The Light of Dead Stars

Donald Juneau

Follow this and additional works at: https://digitalcommons.law.ou.edu/ailr
Part of the Indian and Aboriginal Law Commons

Recommended Citation
https://digitalcommons.law.ou.edu/ailr/vol11/iss1/7

This Article is brought to you for free and open access by University of Oklahoma College of Law Digital Commons. It has been accepted for inclusion in American Indian Law Review by an authorized editor of University of Oklahoma College of Law Digital Commons. For more information, please contact darinfox@ou.edu.
THE LIGHT OF DEAD STARS

Donald Juneau*

Introduction

The treaty between France and the United States for the purchase of the Louisiana Territory was signed on April 30, 1803. When President Jefferson was informed of its execution, he took steps to learn about the newly acquired territory, calling a special session of Congress to ratify the treaty and to pass legislation authorizing the United States to take possession.

By the time the special congressional session had convened, both Congress and the President were aware that a portion of the Louisiana Territory was extensively settled by Europeans, and that there was a well-established system of laws and regulations that had governed the territory for almost a century. In "An Account of Louisiana," which Jefferson had sent the special session Congress, he sketched out the legal background of the territory as one mostly Spanish in origin. Although Jefferson probably did not know its details, within that legal corpus was a systematic, extensive, and comprehensive set of laws governing and protecting the indigenous peoples of Spanish America. It was found mainly in Recopilación de Leyes de los Reinos de las Indias (hereafter Recopilación), a 1680 compilation of all laws, edicts, rescripts, ordinances, decrees, and regulations made by the Spanish imperial government for the governance of its ultramarine possessions in the western hemisphere. The Recopilación, together with subsequent regulations and ordinances, formed a complex, thorough

* LL.B. Tulane, 1966. Member Louisiana and Navajo Nation bars.

The theses and conclusions in this article are those of the author, but it is incumbent upon him to offer his thanks to a number of persons who variously helped him to arrive at these theses and conclusions, by advice, counsel, and in some cases, criticism: Lawrence Aschenbrenner, Esq.; Professor Hans Baade; Professor Mitchell Franklin; Arlinda Locklear, Esq.; and the Honorable Albert Tate, Jr. None of these persons is responsible for any errors that may be in the article, but if there is any merit in the endeavor, they deserve a great deal of credit for their support, encouragement, and inspiration.

The current officers of this Review wish to thank Larry Siria, former Managing Editor, who undertook the cite-checking for this article.—Editor-in-Chief.

2. See infra text accompanying notes 106-109.
3. See infra text accompanying note 111.
5. See infra text accompanying note 114.
6. For the place of the Recopilación de Leyes de los Reinos de las Indias in the
framework of protections for the indigenous peoples within the colonial domain. This essay will show that these protective provisions in the Recopilación are both a source and a basis of Indian rights in property. Not only does the Recopilación afford a basis for establishing ownership in property derived from immemorial aboriginal possession, it can be used to reclaim property wrongfully dispossessed of an Indian tribe that has used and occupied the lands for a long period of time. The doctrine of justa prescripción, or aboriginal immemorial and adverse possession, has been explicitly received into the law of the United States, and the remainder of the corpus of Spanish law guaranteeing Indian property rights and interests, to the extent not preempted by federal law—indeed, federal Indian law contains analogues to many of these Spanish provisions—is, by a peculiar historical twist, still in effect to this day in the state of Louisiana.

Additional legal bases for protection of Indian tribal sovereignty and property rights are as exigent today as they were during the Spanish colonial era. There is an anti-Indian backlash in full cry today, and an accumulation of legal guarantees for Indian tribes is an urgent necessity for protection against the racism, venality, and greed of those coveting Indian lands waging judicial and legislative war against the Indian people.

It is a matter of supreme irony that the autocratic enactments of the long-dead Spanish empire continue today in full force and vigor. The Recopilación and similar Spanish legislation are as binding upon us, our courts and our legislatures, as more modern legislation, such as the Indian Self-Determination and Education...
Assistance Act of 1975. It is true, as André Schwartz-Bart said in the first words of his novel, *The Last of the Just*, that our eyes record the light of dead stars. The Spanish empire is long gone and, for the most part, is unlamented. Yet it erected a monument to the humanity and decency that its humanist reformers and enlightened despots sought for the Indian people under its domain. So, in order to understand why the *Recopilación* lives and affords a powerful new basis for Indian rights, it is necessary to first review the acquisition and transformation of *Lousiane français* to *Luisiana española*.

I. The Acquisition and Amalgamation of Louisiana into the Spanish Colonial Empire

The Louisiana Territory was originally a possession of France. During the Seven Years' War, France acquired Spain as an ally against Great Britain. France lost the war and, with it, its possessions in North America, but by the Family Compact of 1762, Spain was secretly ceded the province of Louisiana.

It was nearly two years later, in October, 1764, before the colony of Louisiana was informed of the cession. This news was not well received and resulted in heated protests by some colonial leaders, who dispatched fruitless petitions to Louis XV to annul the cession. Political opposition increased in direct proportion to the slowness of the Spanish authorities in taking possession


11. France based its title to the Mississippi Valley, or Louisiana, upon the procès-verbal of April 9, 1692 by Robert Cavelier, Sieur de la Salle, which claimed that immense valley for France. 1 B. FRENCH, HISTORICAL COLLECTIONS OF LOUISIANA 46-50 (1846). See also F. PARKMAN, LA SALLE AND THE DISCOVERY OF THE GREAT WEST, 300-05 (1879).


15. See de Champigny, *Memoir of the Present State of Louisiana*, in 5 HISTORICAL MEMOIRS OF LOUISIANA, supra note 13, at 144-45; 2 GAYARRÉ, supra note 12, at 113-14. The French crown had been indifferent to and neglectful of its Louisiana colony for several
of Louisiana, and it was not until May 21, 1765 that Carlos III appointed as governor Don Antonio Ulloa, a naturalist and scientist, who arrived in New Orleans from Havana on March 17, 1766.16 Because of Louisiana's large and established European population, and perhaps in recognition of the political opposition to the Spanish cession, Ulloa was instructed to make no innovation in its system of government, which was to be entirely independent of the laws and practices observed in the other Spanish-American colonies.17 Despite this conciliatory attitude, Ulloa was unenthusiastically received and the supreme council, the advisory legislative body of the French colonial administration, requested supporting documentation as to his powers and authority.18 Ulloa discerned the sullenness in the populace and the rapid depreciation in French currency and sought to address both problems by issuing a series of commercial regulations aimed at protecting the inhabitants from commercial exploitation.19 These regulations were ignored and the joint administration by Ulloa and the French governor, Aubry, continued, to no one's satisfaction, while Ulloa awaited the arrival of Spanish troops so he could take formal possession of the colony. It was not until January, 1763 that Ulloa, on behalf of the Spanish crown, formally took possession of Louisiana at Balize, at the mouth of the Mississippi River.20 During this time, a conspiracy was hatched upriver in New Orleans, among prominent Louisianians, to expel the Spanish, with the hope of forcing Louis XV to annul the cession and take back Louisiana.21 New Orleans was occupied by insurgents on October 28, 1768, and Ulloa sought refuge on a frigate moored there containing the colonial treasury, when, perhaps apocryphically, the vessel's cable was cut by the rebels on November 1, 1768 and Ulloa sailed on to Havana and made report of the insurrection.22

years preceding the cession, so it is not surprising that the French authorities rejected the petitions to annul the cession. 2 GAYARRÉ, supra, at 71-73, 87-89, 163; J. MOORE, REVOLT IN LOUISIANA: THE SPANISH OCCUPATION, 1766-1770, at 21-34 (1976). Du Terrage, supra note 12, at 253, gives a summary of the petitions.

16. 2 GAYARRÉ, supra note 12, at 142-51.
17. Id. at 130-33.
18. Id. at 132.
19. Id. at 174-75. Ulloa drafted a decree abolishing the superior council and imposing the Recopilación de las Indias and the Spanish judicial system on the colony, which was to have gone into effect at the formal taking of possession of Louisiana. Since there was never a formal taking of possession by him at the capital, New Orleans, this decree never took effect. Moore, supra note 15, at 52-53.
20. 2 GAYARRÉ, supra note 12, at 185-86.
21. Id. at 187-93.
22. Id. at 247-54.
Because of the strategic importance of Louisiana, it was decided to retake the colony for Spain.

For this purpose, the crown appointed a distinguished soldier, Alejandro O'Reilly\(^2^3\) on April 16, 1769, by royal cédula, which gave O'Reilly wide discretion in establishing Spanish sovereignty and putting down the rebellion by setting up the "military as well as political administration of justice."\(^2^4\) After making the necessary military preparations in Havana, O'Reilly's expedition arrived in New Orleans on August 17, 1769.\(^2^5\) Shortly afterwards, O'Reilly arrested the twelve leaders of the insurrection, who were tried and found guilty. Five were executed, and the rest were sentenced to varying terms of imprisonment.\(^2^6\)

Pursuant to the instructions from the crown, O'Reilly's policy was to integrate Louisiana into Spain's ultramarine domain in America.\(^2^7\) O'Reilly recommended (and his government approved) that Louisiana should be subject to the same laws as the other Spanish colonies, that all judicial proceedings should be in Spanish, and that a tribunal be set up of judges versed in both French and Spanish law.\(^2^8\) On November 25, 1769, O'Reilly promulgated

\(^2^3\) See his biography in Bjork, *supra* note 12, at 127-28; du Terrage, *supra* note 12, at 302-03.


\(^2^5\) Bjork, *supra* note 12, at 130-32.

\(^2^6\) 2 GAYARRÉ, *supra* note 12, at 340-50. These six were released from their prison in Havana after one year of incarceration.

\(^2^7\) Bjork observes:

It was Spain's first intention, when occupying Louisiana, to make no innovation in its forms of government, which was to be entirely independent of the laws and practices observed by other Spanish-American colonies. Louisiana was to be considered a distinct colony, remaining under its own administration, council and other tribunals. The direction of Louisiana and its correspondence was reserved to the minister of State. Due, however, to the fatal results of this policy, O'Reilly was instructed to establish "that form of government and administration of justice prescribed by our wise laws, and by which all the states of his majesty in America have been maintained in the most perfect tranquility, content, and subordination."

Bjork, *supra* note 12, at 150 (footnotes omitted; language in quotation marks from O'Reilly's Instructions of November 25, 1769). See also 5 HISTORICAL MEMOIRS OF LOUISIANA, *supra* note 13, at 25.

