. The situation in Spanish Louisiana during O'Reilly's tenure differed significantly from that of the other Spanish Borderland provinces. Spain had taken the province recently from another colonial power, France. The former colonists, of a different cultural background and accustomed to foreign laws, had just rebelled when confronted with the Spanish mercantile system.[463] The Spanish leaders of this province had two major concerns. First, the concern was to make the colony self-sufficient so it would not be a drain on the Spanish empire's resources. Second, the concern was to prevent an English advance towards Mexico's wealth.[464] The colony lay on the land route.

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460 *Id.* at 66. For O'Reilly's 1764 recommended reforms, see *infra* notes 474-80 and accompanying text.

461 *See* KUETHE, *supra* note 458, at ix, 25.

462 See *supra* notes 5, 232-39 and accompanying text for the absence of a chattel mortgage act in Mexico.

463 *See, e.g.*, RAMÍREZ, *supra* note 150, at 153; John Caughey, *Bernardo de Galvez and the English Smugglers on the Mississippi, 1777*, 12 HISP. AM. HIST. REV. 46, 48 (1932) (very important cause, listing also insufficient Spanish troops, failure to enlist French troops, and suppression of paper currency).

464 WHITAKER, *supra* note 195, at xix.

At this time, Spanish Louisiana labored under two serious economic drawbacks, namely an economy enduring changes wrought by the Seven Year's War followed by Bourbon attempts at economic reform. The war resulted in a scarcity of food and a much depreciated money.[465] French merchants refused to continue their La Louisiane trade because of financial and political uncertainty.[466] Consequently, colonists had to pay exorbitant prices for food from the occasional arriving ships, French treasury notes declined to 25% of face, and credit was only available to those with property to offer as security.[467] Those with property did not include the newly arrived Spaniards and those officials dependent on the Spanish government for salary payments that never came.[468] English merchants filled this vacuum with contraband trade from their newly acquired dominions in British West Florida and their treaty right to freely navigate the Mississippi River.[469] This trade violated Spain's mercantile policy of confining all colonial trade to the Spanish homeland.[470] These English merchants sought to dominate the Indian trade, divert Cuban trade to their Gulf ports at Biloxi, Mobile, and Pensacola, and supply food, credit, shipping, and large numbers of slaves to Spanish Louisiana.[471] Their efforts introduced the problem of smuggling to avoid Spanish sales and export taxes. English goods and slaves were 40% less expensive than Spanish goods and slaves since the English paid no *alcabalas* or *almajarifazgos*.[472]

In the mid-eighteenth century, Spain endeavored to reform the economies of its colonies to ensure the Spanish mercantile system. This reform, although suggested as early as the 1740s, came to fruition with O'Reilly's mission to Cuba as second in command to rebuild and make impregnable Cuban defenses and reorganize Cuba's military forces following the capture of Havana by the British at the end of the Seven Year's War. Charles III of Spain had instructed O'Reilly, who later would come to Louisiana, to observe Cuba's economy and make

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465 JOHN GARRETSON CLARK, NEW ORLEANS, 1718-1812, AN ECONOMIC HISTORY 160 (1970).

466 *Id.*

467 *Id.*

468 TEXADA, *supra* note 146, at 11.

469 CLARK, *supra* note 465, at 161.

470 *See, e.g.*, MEYER & SHERMAN, *supra* note 412, at 168, 260 (explaining Spain's rigid mercantile system for New Spain and explaining Bourbon attempts to make Spain's mercantilism more efficient).

471 CLARK, *supra* note 465, at 163-64.

472 *See* WHITAKER, *supra* note 195, at xxv (French and English manufactured goods shipped by Spain cost 40% more in Spanish America than in Spain).

recommendations on the policies needed to secure the island and make it profitable to the Crown.[473] O'Reilly's observations focused on the lack of effective government, which reduced royal revenues, inadequate outlets for legal commerce, and the labor shortage.[474] He recommended a Cuban *Audencia*, opening up trade to additional Spanish ports besides Seville and Cadiz and including other Cuban ports besides Havana, a reduction of taxes on commerce, and abolishing all import duties on slaves.[475] He also recommended opening up the slave trade to foreigners under contract, thereby removing inefficient and expensive Spanish middlemen from the trade since the Spanish lacked a sufficient merchant marine, used too many sailors per ship, and lacked coastal bases in Africa for naval escort.[476] A commission appointed by Charles III in 1765 based on O'Reilly's observations enumerated the causes of the decline of the Spanish colonial trade as including the funneling of all colonial trade through the Seville monopoly, ship licensing restrictions confining the trade to Spanish ships, high export duties not based on value but volume and weight, the scarcity of slaves in Spanish America that spawned agricultural neglect, and smuggling.[477] The reform recommended opening up the colonial trade to nine peninsular cities, eliminating special ship licenses so colonials could use their own ships, replacing numerous duties with an impost of 6% ad valorum on Spanish products and 7% ad valorum on foreign products, and replacing the slave import tax with a head tax.[478] These reforms initially only applied to the Spanish Caribbean islands of Cuba, Santo Domingo, Puerto Rico, Margarita, and Trinidad and were extended to Louisiana by decree on March 23, 1768.[479] The net effect of the reforms on Cuba provided sugar producers a broader market, reduced export taxes, and lowered import costs for heavy and bulky items, stimulating the Cuban sugar industry.[480]

This commercially liberating decree could not work for Louisiana. The Louisianan's produce consisted primarily of furs acquired from the Indians up the Mississippi River and indigo, with some lumber, sugar,

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473 TEXADA, *supra* note 146, at 23.
474 KUETHE, *supra* note 458, at 65.
475 *Id.* at 66.
476 *Id.* at 66-67.
477 CLARK, *supra* note 465, at 171.
478 *Id.*; KUETHE, *supra* note 458, at 72.
479 CLARK, *supra* note 465, at 167, 171.
480 KUETHE, *supra* note 458, at 72-73.

and tobacco.[481] The problem was competition from other Spanish colonies. Guatemala produced superior indigo, furs lacked value in warm Spain, Compeche produced superior lumber, Cuba produced superior tobacco, and Hispaniola produced superior sugar.[482] But English merchants, based in British West Florida, the villages at Manchac, Baton Rouge, and Natchez, would take these products as payment for their goods manufactured in England and extend credit.[483] The English began this trade in 1766 and dominated river traffic until 1777,[484] when the American Revolution ended their smuggling threat.[485] Manchac merchants conducted this trade by receiving consignments on London ships that sailed past New Orleans, then slowly ascended the river, stopping frequently so that planters could purchase items at prices far lower than available in New Orleans since they added no Spanish taxes.[486] Manchac merchants converted two ships into warehouses and used them as floating shops.[487] Manchac merchants also supplied the planters clandestinely with slaves, usually on credit.[488] All these sales escaped the Spanish revenue laws.[489] Governor Ulloa's announcement to enforce the decree in October 1768 constituted a threat to end the colony's only viable trade, along with a little trade with the French West

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481 2 WHITE, *supra* note 58, at 462.

482 CLARK, *supra* note 465, at 168.

483 *Id.* at 166, 169.

484 JOHN FITZPATRICK, THE MERCHANT OF MANCHAC: THE LETTERBOOKS OF JOHN FITZPATRICK, 1768-1790, at 20-21 (Margaret Fisher Dalrymple ed., 1978).

485 WHITAKER, *supra* note 195, at xxvi (explaining that the reconquest of British West Florida so ended smuggling and damaged Louisiana commerce that the Crown mandated the famous 1778 "free" trade *cédula* to temporarily relieve Louisiana and Occidente Florida from the Spanish mercantile system for ten years by reducing export and import duties to 6% of value, allowing importation of Negroes duty free, and allowing reexport from New Orleans and Pensacola).

486 FITZPATRICK, *supra* note 484, at 20-21.

487 3 GAYARRÉ, *supra* note 136, at 45.