\(^2^8\) Bjork, *supra* note 12, at 151. Professor Hans Baade notes that the insurrectionists were prosecuted and sentenced under provisions of Spanish law, and that O'Reilly approved these sentences on October 24, 1769 "según nuestras leyes." Baade, *Marriage Contracts in French and Spanish Louisiana: A Study in "Notarial" Jurisprudence*, 52 Tul.

Published by University of Oklahoma College of Law Digital Commons, 1983
his ordinances and instructions for the administration of justice in Louisiana. Because Louisiana had no Spanish law books or Spanish lawyers, these ordinances were partially stop-gap in nature, and it was subsequently ordered by the Council of the Indies that some copies of the digests (Recopilación) of the laws of the Indies, and of Castile, be sent to the colony, and deposited among the archives of the ayuntamiento, in order that the natives of the country may instruct themselves in the form of our government, more minutely than they can from the manual [i.e., O'Reilly's instructions] drawn up, with such discretion, by the said general, inasmuch as the latter, though very clearly and methodically expressed, is only an abridgment or compendium.

These instructions are a paraphrastic summary of the Recopilación, the Nueva Recopilación (1567), and the Siete Partidas (1343). The instructions were printed, and presumably distributed broadcast, in French, and to military commandants of outlying posts.

The instructions do not deviate from the Recopilación, and, as mentioned, served as a manual for practitioners and notaries who were unacquainted with Spanish law, as is clear from the preamble to the First Instructions:

L. REV. 1, 35-36 (1978). The abrogation of French law and Spanish law, imposed in its stead, was necessary because of the legal background of some of the leaders of the insurrection:

The heavy involvement of the French Louisiana legal "establishment" in the events of October, 1768 must have made the suppression of the ancien droit in that Spanish province a virtual certainty. French public law, including penal law, disappeared as a result of O'Reilly's judgment of October 24, 1769 [approving the submission of the prosecutor and sentencing the insurrectionists, which was based on "nuestras leyes."]

Baade, supra, at 36 (footnote omitted).


30. The Report to the King by the Council of the Indies, February 27, 1772, as set out in 5 HISTORICAL MEMOIRS OF LOUISIANA, supra note 13, at 251.

31. Baade, Real Estate, supra note 28, at 682-83; Bjork, supra note 12, at 162-64.

32. Baade, Real Estate, supra note 28, at 683 n.115; Bjork, supra note 12, at 164 n.35.

33. The two sets of Instructions may be found in 5 HISTORICAL MEMOIRS OF LOUISIANA, supra note 13, at 251-88 and Ancient Jurisprudence of Louisiana, 1 LA. L.J. 1-60 (Aug. 1841). This latter translation of the Instructions is footnoted as to the derivative provisions of the Recopilación de las Indias. There are other translations made by Joseph White in 1829 under a commission from the President. White's covering letter to Secretary of State Henry Clay explains how he got involved in the area by being United States commissioner for the adjudication of land titles under the Florida Treaty of 1819. 5
Instructions as to the manner of instituting suits, civil and criminal, and of pronouncing judgments in general, in conformity to the laws of the Nueva Recopilación de Castilla, and the Recopilación de las Indias, for the government of the judges and parties pleading until a more general knowledge of the Spanish language, and more extensive information upon those laws may be acquired: digested and arranged by Doct. Don Manuel Joseph de Urrustia, and the counsellor Don Felix Rey, by order of his excellency Don Alexander O'Reilly, Governor and Captain General of this province, by special commission of His Majesty.  

Subsequent ordinances and regulations did not change the applicability of the totality of Spanish law, including the Recopilación, to Louisiana. Thus, in 1797, Governor Gayoso issued instructions for the distribution of lands. These instructions were obviously supplementary to the more general Spanish legislation on the subject. The regulations of the Intendant Morales in 1794 were similarly devised to take into account the peculiar settlement patterns of the colony. Having established that O'Reilly brought Spanish law with him, we turn to an examination of the Recopilación de las Indias and its provisions governing Indians.

II. The Recopilación de las Indias

The Recopilación de las Indias was first published in 1680 by Carlos II in order to gather together in one publication "muchas Cédulas, Cartas, Provisiones, Ordenanzas, Instrucciones, Autos de gobierno, y otros despachos que por la dilatación y distancias de unas Provincias a otras no han llegado a noticia de nuestros vasallos." The Recopilación begins by decreeing that the laws of metropolitan Spain be observed in all cases where no provision is made in the Recopilación, but made clear, however, that the laws specifically passed for America shall control, the law of

---

35. 5 American State Papers-Public Lands 730 (White tr. 1860).
36. Id. at 431.
37. Recopilación, supra note 6, I, iii.
metropolitan Spain notwithstanding. It devotes one of its books, Book VI, to Indian relations, and a substantial number of other provisions concerning Indians are scattered throughout. Before reviewing this "Indian Code," however, it would be well to understand the reformist impulses that brought it forth.

At the beginning of the European invasion and colonization of the western hemisphere, a process initiated with the "discovery" by Columbus in 1492, the indigenous inhabitants of the Americas were regarded by some of the Europeans as a distinctly inferior species of human being, if human beings at all. It is not surprising that thus perceived, the Indians were treated inhumanly by the invaders. Specifically, Indians were enslaved and their labor was exploited by the device of the encomienda, whereby Indians were given or "commended" by the crown to Spaniards, called encomenderos, who were given the right to compel labor and tribute out of the Indians. The encomenderos were obliged to

---

38. Recopilación, II, 1.2; II, 2.1 (The first citation is to Book II, title 1, Law 2 of the Recopilación de Leyes de los Reinos de las Indias).

39. Beginning with Christopher Columbus, the Indians were considered "deficient in civilization according to Spanish standards of measurement." R. Berkhofer, Jr., The White Man's Indian: Images of the American Indian from Columbus to the Present 11 (1978). Professor Berkhofer demonstrates how the narratives of Columbus and Amerigo Vespucci set the tone for later European notions of Indians, and concludes:

Using the twin criteria of Christianity and "civilization," Spaniards found the Indian wanting in a long list of attributes: letters, laws, government, clothing, arts, trade, agriculture, marriage, morals, metal goods, and above all religion. Judgments upon these failures might be kind and sympathetic or harsh and hostile, but no one argued that the Indian was as good as the European in this early period.

If the Aztecs, for example, possessed sophisticated governmental, agricultural, and social systems, so too they practiced a religion that appeared to Spanish eyes as the very worship of the Devil, with its emphasis on human sacrifice. Indians might, therefore, have the wrong or no religion, have misguided or no government, in addition to other negative qualities attributed to the stereotype, but they always stood in Christian error and deficient in civilization according to Spanish standards of measurement.

Under this impression, no wonder Spaniards debated what means were necessary to bring the Indian in line with their ideals of Christian civilization according to European criteria. Was the nature of the Indian so bestial as to demand force and ultimately enslavement to accomplish his conversion to Christ and Spanish ways, or was the Indian sufficiently rational and human to achieve these goals through peace and example alone?

Id. at 10-11. See also, in this connection, A. Paden, The Fall of Natural Man: The American Indian and the Origins of Comparative Ethnology 10-17 (1982).

provide religious instruction to the Indians and to protect them, but, in practice, the encomienda resulted in "almost unchecked exploitation of the Indians," and gave rise in turn to the first protective legislation for the Indians: the Laws of Burgos, promulgated in 1512. The Laws of Burgos, however, proved unsatisfactory, and the European exploitation under the encomienda system continued unabated. Protests of the injustices began to be widespread and the lead reformer—one may call him even a minor prophet—was Bartolomé de Las Casas, repentant encomendero, Dominican friar, bishop of Chiapas, and polemicist. Early on, Las Casas became a committed enemy of the encomienda, attempted unsuccessfully to have it abolished, and was one of the persons who persuaded Pope Paul III to issue his bull, Sublimis Deus, in 1537. The notion that Indians were not human beings was anathematized in Sublimis Deus, and the Pope proclaimed that Indians possessed human and civil rights that were to be respected:

Indians and all other people who may later be discovered by Christians, are by no means to be deprived of their liberty or the possession of their property, even though they be outside the faith of Jesus Christ; and that they may and should, freely and intelligently, enjoy their liberty and the possession of their property; nor should they be in any way enslaved; should the contrary happen it shall be null and of no effect.

Sublimis Deus did not stop the infamy of exploitation, but it gave an important papal impetus and legitimacy to the reform movement and the issuance of ameliorative legislation, the New Laws

42. Hanke, Struggle, supra note 41, at 20.
43. The best edition of the Laws of Burgos is Altamira, El Texto de las Leges de Burgos de 1512, Rev. de Hist. de America (No. 4, 5 Dic. 1938), and are summarized in Byrd Simpson, supra note 40, at 50-55.
44. See Giménez Fernandez, Fray Bartolomé de Las Casas: A Biographical Sketch, Bartolomé de Las Casas in History—Toward an Understanding of the Man and His Work 67 (J. Fried & B. Keen ed. 1971).
46. Translated in Hanke, All Mankind, supra note 45, at 21.
of 1542, in the drafting of which Las Casas played a considerable part. The struggle between the exploiters and the indigenists came to a head in 1550, when Las Casas debated Juan Ginés de Sepúlveda at Valladolid. Ginés de Sepúlveda, a theologian, Aristotelian, and militarist, maintained that Indians, as pagans, should be subjected to the Christian faith by force, if necessary, and adopted the arguments of John Major, a Scottish theologian, to that effect. Major and Ginés de Sepúlveda advocated the view that the political leaders of the Indians should be deprived of their authority in order that their subjects accept the Christian faith, and that these leaders should be deposed if they refused to accept Christianity. Las Casas sarcastically accused Major of ignorance in matters of the New World’s aborigines and pointed out that the polity of the Indians was entitled to be respected, including the obedience of the subjects to their lords and the payment of taxes. Las Casas maintained the legitimacy of Indian government (in effect recognizing, in a prescient manner, the modern concept of Indian tribal sovereignty) since the Indians had their own government, their own laws, and the right to choose their own leader, even though a previous leader had been deposed by the Pope himself for a just cause.


48. See generally Hanke, All Mankind, supra note 45, and Losada, The Controversy between Sepúlveda and Las Casas in the Junta of Valladolid, in LAS CASAS IN HISTORY, supra note 44.