488 FITZPATRICK, *supra* note 484, at 215, 304 (payable in indigo within one year, secured by third-party guarantee and ordering foreclosure for nonpayment of principal and interest, respectively); 3 GAYARRÉ, *supra* note 136, at 45. Third-party guarantees provided a major source of the early chattel mortgages. *See* Flint, *Myth*, *supra* note 182, at 17. The English had the monopoly privilege to sell slaves to the Spanish colonies from 1713 to 1739 directly through the South Sea Company and thereafter indirectly by selling to a Spanish company, the Royal Havana Company. CLARK, *supra* note 465, at 171; THOMAS, *supra* note 104, at 31.

489 3 GAYARRÉ, *supra* note 136, at 45.

Indies and the other Spanish colonies.[490] The merchants and planters reacted by driving Ulloa out of the colony.[491]

Charles III chose his bureaucrat with the most experience in reorganizing a province, O'Reilly, to reestablish the province's government, impose Spanish law, and implement the 1768 decree with authority to modify the decree to suit local conditions.[492] O'Reilly, who arrived in Louisiana in July 1769, arrested the leaders of the rebellion, tried them, and executed five of them.[493] To revive the stagnant economy, on October 17, 1769, O'Reilly proposed exporting Louisiana products, primarily lumber, indigo, furs, and some corn and rice, all of no use in Spain, to Havana, most importantly cypress, which O'Reilly invisioned for making boxes to package sugar, in exchange for flour, wine, implements, arms, munitions, clothing, and other essentials.[494] Tobacco, inferior to Cuban tobacco, O'Reilly reserved for the interior trade in exchange for pitch, tar, and meat.[495] All this trade of course violated the basic Spanish mercantile theory mandating all trade with the homeland. The royal decree approving the variation limited the produce to that from the land.[496] O'Reilly further proposed that Louisiana ships conduct this trade, rather than Spanish ships, provided the captains and two-thirds of the crew were Spanish and anchorage fees and custom duties were paid in New Orleans.[497] The royal order approving this proposal strictly prohibited trade between the province and foreign colonial ports and New Spain.[498] The situation was so

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490 CLARK, *supra* note 465, at 168.

491 *Id.* at 167. The Spanish mercantile policies may have been liberal to other Spanish colonies as opening up trade to Spain, but to the former French colony used to free trade, the *cédula* was restrictive. TEXADA, *supra* note 146, at 8, 19.

492 CLARK, *supra* note 465, at 173.

493 2 GAYARRÉ, *supra* note 136, at 303, 320, 347.

494 RAMÍREZ, *supra* note 150, at 154 (citing O'Reilly's New Orleans letter to Arriaga dated October 17, 1769, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 2666) (the cypress would replace Cuban cedar). Julian de Arriaga was the minister of the Indies and Navy. *See* KUENTHE, *supra* note 458, at 26.

495 RAMÍREZ, *supra* note 150, at 154 (citing O'Reilly's letter to Bucareli on April 3, 1770 from Havana, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 1223). Antonio Maria de Bucareli was the Captain-General of Cuba and later Viceroy of New Spain (1771-1779). *See* KUENTHE, *supra* note 458, at 87.

496 RAMÍREZ, *supra* note 150, at 155 (citing Royal Order to the governor in Havana dated May 10, 1771, at Aranjuez, *in* A.G.I., *supra* note 83, Cuba, leg. 1140).

497 *Id.* (citing O'Reilly's letter to Bucareli on April 3, 1770 from Havana, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 1223).

498 *Id.* at 154 (citing Royal Order to Bucarelli to deliver to O'Reilly or if he has left Unzaga dated January 27, 1770, at El Pardo, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 1196).

desperate in New Orleans, even O'Reilly had to exempt some trading for French ships from St. Dominique.[499]

Because of the rebellion, O'Reilly, in November 1769, abolished French law and governmental institutions, contrary to the 1762 cession treaty,[500] replacing them with an abridged Spanish law and Spanish institutions, which action Charles III approved on January 28, 1771.[501] On February 18, 1770, O'Reilly imposed new land grant regulations to encourage settlement of vacant river lands.[502] The regulations required one copy of the grant be deposited with the government, a three-year period to develop the river front, subject to divestment for failure to do so during which time no incumbering of the land could occur, the governor's consent thereafter to transfer the land initially, and, for inland grants, an extension upon proof of supporting at least 100 head of cattle, horses, and sheep plus slaves sufficient to handle the livestock.[503]

A part of O'Reilly's effort to establish a viable colony in the Spanish mercantile system was to eliminate smuggling, which otherwise would supplant Spanish trade as well as evade the province's revenue raising. O'Reilly came down hard on the smugglers, especially the English merchants, who dominated the Louisiana economy.[504] O'Reilly ordered the English merchants to leave New Orleans by October 1769 after their stock was sold,[505] prevented them from returning to collect debts by seizing them and escorting them out of the colony, banned British ships from berthing on the Spanish side of the Mississippi riverbank,[506] and prevented local merchants from paying off credit from English merchants until they had paid off credit from Spanish merchants.[507] The antiberthing rule also eliminated the floating shops.[508] O'Reilly allowed

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499 *Id.* at 156 (citing letter from O'Reilly to Ariaga dated December 10, 1769, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 1223) (exchanging lumber, tobacco, indigo, rice, and beaver skins for flour, soap, coffee, and wine).

500 See *supra* note 147 and accompanying text for the treaty.

501 2 GAYARRÉ, *supra* note 136, at 2, 8, 38; 2 WHITE, *supra* note 58, at 464.

502 RAMÍREZ, *supra* note 150, at 151-53 (citing O'Reilly's New Orleans regulation over land grants dated February 18, 1770, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 1223).

503 *Id.*

504 2 WHITE, *supra* note 58, at 463.

505 Caughey, *supra* note 463, at 49 (citing letter of O'Reilly to Arriaga dated October 17, 1769, *in* A.G.I., *supra* note 83, Santo Domingo, 80-1-7, No. 4).

506 *Id.* (citing letter of O'Reilly to Lt. Gov. Browne at Pensacola dated September 24, 1769) (the order had the effect of eliminating free passage on the Mississippi River since ships had to tack to ascend the river).

507 CLARK, *supra* note 465, at 173-74.

508 RAMÍREZ, *supra* note 150, at 156.

one exception for a fellow countryman who had immigrated from Ireland to Philadelphia in 1760 and had established a trade in Havana before immigrating to New Orleans in 1768.[509] But O'Reilly had known Oliver Pollock, a Catholic, from his earlier mission in Havana, and Oliver Pollock had sold his Philadelphia flour to O'Reilly on O'Reilly's terms, at $15 per barrel, when O'Reilly was desperate to feed his troops, rather than the then inflated market price of $30 per barrel.[510] A grateful O'Reilly awarded Pollock a long-term trading exemption, which Pollock used to become one of English America's most wealthy by the time of the American Revolution.[511] In the interior, in another instruction to the commandants dated February 23, 1770, O'Reilly totally prohibited trade with the English.[512] To avoid English manufactured goods used in the Indian trade, O'Reilly mandated that all goods destined for the Indian trade and furs received from the Indians had to pass through New Orleans and required registration of those engaged in the Indian trade.[513]

English smuggling was not O'Reilly's sole target. He also went after French merchants in New Orleans who had correspondents in Natchitoches and Opelusas in the interior who smuggled goods into Mexico, avoiding Mexico's revenue collection efforts.[514] He expelled the mercantile companies engaged in this trade, the Duralde brothers, and the three Jewish firms of Monsato, Mets, and Brito with correspondents in Veracruz and Compeche.[515]

Recording titles under O'Reilly's recording statute would help end the smuggling of the English enemy. The English merchants would sell goods or slaves and deliver them to the Louisiana planters. In return, the English merchants would take a nonpossessory security interest in future crops, a land interest, or slaves. If not recorded, upon default the Spanish court in New Orleans would refuse to enforce the English

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509 JAMES, *supra* note 394, at 1-4 (noting that the countryman was born in Northern Ireland).

510 *Id.* at 7 n.339 (listed as Catholic in records of St. Joseph's Church, Philadelphia, but his wife was listed as Protestant as were his children).