49. See Hanke, All Mankind, supra note 45, at 69-70, 83-99, for Las Casas’ rebuttal to Sepúlveda’s arguments seeking to justify war against the Indians.

50. Id. at 118. Las Casas’s polemic against Ginés de Sepúlveda has recently been translated into English. B. LAS CASAS, IN DEFENSE OF THE INDIANS—THE DEFENSE OF THE MOST REVEREND LORD, DON FRAY BARTOLOMÉ DE LAS CASAS, OF THE ORDER OF PREACHERS, LATE BISHOP OF CHIAPA, AGAINST THE PERSECUTORS AND SLANDERERS OF THE NEW WORLD DISCOVERED ACROSS THE SEAS (S. Poole tr. 1974).

51. LAS CASAS, supra, at 326-41; Hanke, All Mankind, supra note 45, at 100-04.

52. LAS CASAS, supra note 50, at 339-40.

53. Las Casas cites the admonition of Christ to render unto Caesar that which belongs to him, as well as Saint Paul’s command that Christians should be subject to their nonbelieving lawful authorities, including the payment of taxes. Id. at 331-52. He also invokes Saint Thomas Aquinas to the effect that it is lawful for a nonbeliever to exercise judicial power over a Christian. Id. at 333.

54. Id. at 337-38. One commentator has remarked that this position foreshadows the modern concept of universal suffrage and a parliamentary system of democracy. See Losada, La Apología Obra Inédita de Fray Bartolomé de Las Casas: Actualidad de su Contenido, 142 BOLETÍN DE LA REAL ACADEMIA DE HISTORIA 201, 242 (1968).
The second major point made by Las Casas in opposition to Ginés de Sepúlveda was related to the preceding argument as to polity: the just title to the New World. Ginés de Sepúlveda had invoked the name of the theologian Francisco de Vitoria\(^55\) as one who approved of war against the Indians. But Las Casas pointed out that, far from supporting Ginés de Sepúlveda, Vitoria had, rather, thoroughly destroyed a major prop of Ginés de Sepúlveda's argument—the "donation" to the Spanish king of the New World by Pope Alexander VI in his bull, *Inter Caetera* of June, 1493.\(^56\)

Vitoria resoundingly refuted the notion that Spanish title to the New World could rest upon *Inter Caetera*, or even the right of conquest, by noting the obvious fact that since neither the Pope nor the Holy Roman Emperor (who was also the king of Spain), had dominion over the whole world, neither person could give away that over which he had no dominion, possession, or control,\(^57\) and the refusal of the Indians to recognize this assertion of power by the European potentates did not justify making war on the former, forcing them to convert to Christianity or depriving them of their property.\(^58\)

Vitoria did propose lawful titles to the New World, but Las Casas observed that, in these arguments, Vitoria either spoke conditionally or assumed facts that did not exist.\(^59\) In the main,

---


59. B. Las Casas, *Tratado Comprobatorio del Imperial Soberano, II Tratados de Fray Bartolomé de Las Casas* 1066-69, 1174-81 (1965). *See also* Hanke, *Struggle, supra* note 41, at 153-55. One "lawful title" of Vitoria is worthy of mention, the role of the Spanish crown as guardian or trustee for the Indian principalities in assisting the Indians with prefects, governors, and other governmental adjuncts, as long as it was for the benefit of the Indians. De Vitoria, *supra* note 57, at 94-95. As will be seen infra, the special governmental infrastructure created under the *Recopilación de las Indias* for
however, Las Casas was in agreement with Vitoria: the Indians should retain all their property, estates, and juridical powers, and he accused the Spanish settlers of unlawfully taking away Indian mines and lands.⁶⁰

There is no question but that Las Casas and his band of reformers and polemicists influenced the passage of further reform legislation by the crown. The writings and activity of Vitoria, his disciple, Domingo de Soto,⁶¹ Las Casas, and others was the immediate impulse for the great reform ordinance of 1573, by Philip II, which eschewed mention of the word “conquest” and proscribed all forceful means of “pacification” of Indians unless there was an absolute need for them, and then only with as little harm as possible.⁶² Indeed, the practical effect of the Great Valladolid Debate of 1550 was that the royal cédulas of the Council of the Indies, which initiated reforms and protection for the Indians—later incorporated into the Recopilación—were inspired by, and were practical applications of, the philosophy of the reformers.

The themes sounded by Las Casas, Vitoria, de Soto and other reformers can therefore be clearly seen in the Recopilación. To begin with, there was the express disclaimer of title by conquest in the 1573 Ordinance:

For suitable causes and considerations, it is proper that in all the grants which are made out for new discoveries, the word “conquest” be avoided, and in its place the words “pacification” and “colonization” used. Since, desiring to act with all peace and charity, it is our will, that this word, by being interpreted contrary to our intention, should not give opportunity or excuse to the grantee to do violence or injury to the Indians.⁶³

Indians was a response to the guardian obligation envisaged by Vitoria. This has, in turn, been reflected in United States legislation for the Indians because the federal government has the duties of a trustee for its Indian wards. See Morton v. Ruiz, 415 U.S. 199, 236 (1974).

⁶⁰ See Hanke, All Mankind, supra note 45, at 113-22. Las Casas did not, however, succeed in the immediate accomplishment of his main political goal, that of having the encomiendas abolished, but they did become less and less important for the colonialist economy of the crown and were finally abolished in the eighteenth century.

⁶¹ As to Domingo de Soto, his contribution is discussed in V. Carro, La Teología y los Teólogos-Juristas Españoles ante la Conquista de América 523-37 (2d ed. 1951).

⁶² See J. Manzano y Manzano, La Incorporación de las Indias a la Corona de Castilla 206-09 (1948); F. Chevalier, La Formación de los Latifundios en México-Tierra y Sociedad en los Siglos XVI y XVII, at 234-56 (2d ed. 1976).

⁶³ Recopilación, IV, 1.6:
El mismo, [Don Felipe, II] ordenanza 29 de poblaciones. Don Felipe, IV, en Madrid á II de junio de 1621. Don Carlos, II y la reina gobernadora.
It was further expressly recognized that the Indians had their own governments, which had issued their own laws for their own governance, and that this aboriginal legislation should be obeyed and enforced:

We order and command that the laws and good customs which the Indians anciently had for their good government and order, and their usages and customs which they have observed and kept since they became Christians, and which are not incompatible with our holy religion, or with the laws of this book, as well as those which they have recently made and declared, be kept and executed, and, it being necessary, by these presents we approve and confirm them, together with what we are able to add thereto that is useful to us and appears to us accordant with the service of our Lord God, and our own, and the preservation and Christian government of the natives of these provinces, without prejudice to what has already been done, and their good and just customs and their own statutes.  

In connection with this recognition of Indian government, Europeans were forbidden to seize the property of Indians under the pretext of taking sides in a dispute between Indians:

The discoverers by land or sea shall not involve themselves in any war between certain Indians and others, nor foment nor
assist in any controversies, for any cause or reason whatsoever; they shall do them no harm nor injury, nor take their property, except by way of barter, or gifts made of their own free will.\textsuperscript{65}

But there was an even stronger guarantee of due process:

We order and command the Governors, chiefs and new discoverers, not to suffer or permit anyone to make war against the Indians, except in the cases mentioned in the Title concerning war, or to do them any other wrong or injury whatever, or to take from them anything of their property, fortune, cattle or crops, without payment in advance, and full satisfaction given, provided that purchases and exchanges shall be of their own free will and accord, and that punishment be inflicted upon those who maltreat or injure them, in order that they may easily come to a knowledge of our Holy Catholic Faith.\textsuperscript{66}

Book VI of the \textit{Recopilación} is specifically devoted to Indian affairs, and it begins by giving Indians certain preference rights:

Having to treat in this book the subject of the Indians, their liberty, growth and protection, as is set forth in the titles of which it is composed; it is our will to charge upon the viceroy, Presidents and Audiencias, the duty of looking after them and

\textsuperscript{65} \textit{Id.}, IV, 1.10:
Don Felipe, II, Ordenanza 20 de poblaciones.

\textit{Que los descubridores no se embaracen en guerras ni bandos entre los Indios, ni los hagan daño, ni tomen cosa alguna.}

\textit{Los descubridores por mar, ó tierra, no se embaracen en guerra ninguna, entre unos y otros Indios, ni los ayuden ni revuelvan en cuestiones por ninguna causa, ni razón que sea: no les hagan mal, ni daño ni tomen sus bienes si no fueren por rescate ó dándoselo ellos por su libre voluntad.}

\textsuperscript{66} \textit{Id.}, IV, 1.8:
El Emperador D. Carlos, Ordenanza 8 de 1523.

\textit{Que no se consentía que a los Indios se les haga guerra, mul, ni dano, ni se les tome cosa alguna sin paga.}

\textit{Ordenamos y mandamos a los Gobernadores, Cabos, y nuevos descubridores, que no consentan, ni permitan hacer guerra a los Indios, si no fuere en los casos expresados en el título de la guerra, ni otro cualquier mal, ni daño, ni que se les tome cosa ninguna de sus bienes, hacienda, ganados, ni frutos, sin que primero se les pague, y de satisfacción equivalente, procurando, que las compras, y rescates sean a su voluntad, y entera libertad, y castiguen a los que les hicieren mal tratamiento, o daño, para que con facilidad vengan en conocimiento de nuestra Santa Fé catolica.}

It is to be noted that this provision is superior to the due process guarantees in the fifth and fourteenth amendments to the United States Constitution, in that it requires payment \textit{in advance}.
giving the proper commands, in order that they may be protected, favored and relieved, because we desire that the injuries which they suffer be remedied, and that they may live without molestation or annoyance; taking this charge as established once for all, and having always before them the laws of this compilation which favor and protect them, and defend them from all injury whatsoever, that they observe them and cause them to be observed with great care, punishing those who violate them with special and rigorous severity; and we ask and charge upon the ecclesiastical authorities that, for their part, they act as true spiritual fathers of this new Christendom, and preserve all of them in their privileges and prerogatives, and keep them in their protection.67

Paramount in the scheme of protection under the Spanish colonial regime is the Indians’ ownership of land. To begin with, safeguards were set up to guard against the improvident sale of Indian properties, real or personal, and at the same time, there was an express recognition of the right of Indian ownership:

When the Indians sell their property, immovable and personal movable, according to what is permitted to them, it shall be proclaimed by public outcry and sold at public auction, in the presence of a judicial officer—the immovable property for a period of thirty days, and movable property for nine days; and whatever shall be sold in any other way shall be of no validity or effect; and if it shall seem proper to the judge for sufficient reason to shorten the time, he can do so in regard to personal property. And since the property which the Indians sell is ordinarily of small value and if in all of such sales it was necessary

67. Id., VI, 1.1:
Don Felipe, II, en Madrid, á 24 de diciembre de 1580. Don Carlos, II, y la reina gobernadora.

Que los indios sean favorecidos, y amparados por las justicias eclesiasticas, y seculares.

Habiendo de tratar en este libro la materia de indios, su libertad, aumento, y alivio, como se contiene en los títulos de que se ha formado: Es nuestra voluntad encargar á los virreyes, presidentes, y audiencias el cuidado de mirar por ellos y dar las ordenes convenientes para que sean amparados, favorecidos, y sobrellevados, por lo que deseamos que se remedien los daños que padecen, y vivan sin molestía, ni vejacion, quedando esto de una vez asentado, y teniendo muy presentes las leyes de esta Recopilacion, que les favorecen, amparan, y defienden de cualesquier agravios, y que las guarden y hagan guardar muy puntualmente, castigando con particular y riguosa demostracion á los transgresores. Y rogamos y encargamos a los Prelados eclesiasticos, que por su parte lo procuren como verdaderos padres espirituales de esta nueva cristianidad, y todos los conserven en sus privilegios y prerogativas, y tengan en su proteccion.
to follow these formalities it would involve as much expense as the principal amounts to, we order that this law be observed and enforced, in regard to whatever exceeds thirty pesos of usual gold, and not in smaller amounts; for in this case it will be sufficient for the Indian vendor to appear before any ordinary judge, and ask leave to make the sale; and such judge, ascertaining by some investigation that what he wishes to sell is his own, and that its alienation is not injurious to him, shall give him permission, placing his authorization upon the writing which the purchaser shall execute, being of full age and having capacity to that end.

As a result of the efforts of the reformers, the main purpose of Spanish Indian policy was that Indian settlements and lands were to be separate and apart from those of Europeans. The crown was firm in its protection of the Indians' property rights, both as individuals and as groups. From 1503, through its instructions to Governor Ovando, it endeavored to assure them that their lands would be sold to the Spanish at "fair" prices. Allotting lands for the neighboring settlers of Spanish towns could only be carried out in a manner that would not prejudice the Indians, in accordance with the colonizing ordinances of 1573.

Upon formulating the program of the *reducciones*, a decree of 1560, later codified, ordered that the establishment of a *reducción* would in no way mean that the lands previously possessed by the Indians would be taken from them. On the other hand, the *reducción*, or Indian village, should be surrounded by a zone set aside for their fields and pastures. This zone, which in New Spain was called the *fundo legal*, was, by its special nature, inalienable. Viceroy Falces, in 1567, fixed its area at 500 varas [one vara = 2.8 feet]. As Francois Chevalier says, "in a country somewhat mountainous, dry and poor, that general minimum . . . seems very paltry for allowing a community to live independently." In 1637, the *fundo legal* was increased to 600 varas, beginning at the last house of the village, and then in 1695, from the church. Other ranches could not be established less than 1,100 varas from an Indian village. The ordinances of Alfaro in 1618, which at that time were directed to a scarcely populated region, or rather, to the provinces of the Río de la Plata, ordered that new *reducciones* have a "common" one league long for their livestock, that is, some six thousand varas. Livestock ranches could not be located less than one league from an already existing Indian village and three leagues from a new *reducción*. This precept was included in the 1680 *Recopilación*. The area reserved for Indian resettlement was established to be one league square, but the grazing boundary was two leagues. Whatever interpretation is given to the extension of the inalienable Indian lands, the crown, foreseeing any kind of eventuality, ordered in the 1570s that no sale of Indian possessions be made without judicial permission, a precept which was later incorporated into the *Recopilación*. In New Spain, at least, an ordinance in 1619 required that the leasing of Indian lands be accorded the same legal precautions in effect for sales of Indian lands. Finally, in the 1640s, in connection with the sale and settlement of lands, the monarch decreed that vacant and unoccupied lands be reserved for the Indians and that lands irrigated or improved by them "in no case" be sold or taken away.
legislative expression of this policy is found in the provision that Indians would be willing to
be brought into settlements more willingly and more quickly if their lands and farm-buildings are not taken from them in those areas in which they no longer reside. We ordain that there be no change in this, and that the Indians possess in the same manner as before in order that they may cultivate and improve these properties.\(^{70}\)

Non-Indians were prohibited from residing or even passing through Indian villages.\(^{71}\) European livestock was to be separated by an extensive protective zone, at least one league square, in which the livestock of the Indians was to have exclusive rights of pasturage:

The locations where Indian villages and Indian reserves are to be placed shall have sufficient water rights, sufficient farmland and uncultivated fertile land, and shall be provided with entrances and exits, land suitable for cultivation and enough common land for pasturage of at least one league in extent, in order that the cattle of the Indians be not intermingled with those of the Spanish.\(^{72}\)

This entire series of legal provisions was based on a logical and consistent philosophy. No one expresses better than the Viceroy Toledo the methods that this agrarian policy dictated: "The Indian policy of this kingdom consists of their holding lands as property . . . and their labor creates a spiritual good in that they are not idle and that they are able to pay their taxes to their communities . . ." Thus, the common good of the kingdom was linked at the same time to the religious good of the poor Indian laborer. It would be anachronistic to see in this mixed motivation a hypercritical cynicism. Fear of idleness and the belief in the salutary advantages related to growing crops were concepts deeply rooted since medieval times. M. Mörner, LA CORONA ESPAÑOLA Y LOS FORANEOS EN LOS PUEBLOS DE INDIOS 168-69 (J. Hoxie tr. 1970).

70. Recopilación VI, 3.9:
Don Felipe, II, en Toledo, a 19 de Febrero de 1560.
Que a los Indios reducidos no se quiten las tierras, que antes hubieren tenido. Con más voluntad y prontitud se reducirán a poblaciones los Indios, si no se les quitan las tierras y granjerías que tuvieren en los sitios que dejaren: Mandamos que en esto no se haga novedad, y se les conserven como las hubieren tenido antes, para que los cultiven, y traten de su aprovechamiento.

See also id., VI, 1.23 (Ordinance of Philip III, 1609). This last provision shows a recognition by the crown that some Indians were not provided with enough land of their own, so that they could supplement their subsistence by taking time off from the encomienda to farm their own individual and communal lands.

71. Id., VI, 3.21. The evolution of this provision is analyzed in Mörner, supra note 69, at 125-28. See also Recopilación VI, 9.14, and the discussion in Mörner, supra at 129-31.

72. Recopilación VI, 3.8:
Not only was this physical and economic separation necessary for the protection of the Indians, it was also important for the colonial economy. The Indians were to be the laborers and producers of crops and the colonial authorities desired to replicate feudalism in the New World, with the Indians as serfs.\(^7\)

This separatist policy is consistently expressed throughout the *Recopilación*. Thus, no land granted to a Spanish settler would be in prejudice to any rights of Indians, and if there be such a conflict, the Indians were to be restored to possession and ownership.\(^7\) Indian land was inalienable, and royal officials were to see to it that the rights of the Indians were protected.\(^7\) An individual Indian could not sell tribal land,\(^7\) and an Indian had a preference right to purchase vacant lands.\(^7\)

To see that these provisions were enforced, royal protectors were appointed,\(^7\) and the viceroy was to be informed of the con-
ditions of the Indians by high church officials and visiting judges. The fiscal real, or king's attorney, of the royal audiencia, was appointed to represent the Indians should they be involved in litigation. The visiting (or circuit) judges were charged with determining if European livestockmen were using Indian lands to the detriment of Indians and were empowered summarily to expel the encroachers. The fiscal real was to be notified each time real property was conveyed and was charged with the duty of investigating the sale or grant to see whether it would affect any Indians. The fiscal real was to set aside all royal grants or homesteads if the land had belonged to the Indians and had been illegally sold to a European. These royal grants or homesteads, called composiciones, were to be offered to the Indians on a preferential basis.

This, then, was the body of law brought to the somewhat unwilling colony of Louisiana by General O'Reilly in 1769. As has been seen, his regulations were a broad summary of the law of colonial Spain and were promulgated until such time as Spanish lawyers and law books could be brought to the colony to serve the legal needs of the population. Later on, when the Intendant Juan Ventura Morales issued regulations governing the issuance of land grants, the Recopilación was cited as authority that only vacant lands should be granted, and it was specifically provided that "the Indians owning land throughout the whole of this Government, shall not be disturbed, but, on the contrary, shall

representation of reservation Indians. However, Indians may sue in their own behalf, Poapbybitty v. Skelly Oil Co., 390 U.S. 365, 370-72 (1968), especially in those cases where there may be a conflict of interest. E.g., New Mexico v. Aamodt, 537 F.2d 1102, 1107 (10th Cir. 1976), cert. denied sub nom. New Mexico v. United States, 429 U.S. 1121 (1977); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D.C. Cir.) supplemented 360 F. Supp. 669 (D.C. Cir. 1973). In Pyramid Lake Tribe, the D.C. Circuit reversed the awarding of attorney's fees against the federal government, even though the private counsel were successful in vindicating an important interest of the tribe that the government had failed to protect in its role as a fiduciary. Pyramid Lake Paiute Tribe v. Morton, 499 F.2d 1095 (D.C. Cir. 1974), cert. denied, 420 U.S. 962 (1975).
be maintained and supported: and the commandants, syndics, and surveyors, shall pay the strictest attention to it, in order to make their reports in consequence thereof."

When the United States land commissioners reviewed the practices of the former Spanish colonial land officials regarding Indian land holdings, it was found that the Indians held original title, superior to that of the crown and protected by the crown. After noting that the Spanish authorities divided the Indians into two categories, Christian Indians, who had rights identical with those of Spanish subjects, "and the ordinary tribes or natives of Indians within the limits of Louisiana," the commissioners, quoting former Spanish officials familiar with the legal tenure of the Indian tribes, said:

"We always considered the title from the Indians to their villages the best of titles, because the original property of the soil was in them; and when this country was conquered, the laws of the conquerors were enforced, but the property of the aborigines was held sacred. Hence the difference between the titles of Indians and other subjects. The other subjects who wanted land must demand and have a written title. It was not necessary for the Indians, because they already had a title to the land they claimed. Their title originated in, first, occupancy, cultivation, and settlement. The Indians never claimed other lands than their villages, and when they did, it was given them by the Government. There never was an instance of the Government of Spain taking land from Indians, especially their villages. Even when the Indians had abandoned some villages, because their hunting was exhausted, and had established new ones, by the grant of the Spanish Government their deserted villages were always considered as their property, subject to their disposal, and the inhabitants never suffered to settle there, but were always driven off.