511 *Id.* at 54-56.

512 RAMÍREZ, *supra* note 150, at 157 (citing articles of instruction given to the commandants of Natchitoches, Arkansas, and Illinois dated February 23, 1770, at New Orleans, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 2582 R.o.2).

513 *Id.* (citing articles of instruction given to the commandants of Natchitoches, Arkansas, and Illinois dated February 23, 1770, at New Orleans, *in* A.G.I., *supra* note 83, Santo Domingo, leg. 2582 R.o.2).

514 *Id.* at 156.

515 *Id.* at 157.

merchants' interests under O'Reilly's recording statute's voidness provision, leaving the goods or slaves with the planters. If recorded, taxing authorities would be alerted to the potential tax, thereby raising the price towards the level of nonsmuggled goods. The fraud and malpractice of Unzaga's decree[516] were the evasions of the revenue laws caused by smuggling. So O'Reilly's recording statute did relate indirectly to the *alcabala*.

O'Reilly's idea was to replace this English smuggling with Cuban trade.[517] However, in April 1770, Spanish officials prohibited Louisiana tobacco exports to Cuba to prevent mixing of inferior Louisiana leaf with Cuban leaf and rejected exports to St. Domingue in return for slaves.[518] Spanish officials did approve O'Reilly's export of lumber to Havana in 1772; however, this trade failed since the Cubans would not pay sufficient prices for the lumber to allow a profit and could not satisfy the Louisiana demand for manufactured goods.[519] The Louisianan economy eventually took off under O'Reilly's successor Unzaga, who ignored the antismuggling trade restrictions to allow in the English merchants, the colony's only outlet for the planters and only source for credit, goods, and slaves.[520]

VII. CONCLUSION

Traditional Anglo-American history propounds a northeast origin for chattel mortgage acts in the 1830s with their subsequent migration west. But Spanish Louisiana and both Floridas had previously spawned a chattel mortgage act sixty years earlier, overlooked by that traditional history since Anglo-American law eventually replaced the Spanish chattel mortgage act.

Legal historians have hypothesized two origins for legal rules: the continuance of an out-dated solution to a particular problem and grafting from a perceived superior body of law. The Spanish chattel mortgage act exhibits a non-Spanish origin as a solution to smuggling, a

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516 *See supra* note 164 and accompanying text.

517 CLARK, *supra* note 465, at 176; 2 WHITE, *supra* note 58, at 462;.

518 CLARK, *supra* note 465, at 176.

519 *Id.* at 176-77.

520 *Id.* at 179. Tobacco became significant in the 1780s with a supply monopoly to Mexico in 1776. *Id.* at 184, 189. Sugar became significant in the 1790s when successive droughts, floods, and worms destroyed the indigo plantations. *Id.* at 183, 187.

problem no longer existent when the Anglo-American jurisdictions continued the statute in various forms.

The Spanish chattel mortgage act did not encompass chattel mortgages on all goods, but mortgages on slaves, ships, and also on land. Furthermore, it also extended to sales of land, slaves, and ships. The act arose in Louisiana immediately after the unsuccessful attempt of the French Creoles to thwart the Spanish mercantile system. O'Reilly, charged with imposing the Spanish mercantile system on the French inhabitants, aimed to establish a viable economic unit in the Spanish mercantile system by fostering Cuban-Louisianan trade and to eliminate English smuggling that sapped Spanish tax revenue needed to support the Louisiana government. Part and parcel of his program included the registration of land, slave, and ship conveyances and incumbrances under penalty of voidance. This would void any such transaction arising in the clandestine trade with the English enemy, but it also would provide a record for the *alcabala* and make credit less expensive by removing the secret lien problem. Eighteenth century Bourbon reforms encouraged incorporation of legal ideas from other successful colonial enterprises. When matters of recordation came to the fore, O'Reilly's Havana lawyers turned to the British Caribbean. These British credit economies had previously developed recording statutes for land and slave conveyances and encumbrances. So O'Reilly grafted these subject matters, land and slave conveyances and slave encumbrances, onto Spain's existing real estate mortgage recording system.