"There was no time fixed in which a deed must be presented for approbation. It could be presented in one year, or a hundred years, and it would receive the sanction of the Government. The laws made it necessary when the Indians sold their

86. Article 31 of the Regulations of the Intendant Morales. 3 American State Papers-Public Lands, at 435. See also Article 32 of the Regulations, id.

87. Report of Board of Land Commissioners, Western District of Louisiana, April 6, 1815, 3 American State Papers, at 86.
lands to have the deeds presented to the governor for approba-
tion. This was only a form, as the governor in all cases ap-
proved, and never refused.

"The villages of the Indians never consisted of less than a
league, and often two leagues or more in front; and it was the
custom of the Spanish Government, *whenever they granted land to Indians*, to give them a league or more square. . . ."

The lands claimed by the Indians *around their villages*, were
always considered as their own, and they were always protected
in the unmolested enjoyment of it by the Government against
all the world, and has always passed from one generation to
another, so long as it was possessed by them as their own prop-
erty. The Indians could always sell their land with the *consent of the Government*; and if, after selling their village and the
lands around it, they should, *by the permission of the Govern-
ment*, establish themselves elsewhere, they might again sell, hav-
ing first *obtained the permission of the Government*, and so on,
*as often as such permission was obtained*; and no instance is
known where such permission has ever been refused or withheld.
These sales were passed before the commandant of the district,
and was always considered good and valid without any order
from the Government." 8

The commissioners later opined that the quoted statements as
to the paramountcy of Indian title and its nondefeasibility without
viceregal sanction were not heterodoxy. However, as has been seen,
it was, of course, the commissioners, not former Commandant
De Blanc or Surveyor Trudeau whose assertions were unorthodox.
It has been shown that the Indians did not relinquish their lands
if they were moved to another village site and that the league square
for a grazing common was the minimum zone of protection around
an Indian village. The commissioners were probably unversed in
Spanish law, and, in any event, their arguments in favor of their
position are not supported by any citation or reference but rest
upon a shaky framework of casuistry and vague inference. It is
significant, moreover, that the commissioners knew of only three
government-approved sales of Indian lands during the Spanish
domination. This is proof of the observance of the protective laws,
rather than the latitudinarianism, if not noncompliance, which
the commissioners seem to deduce from the historical record.

88. *Id.* at 94-95 (emphasis in original).
What seems to horrify the commissioners the most is De Blanc's assertion that Indian title is the best of all titles by virtue of their being the aboriginal inhabitants of the country. The commissioners do not argue so much that this aboriginal title never existed, but that it was extinguished by adverse possession or prescription by the European settlers. Yet it has already been seen that the Europeans could not usurp or prejudice Indian land holdings or real property rights. Rather than an Indian title being extinguished by prescription, the Indian could maintain prescriptive rights even against the crown by virtue of the doctrine of *justa prescripción*. It is that doctrine, "one of the profoundest factors in human thought," which now must be examined.

III. *Justa Prescripción*

In view of the cruelty and genocidal character of the Spanish occupation of the Americas, it is hard not to be cynical about the laws passed to protect the Indians. It may be said that many of these laws were never observed and that many more were obeyed in the breach. Some would say that the imperial decree that forbade use of the word "conquest" and required that the term "pacification" be used instead is similar to the same ugly euphemism used during the Vietnam War to describe napalming villages at random and defoliating large tracts of forest with carcinogenic Agent Orange. An examination of the historical record will show, however, that at least some of the cynicism is misplaced. The protective laws did mitigate, even when they did not succeed in prohibiting, harm. That the use of "pacification" and the disapproval of "conquest" was more than just a semantic dodge can be seen in the decrees that led to the adoption of the doctrine of *justa prescripción*.

During the latter part of the sixteenth century, Indian population began to decline, and Indian villages and landholdings were snatched up by the European settlers. Because of this economic and demographic decline and in order to protect the interest of the crown and to preserve the landholdings of the decimated and almost liquidated Indian tribes, a series of decrees were passed

(Holmes, J.).

90. See *supra* note 63.

that established a regular cadastral scheme for recording and preserving interests in land. 92 These decrees culminated in this codification in the Recopilación:

Whereas we have completely succeeded to the lord-ship of the Indies; and the farms, dwelling-places, and lands which have not been granted by their Majesties the Kings our predecessors, or by us, or in our name, belong to our patrimony and royal crown; and it is appropriate that all the land which is possessed

92. Professor Mörner describes the situation:
The Crown's mechanisms for protecting Indian land rights acceded well with its policy of residential separation. The risks would be very great that foreigners settling among the Indian villages would end up taking the Indians' lands from them. On the other hand, the fact of acquiring land within an Indian village could, obviously, induce the buyer to make residence there himself. It would likewise increase the difficulty of carrying out the legally ordained expulsion of the outsiders, because their interest in remaining there would be greater.

Toward the middle of the 17th century, the demographic curve of the Indian population reached its nadir. At the same time, the population of the Spanish in the cities increased. It was natural that, since the Indian lands were left uncultivated, many foreigners were attracted to the villages, desirous of appropriating the lands. It was necessary, then, that the mother country declare that the prohibition on foreigners dwelling among the Indians was also valid in cases where they had acquired lands in the Indians' villages. As we have indicated before, the corresponding decree of 1646 should, above all, be understood within the context of the complex of influences of certain absent landlords residing in Spain. But at the same time, it shed light upon the desires of the natives themselves. There is, for example, a petition from the Indian governor of Jangolgui, in the Audiencia of Quito in 1639, which describes the difficulty of carrying out the expulsion of the foreigners, including those who had acquired land in Indian villages. At the same time, since 1591, the crucial process of the settlement and sale of unclaimed lands, motivated by the Crown's financial crisis, necessarily constituted a more serious danger than any to the Indians' claims to their lands. The anxiety, or bad conscience, of the Crown, finds an elegant expression in the repeated prohibitions contained in the Recopilación of 1680 against taking land from the Indians in the course of the settlement, and the prohibition of land sales from the Indians themselves.

The communal ownership of lands in an Indian village would be confirmed by some land grant or other indisputable title. But often, the natives lacked such explicit titles. In such a way, the decrees prohibiting the residence of foreigners in the said villages would be able to be invoked by the Indians, with the object of recovering lands usurped by foreigners. What was in substance a right to protection of their persons, was to be used in defense of their property rights. As Jose Miranda emphasized, indigenous communal ownership, of strong pre-columbian roots as much in New Spain as in Peru, was documented by three institutionalized factors: the existence of ancient Indian customs, the retention of an autonomous municipal government and the policy of residential separation.

MÖRNER, supra note 69, at 170-71.
without just and true titles be restored to us, in manner and form as it belongs to us; we order that, reserving in the first place whatever may appear necessary to us; or to the Vicerolös, Audiencias and Governors for public squares, ways, commons, pastures and farms, in the places and villages which have been colonized, as well for what is suitable for their present state, as for the future, and the growth which they may make, and allotting to the Indians what they fairly need to cultivate and make their plantations and gardens confirming them in what they have now, and giving them further what is necessary, all the rest of the land may be and shall remain free and unencumbered in order to grant freely and dispose of at our will and of our own bounty. Therefore, we order and command the Vicerols and Presidents of pretorian Courts, that when it seems proper to them, they appoint a suitable term within which the possessors shall exhibit to them and the officers of their Councils whom they may appoint, their grants of lands, farms, plantations and manors, and confirming those who hold with good grants and assurances or by just prescription, that the rest be returned and restored to us to dispose of at our will.\textsuperscript{93}

This enactment followed past Spanish law, as well as Roman law. The \textit{Siete Partidas} had provided that while certain kinds of

\textsuperscript{93} \textit{Recopilacion}, IV, 12.14:

\textit{Don Felipe, II, en 20 de noviembre de 1578. Y á 8 de marzo de 1589. Y en el Pardo, á 1º de noviembre de 1591.}

\textit{Que á los poseedores de tierras, estancias chacras y caballerías con legítimos títulos, se les ampare; en posesión, y las demás sean restituidas al rey. Por haber Nos sucedido enteramente en el señorío de las Indias, y pertenecer á nuestro patrimonio y corona real los valdios, suelos y tierras que no estuvieren concedidos por los señores reyes nuestros predecesores, ó por Nos, ó en nuestro nombre, conviene que toda la tierra que se posee sin justos y verdaderos títulos, se nos restituya, según y como nos pertenece, para que reservando ante todas cosas lo que á Nos, ó á los virreyes, audiencias y gobernadores pareciere necesario para plazas, exidos, propios, pastos y valdíos de los lugares y concejos que están poblados, así por lo que toca al estado presente en que se hallan, como al porvenir, y al aumento que pueden tener, y repartiendo á los indios lo que buenamente hubieren menester para labrar y hacer sus sementeras y crianzas, confirmandoles en lo que ahora tienen, y dándoles de nuevo lo necesario, toda la demás tierra quede y esté libre y desembarazada para hacer merced, y disponer de ella a nuestra voluntad.}

\textit{Por todo lo cual ordenamos y mandamos á los virreyes y presidentes de audiencias pretoriales, que cuando les pareciere señalen término competente para que los poseedores exhiban ante ellos, y los ministros de sus audiencias, que nombraren, los títulos de tierras, estancias, chacras y caballerías; y amparando á los que con buenos títulos y recaudos ó justa prescripción poseyeren, se nos vuelvan y restituuyan las demás, para disponer de ellas a nuestra voluntad.}
property in actual public use, such as streets, squares, parks, and the like, were imprescriptible, other species of government property could be obtained by forty years' prescription. The Novísima Recopilación allowed the acquisition of royal property through proof of immemorial possession. The Code of Justinian also provided for a forty-year prescription, good against the state. Indeed, the provision extended to ultramarine Spain the settled law of metropolitan Spain regarding prescriptive rights against the crown. It is quite clear that this provision expressly recognized that Indians would likely not be in possession of documents of title (con buenos títulos), and it explicitly confirms the property holdings already in possession of the Indians (conformándoles en lo que a hora tienen). The crown thus recognized that the Indians held under their own laws and customs, and that nothing, not the papal donation, not discovery nor conquest, vitiated these titles. Since their title was based upon immemorial possession, Indians obviously could not exhibit their buenos títulos to the royal officials; the provision quite clearly absolves them of this duty. Moreover, the provision explicitly places holdings under Indian customary law on an equal footing with royal grants.

When the provision is read in context with other portions of the Recopilación protecting Indian land holdings, what emerges is an unequivocal recognition of Indian property rights, a prophylaxis against usurpation, and a recognition of the Indian governmental structures that had created and still guarded them. Even the specious argument of the Louisiana federal land commissioners that, somehow, the Indians lost their property rights by prescriptive rights acknowledges, as a premise, that there were valid, existing rights and interests in land which had to have been "lost."

94. See SIETE PARTIDAS, Partida 3, Título 29, Ley 7. See also Partida 3, Título 29, Leyes 18, 21.

95. In Allard v. Lobau, 3 Mart, (N.S.) 293, 300 (La. 1825), the Louisiana Supreme Court applied this provision to hold that "possession cannot be pleaded against a public right unless it has been immemorial. Novissima Recop., Lib 11, titl. 8. Ley 4."

96. See CODEX JUSTINIANIS VII, 27.1; VII, 38.2; VII, 39.4; VII, 39.6.

97. See RECOPILACIÓN, II, 1.4, requiring that Indian customary law be observed, supra note 64.

98. There is nothing in Recopilación, IV, 12.14 which would have prohibited an Indian from putting on record evidence of immemorial possession, and thus acquire an additional assurance of ownership, but the provision quite clearly does not require this.

99. While there is no provision in the Recopilación de las Indias that explicitly says that Indian property rights are imprescriptible, it is difficult to see how prescriptive rights can be acquired, or even exist in an inchoate state, in the light of provisions such as Recopilación VI, 3.9, allowing reservation Indians to retain ownership of previously owned
Finally, the provision was reaffirmed by a royal cédula of 1754, which provided that when persons could not produce a paper title, "their proof of long possession shall be held as a title by prescription." Against this background, it can be seen that the Spanish crown had not extinguished aboriginal title; it did not claim to have extinguished it; and, in those cases where Spanish officials moved Indians from one place to another, the former Indian lands were not automatically divested of aboriginal title. Thus, at the time of the change of sovereignties, there were extensive Indian holdings in Louisiana, though not all of them were evidenced by paper title.

IV. Spanish Law Under the American Flag

The territory of Louisiana was retroceded to France by the Treaty of San Ildefonso in 1800, but Spanish colonial officials continued to administer the colony until it was purchased by the United States in 1803. The laws of Spain, including the Recopilación, were therefore in force at the time Louisiana was purchased by the United States.

Before ratification of the Louisiana Purchase Treaty, President Jefferson had sent a set of questions to a prominent New Orleans merchant, Daniel Clark, inquiring, inter alia, as to the legal system in operation within the Louisiana Territory. In his answers, Clark lands; Recopilación VI, 1.30, forbidding an encomendero to succeed to the lands of deceased Indians; Recopilación IV, 12.5, 7, 9 that royal land grants shall be made without prejudice to Indians and allowing the Indians to retain their own landholdings with suitable water rights; Recopilación IV, 12.17, 18, that land grants not be made of land which had been illegally obtained from Indians; and Recopilación IV, 12.19, that Indians be given preference rights for land grants. Recopilación IV, 12.18 specifically recognizes that the Indian lands will be left to Indian rulers and governmental leaders.

100. Royal Regulation of Oct. 15, 1754, 5 AM. STATE PAPERS-PUBLIC LANDS, at 656.
101. As to the Spanish policy of making Indian tribes buffer states for their colonial territories, see O'Callaghan, An Indian Removal Policy in Spanish Louisiana, in GREATER AMERICA: ESSAYS IN HONOR OF HERBERT EUGENE BOLTON 281 (1945).
102. See Recopilación VI, 3.9, supra note 70.
105. See TERRITORIAL PAPERS OF THE UNITED STATES: THE TERRITORY OF ORLEANS 3-4 (C. Carter, ed. 1940) (letter from Thomas Jefferson to Governor Claiborne, July 17, 1803). Jefferson had enclosed a copy of his questions to Clark in a letter to Governor Claiborne of the Mississippi Territory informing him of the Louisiana Purchase.
gave an accurate account of the system of laws prevailing in the territory:

NO. 16. Whence is their code of laws derived, a copy of it if in print.

Ans' The Code of laws is derived from the Recopilación de Indias, & Leyes de Castilla & les uses & Coutumes de Paris for what respects usages & Customs,

The Marquis de Yrujo, & John Vaughan of Philadelphia had copies of the Spanish Laws,—the French uses & Coutumes may I presume be easily found among the Book-sellers in the United States, they are not to be had here.—

Query NO. 21. What is the nature of their criminal Jurisprudence, number & nature of Crimes & Punishments.

Answer. For an answer to this Question I refer to the small work on the subject herewith which treats of it more clearly and concisely than all I had got written by the Lawyers respecting it. For further information I refer to the Leyes de Castilla & Recopilación de Indias on which this little Work is founded.106

In his answer to Query No. 21, the "small work" to which Clark was referring was a copy of the O'Reilly Ordinances.107

President Jefferson used Clark's information in drawing up a document which, under the title "An Account of Louisiana," he transmitted to Congress on November 14, 1803.108 The "Account" contained this paragraph:

OF THE LAWS

When the country was first ceded to Spain, she preserved many of the French regulations; but by almost imperceptible degrees, they have disappeared; and at present the province is governed entirely by the laws of Spain and the ordinances formed expressly for the colony. Various ordinances promulgated by General O’Reilly, its first Governor under Spain, as well as some other laws, are translated and annexed in the Appendix, No. 1.109

106. Id., at 35, 38 (letter from Daniel Clark to James Madison, Sept. 8, 1803).
107. The copy of O'Reilly's Ordinances which accompanied Clark's letter is in French, id. at 38 n.48, and was translated in the appendix to Jefferson's "Account of Louisiana."
108. 1 AMERICAN STATE PAPERS-MISCELLANEOUS, at 344.
109. Id. at 351. The appendix referred to in the quotation is set out id. at 363-81, and contains the two sets of ordinances by O'Reilly and the Police Regulations of June 1, 1795 by Governor Carondelet.
Even though, as has been seen, the abrogation of French law and its supplanting by Spanish law can hardly be said to have been "imperceptible," and although O'Reilly was not the first governor of Spanish Louisiana, it is clear that Jefferson was correct that the municipal law of the newly acquired territory was that of Spain.

In the special session called to ratify the Purchase Treaty and to appropriate money for the purchase,\textsuperscript{110} Congress passed an act enabling the President to take possession and vesting all the military, civil and judicial powers, exercised by officers of the existing government of the [territory]. . . . in such person or persons, and shall be exercised in such manner, as the President of the United States shall direct for maintaining and protecting the inhabitants of Louisiana in the free enjoyment of their liberty, property and religion.\textsuperscript{111}

The President appointed William C. C. Claiborne, the governor of the Mississippi Territory, as governor of Louisiana, authorizing him "to exercise within the ceded territories all the powers and authorities heretofore exercised by the Governor and Intendent thereof. . . .\textsuperscript{112}

In his first proclamation as governor on December 20, 1803, Governor Claiborne assured the inhabitants that "they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess; that all laws and municipal regulations, which were in existence at the cessation of the late Government, [shall] remain in full force. . . ."\textsuperscript{113}

After the United States took possession of Louisiana, Congress passed an organic act in March, 1804, which divided the purchased territory into the Territory of Orleans and the District of Louisiana.\textsuperscript{114} The act extended many federal statutory provisions to the territory, including the Indian Trade and Nonintercourse Act.\textsuperscript{115}

Under section 11 of the 1804 Organic Act, all laws in the territory that were in force at the time of the purchase were to "con-

---

\textsuperscript{110} See 2 American State Papers-Foreign Relations, at 506 (President Jefferson's Message to the Senate, Oct. 17, 1803).
\textsuperscript{111} Act of Oct. 31, 1803, ch. 1, § 2, 2 Stat. 245.
\textsuperscript{112} Orleans Territory, supra note 105, at 143.
\textsuperscript{113} 2 American State Papers-Foreign Relations, at 582.
\textsuperscript{114} Act of Mar. 26, 1804, ch. 38, 2 Stat. 283.
\textsuperscript{115} The then current version of the Indian Trade and Nonintercourse Act was the Act of Mar. 30, 1802, ch. 13, 2 Stat. 139, which was extended to the Louisiana Territory by § 15 of the 1804 Organic Act., 2 Stat. 289.
continue in force, until altered, modified, or repealed by the legislature.”

Acting under the 1804 Organic Act, the Legislative Council of the Territory, in its joint resolution of February 4, 1805, appointed a committee “to draught and report a civil and criminal code for the said territory . . . [and] to employ two counsellors of law to assist them in draughting the said codes . . .,” appropriating $5,000 for the “counsellors at law so employed, for their services.”

A second organic act governing the Louisiana Purchase Territory was passed on March 2, 1805. This statute extended the provisions of the Northwest Ordinance of 1787 to the Louisiana Purchase Territory. Under the ordinance, the three-judge territorial judiciary was to conduct “judicial proceedings according to the course of common law.” However, section 5 of the 1805 Organic Act preserved the law of descent and distribution in the Territory of Orleans. Moreover, the statute authorized the continuance of laws in force until altered or revoked by the territorial legislature. The legislative assembly was thus empowered to alter, amend, or repeal these general laws under the grant of power conferred by the ordinance.

120. 1 Stat. 52 n.(a). Section 1 of the Organic Act of 1805 provides that “the inhabitants of the territory of Orleans shall be entitled to and enjoy all the rights, privileges and advantages secured by the said ordinance, and now enjoyed by the people of the Mississippi territory.” 2 Stat. 322. This means that the Indian inhabitants of the Territory of Orleans were entitled, under article III of the Ordinance, to “[t]he utmost good faith being always observed towards them,” and it was guaranteed that “their land and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed. . . .” 1 Stat. 52 n.(a).
121. 2 Stat. 322 § 5. “And be it further enacted, that the second paragraph of the said ordinance, which regulates the descent and distribution of estates . . . [is] excluded from all operation within the said territory of Orleans.” 1 Stat. 52 n.(a). Article II of the Ordinance guarantees, inter alia, that the inhabitants of the territory would be entitled to “trial by jury” and “judicial proceedings according to the course of common law.”
122. 2 Stat. 322 § 5. “And be it further enacted, that the laws in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature.”
2 Stat. 286 § 11 provided: “The law in force in the said territory, at the commencement of this act, and not inconsistent with the provisions thereof, shall continue in force, until altered, modified, or repealed by the legislature.”
123. 1 Stat. 52 n.(a). “[T]he governor, legislative council, and house of representatives,
Before the territorial legislature got around to performing its duty under the 1805 Organic Act to "make laws, in all cases, for the good government of the district," Judge John S. Prevost (a stepson of Aaron Burr) of the Territorial Supreme Court ruled, in an opinion which, unfortunately, has been lost, that the law in force within the Territory of Orleans was the civil law of Spain.

At the first session of the First Legislature held under the 1805 Organic Act, James Brown and Louis Moreau-Lislet were appointed "to compile and prepare, jointly, a Civil Code for the use of this Territory." The Territorial Legislature also passed an act declaring that the salvo provisions of the 1804 and 1805 organic acts carried forward

the laws which remain in force, and those which can be recurred to as authorities in the tribunals of this Territory are the laws and authorities following, to wit: . . . 2.° The Spanish law, consisting of the books of the recopilation de Castilla and autos acordados being nine books in the whole; the seven parts or partidas of the king Don Alphonse the learned, and the eight books of the royal statue (fueroreal) of Castilla; the recopilation de indias, save what is therein relative to the enfranchise-ment of Slaves, the laws de Toro, and finally the ordinances and royal orders and decrees, which have been formally applied to the colony of Louisiana. . . .

Governor Claiborne, however, perfunctorily vetoed this act on May 22, 1806.

It was not until 1808 that the Territorial Legislature approved of the labors of Brown and Moreau-Lislet by enacting their work as positive law. The statute makes it clear that the work being

shall have authority to make laws, in all cases, for the good government of the district, not repugnant to the principles and articles in this ordinance established and declared." 124. Act of Mar. 2, 1805, ch. 23, 2 Stat. 322.

125. The ruling is paraphrased and discussed in G. Dargo, Jefferson's Louisiana: Politics and the Clash of Legal Traditions, 132 n.16-17 (1975); W. Hatcher, Edward Livingston: Jeffersonian Republican and Jacksonian Democrat 118-19 (1940); Dart, The Influence of the Ancient Laws of Spain on the Jurisprudence of Louisiana, 6 Tul. L. Rev. 83, 84-85 (1931).


128. The terse veto message is in 3 Official Letterbooks of W.C.C. Claiborne, 1801-1816 (D. Rowland ed. 1917), at 313. Governor Claiborne gave curt and somewhat unsatisfactory reasons for this veto in two letters dated May 26, 1806 to James Madison and Julien Poydras. Id. at 309-11, 314-16.
approved was not a comprehensive enactment of the civil laws to be in force in the territory, but a digest.\(^\text{129}\)

Until 1808 the judiciary had considered Spanish law to be controlling. Thus, in the second reported case before the Territorial Superior Court, Judge Lewis acknowledged that "the law of Spain... is to form the rule of decision in this case,"\(^\text{130}\) and so applied it. But even after the promulgation of the 1808 Digest, the courts continued to apply Spanish law, deeming it to be still in operation and the 1808 Digest to be merely a summary of the entire corpus of Spanish law. The character of the Digest was so defined in the 1812 decision of *Hayes v. Berwick*: "What we call the Civil Code is but a digest of the civil law, which regulated this country under the French and Spanish monarchs."\(^\text{131}\) A few years later, in *Beard v. Poydras*,\(^\text{132}\) Judge Derbigny used the historical record to reject a claim that the French *code noir* was still in force; it was there held that Spanish law had completely supplanted wordy aspects of French law.\(^\text{133}\) Finally, in *Cottin v. Cottin*,\(^\text{134}\) Judge Derbigny again applied the *Recopilación de Castilla* to govern whether a child who died after seven or eight hours of life could inherit:

In Spain, however, the laws of which were, and have continued to be ours, where not repealed, there exists a particular disposition, by which it is further required, that the child, in order to be considered as naturally born, and not abortive, should live twenty-four hours. Is that law still in force among us, or is it virtually repealed by the expressions used in our civil code, in relation to this subject?...

It must not be lost sight of, that our civil code is a digest of the civil laws, which were in force in this country, when it was adopted; that those laws must be considered as untouched, wherever the alterations and amendments, introduced in the digest, do not reach them; and that such parts of those laws only are repealed, as are either contrary to, or incompatible with the provisions of the code.\(^\text{135}\)

---

129. Act of Mar. 31, 1808, Orleans Territory, 2d Legis., 1st Sess., ch. 29, at 120.
130. Calserques v. Dujarreau, 1 Mart. 7, 11 (Orleans 1809).
131. 2 Mart. 138, 140 (Orleans 1812).
132. 4 Mart. 348 (La. 1816).
133. *Id.* at 366-68.
134. 5 Mart. 93 (La. 1817).
135. *Id.* at 94.
The jurisconsults who considered the question were unanimous that the 1808 Digest was only a partial codification of the law of Spain that was in effect at the time of cession to the United States. It was obvious that the Digest would have to be revised and augmented, since the brooding omnipresence of Spanish law and the scarcity of Spanish law books made for much uncertainty. The legislature again addressed itself to the problem.

By its resolution of March 14, 1822, the legislature authorized a revision to be done by Moreau-Lislet, Edward Livingston, and Pierre Derbigny. In their report to the legislature a year later, the three revisers stated that their purpose was to prepare a complete civil code in order to relieve the courts "in every instance, from the necessity of examining into Spanish statutes, ordinances and uses." After some revisions, the legislature promulgated the Civil Code in 1824, pending its final revision and printing, and the Code was finally adopted in 1825.

With 3,522 articles, the 1825 Civil Code had half as many articles as had the 1808 Digest. The penultimate article of the Code provided:

From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State when Louisiana was ceded to the United States, and the acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretence that their provisions are not contrary or repugnant to those of this Code.

But in two decisions after promulgation of the 1825 Civil Code, the Louisiana Supreme Court held that the new code did not repeal any preexisting law unless the latter was contrary to the former;
in other words, only laws that were directly contrary or repugnant to express provisions of the 1825 Civil Code were deemed to have been repealed by article 3521 of that Code.

The legislature reacted to these decisions in its next session. In Act No. 83 of 1828, it provided that “all the civil laws which were in force before the promulgation of the Civil Code lately promulgated, be and are hereby abrogated.”

The Louisiana Supreme Court had the last word. In its 1839 decision in Reynolds v. Swain, the supreme court construed whether a previous decision made by it applying the principles of Roman law was binding on it, in view of the repealing provisions in article 3521 and Act No. 83 of 1828:

The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted; for it is this alone which it may repeal; *eodem modo quiquit constitutur, eodem modo dissolvitur.*

The civil or municipal law, that is, the rule by which particular districts, communities, or nations are governed, being thus defined by Justinian—“*jus civile est quod quisqui sibi populus constituit.*” 1 Blackstone’s Commentaries, 44. This is necessarily confined to positive or written law. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the law of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.

We, therefore, conclude, that the Spanish, Roman, and French civil laws, which the legislature repealed, are the positive, written, or statute laws of those nations, and of this state; and

142. Section 25 of Act No. 83 of Mar. 25, 1828, La. Acts. 1828, at 160, provides, in full: *And be it further enacted,* that all the rules of proceeding which existed in this state before the promulgation of the code of practice, except those relative to juries, recusation of judges and other officers and of witnesses, and with respect to the competency of the latter, be and are hereby abrogated; and that all the civil laws which were in force before the promulgation of the civil code lately promulgated, be and are hereby abrogated, except so much of title tenth of the old civil code as is embraced in its third chapter, which treats of the dissolution of communities or corporations.

It can be seen that the repealing provision was inserted in § 25 almost as a kind of afterthought, as Act No. 83 mainly addresses itself to making technical amendments to the Code of Practice. Another act passed the same session repealed the 1808 Digest. Act No. 40 of Mar. 12, 1828, La. Acts. 1828, at 66.

143. 13 La. 193 (1839).
only such as were introductory of a new rule, and not those which were merely declaratory—that the legislature did not intend to abrogate those principles of law which had been established or settled by the decisions of courts of justice.  

Several years later, in *Hubgh v. New Orleans & Carrollton Railroad*, 145 the Louisiana Supreme Court made it clear that it regarded settled principles of Spanish law, even if they had not been the subject of definitive judicial declaration, as surviving the 1828 act and article 3521. The case was an action for wrongful death, and the court concluded:

We can find nothing in the laws of Spain which authorizes this action, or which presupposes any such right of action to exist, and are satisfied that, as a general rule under both systems [i.e., Roman law and Spanish law], actions for injuries to the person are strictly personal; and that there is no recognized principle, in either, in which the plaintiff's action can be maintained.  

This is still the law in Louisiana; as late as 1927, the Louisiana Supreme Court reaffirmed both *Hubgh* and *Reynolds* in *Moulin v. Monteleone*. 147

Using the *Reynolds-Hubgh* criterion, are provisions of Spanish colonial law in the *Recopilación de las Indias* and other Spanish legislation "established," "settled" principles of law, "founded in those relations of justice" existing "in the nature of things"?

There is a line of cases that recognize the transcendence of the principles laid down by the *Recopilación*. The most important, and thus deserving of extended quotation, is the 1854 decision of the Supreme Court of the United States in *Chouteau v. Molony*, 148 where the Court endorsed the protection afforded by the *Recopilación*: "Spain, at all times, or from a very early date, acknowledged the Indians' rights of occupancy in these lands, but at no time were they permitted to sell without the consent of the king." 149 The Court then reviewed the provisions of the *Recopilación de las Indias*:

144. *Id.* at 197-98. The author speculates that Judge Martin may have been dissatisfied with the offhand manner in which the repeal was expressed in § 25 of Act No. 83 of 1828.  
145. 6 La. Ann. 495 (1851).  
146. *Id.* at 511 (on rehearing).  
149. *Id.* at 229.
It is fact in the case, that the Indian title to the country had not been extinguished by Spain, and that Spain had not the right of occupancy. The Indians had the right to continue it as long as they pleased, or to sell out parts of it—the sale being made conformably to the laws of Spain, and being afterwards confirmed by the king or his representative, the Governor of Louisiana. Without such conformity and confirmation no one could, lawfully, take possession of lands under an Indian sale. We know it was frequently done, but always with the expectation that the sale would be confirmed, and that until it was, the purchaser would have the benefit of the forbearance of the government. We are now speaking of Indian lands, such as these were, and not of those portions of land which were assigned to the Christian Indians for villages and residences, where the Indian occupancy had been abandoned by them, or where it had been yielded to the king by treaty. Such sales did not need ratification by the governor, if they were passed before the proper Spanish officer, and put upon record.

The Indians within the Spanish dominions, whether christianized or not, were considered in a state of tutelage. In the Recopilación de las Leyes de las Indias, a part of the official oath of the Spanish governors was, that they would look to the welfare, augmentation, and preservation of the Indians. (Book 5, c. 2.) Again: Indians although of age, continue to enjoy the rights of minors, to avoid contracts or other sales of their property—particularly real—made without authority of the judiciary or the intervention of their legal protectors. (Solerzanos Política Indians, 1, 209, §§ 204, 42) Indians are considered as persons under legal disability, and their protectors stand in the light of guardians. (46, 51) The fiscal in the audiencia were their protectors, but in some cases they had special protectors.

When Indians dispose of their landed property or other thing of value, the sale is void unless made by the intervention of the authorities, or of the protector general, or person designated for the purpose. (C. 29, 42) Many other citations of a like kind might be given from the king’s ordinances for the protection of the Indians. They were protected very much by similar laws when Louisiana was a French province excepting in this: that the power to confirm an Indian sale of land, as to the whole or a part of it, or to reject it altogether, was exercised by the French governors of the province. 

150. Id. at 237-39.
Justice Wayne's summary of the facts is in exact accordance with the account presented above, that the *Recopilación de las Indias* became the law of Louisiana upon O'Reilly's taking possession of Louisiana, and that his ordinances were supplementary to, rather than superseding, the *Recopilación*. The ratification of an Indian sale by the governor was subject to laws made for the protection of the Indians. These laws were no novelty; many, if not most of them, were more than two hundred years old at the time Spain acquired Louisiana, and they therefore fit the *Reynolds-Hubgh* criterion of settled and established laws, laws "founded in those relations of justice that existed in the nature of things," laws that were not "introductory of a new rule," laws that were "declaratory" of the rights of Indians. And *Reynolds* also excepted laws that were "settled by decisions of courts of justice." Beside *Chouteau v. Molony*, there are a number of decisions by the Louisiana Supreme Court regarding Indian rights that fit under this rubric.

The first of these is *Reboul v. Nero*, decided in 1818, before the promulgation of the 1825 Code and the 1828 repealer. There, a defendant in an action for ejectment had purchased the land from the Chitimacha Indians in a sale duly ratified by the colonial government. The question concerned the extent of the land sold:

> The manner of locating the lands assigned to the Indians was not by fixing their boundaries by actual survey. They obtained permission from the government to settle on a certain spot; and round that spot they were by law entitled to possess an extent of one league. Recop. de Ind. 6, 3, 8.\(^{152}\)

In *Martin v. Johnson*, decided the same year, the *Recopilación* was again invoked as the basis of the Indians' title.\(^{154}\) *Spencer's Heirs v. Grimball*, decided in 1827, was a case arising out of the Bayou Boeuf area of Rapides Parish, the subject of the Miller-Fulton claims.\(^{156}\) It was argued that the Indians could not sell

151. 5 Mart. 490 (La. 1818).
152. Id. at 492.
153. 5 Mart. 655 (La. 1818).
154. See id. at 658-59, 660.
155. 6 Mart. (n.s.) 355 (La. 1827).

https://digitalcommons.law.ou.edu/ailr/vol11/iss1/7
land, but the court, citing Reboul and Martin v. Johnson, held otherwise, since the Indians

were in every respect as completely owners of it [the soil] as those who hold under a complete grant, although being considered in a state of pupilage, the authority of the public officers who were constituted their guardians, was necessary to a valid alienation of their property.

But it is contended that no right was shown in the Indians to settle in one part of the country, and after settling there to move off and place themselves on other portions of the domain, and dispose of that too, as soon as a real or fancied necessity or caprice might urge them to such a measure. That the Spanish laws did not confer on them any such privilege, and that the exercise of it would have been incompatible with complete sovereignty over the soil, because in this way the whole right of the nation in it might be lost. This objection appears to us of little weight when considered in relation to the laws and the policy of the country by which its validity must be tested. Spain appears to have felt earlier than any other European nation the wrongs inflicted on the original inhabitants of this continent, and her legislation bears repeated and anxious marks of her desire to repair the injuries her ambition and cupidity had occasioned. Whether she was defeated or not in this laudable purpose, by the neglect of her agents, cannot affect the argument in a court of justice. Her indulgence to those tribes of Indians who survived the conquest; her liberality, or rather justice in allotting to them particular portions of the soil she has wrested from them, and her care to make these acquisitions of value, by preventing the intrusion of white settlers, are proved by various laws, passed at different times, for the government of her colonies in America. One of these laws meets the very objection taken in this case, and directs that when the Indians give up their lands to the whites, other shall be assigned to them.

Porque a los Indios se habren de señalar y dar tierras, y aguas, y montes, si se quitaren a Españoles, se las dara justa recompensa en otra parte. Recop. de law Ind. liv. 6, tit. 3, leg. 14. It is true this law does not specify in what mode the Indians must abandon, to enable them to enjoy this advantage; it cannot however, be presumed it was in the contemplation of the government to permit them to make donations of their lands to the Spanish settlers. 157

157. 6 Mart. (n.s.) 355, 357 (La. 1827). The paraphrase of Recopilación VI, 3.14 is
The court then considered the extent of the land purchased. Miller and Fulton had purchased the land in dispute from three tribes, the Choctaw, the Pascagoula, and the Biloxi, in "proceedings [which] exhibit a great deal of that looseness and irregularity which characterize the acts of the Spanish officers in Louisiana." The court, significantly, added:

Both the commandant and the governor seem to have been ignorant, or if not ignorant of, to have entirely disregarded the laws of the Indies, which limit the quantity of land each tribe was entitled to; for the space assigned to the Pascagoulas and Biloxis far exceeds that which under the most liberal constitution of those laws they should have received. . . .

[Plaintiffs] have contended that by the local usages existing in Louisiana, the Indians were entitled to more than a league; and the evidence they offer of these usages is, the assent of the governor to a sale, by which much more was sold by one tribe. Respect is certainly due to the official acts of the officers of the former government, and in the absence of proof to the contrary we should be inclined to consider them prima facie correct. But in relation to the subject matter before us, we have the law itself, which clearly limits the quantity to which Indians were entitled. 

The provision of the Recopilación referred to does not limit the quantity of land to which Indians are entitled, but, as has been seen, places a limitation on the Spanish settler of a distance of at least a league square from the Indians for the grazing of

---

incorrect. It says, rather, that the Spanish shall be compensated for any lands taken from them to form a reducción, i.e., a reservation for the Indians:

Y porque a los indios se habrán de señalar y dar tierras, aguas y montes, si se quitaren a españoles, se les dara justa recompensa en otra parte, y en tal caso formaran una junta con dos o tres ministros de la audiencia, porque si algunos se agraviaren, los oigan en apelación, y hagan reparar al daño, sobre que inhibimos a nuestras audiencias.

In English:
The Indians will therefore have to show the lands, waters, and mountains taken from the Spanish, for which Spanish settlers will be given just compensation in some other place, in which case they are to meet with two or three members of the audiencia to whom they will present, if necessary, their grievances on appeal so that any prohibited damages will be recompensed by the audiencia. (October 20, 1598).

158. 6 Mart. (n.s.) 355, 365-66 (La. 1827).
159. Id. at 366-67.
160. RECOPILACIÓN VI, 3.8. See supra text at note 72.
livestock. It is ironic how the provision is inverted to state a limitation on ownership, especially when its literal terms clearly mean otherwise. The phrase un exido de una legua de largo means, literally, “a common of one league in extent.” This should be kept in mind in considering Maes v. Gillard’s Heirs,161 decided a year after Spencer’s Heirs. The land in dispute had originally been purchased from the Pascagoula Indians. Here, as in Spencer’s Heirs, there was a controversy as to the extent of land purchased:

These expressions of “a common of one league in extent,” are given in Spanish by the following “un exido de una legua de largo,” and though the true meaning is not quite free from doubt, it does not appear to us that they support the construction of a league in extent, round the village in every direction. Nothing of there being a league round the village, is said in the law. The common is to be of a league in extent. And by giving a league in every direction, there would be a common of two leagues in extent at every point of the compass.

This construction is somewhat opposed to the reasons given in the law of granting land to the Indians. The avowed object is, to prevent their flocks mixing with those of the Spaniards. And that object would certainly be better attained by granting them a league in every direction from their village. But other provisions of the laws of Indians deprive this argument of a great deal, if not all of its force. By them Spaniards are prohibited from placing their flocks of large animals (ganado mayor) within a league and a half of the ancient Indian settlements, and their flocks of smaller animals (ganado menor) within half a league. In regard to the new settlements, the prohibition extends to double this distance. These restrictions rendered it unnecessary to give the Indians the extent of a league in every direction round their villages for their cattle. The appellants have, however, relied on these laws, to show that the Indians were entitled to all the lands on which the Spaniards could not pasture their flocks. But nothing, in our judgment, can be more unfounded than this pretension, for it would make the quantity of soil which it is supposed was given to the Indians when they were settled by the government, depend on the kind of cattle the white men approached them with.

If it was a ganado mayor, they had a league and a half in extent around them; but if a ganado menor was brought near

161. 7 Mart. (n.s.) 314 (La. 1828).
them, their right diminished to half a league from their village. These laws were evidently political regulations, for the better preserving harmony among the different races of men who formed the population of these colonies, and for the protection of that race on which they had inflicted so much injury, when they first discovered and settled the country. Recopilación de las Indias, liv. 5 titl. 21, law 12; ibid., liv. 7, titl. 3, law 20.\textsuperscript{162}

Here again, the court made a confusion. The provision limiting estancias, or cattle ranches,\textsuperscript{163} is to be read in conjunction with the league-square ejido limitation on European settlers; indeed, they are part of the same decree of Philip II, on October 10, 1618. Reading these provisions together, they mean that the ejido, which must be at least one league in extent, should not have a cattle ranch within a league, or a sheep or goat ranch within a half-league, from the ejido.

It should be emphasized that these cases did not involve Indian possessory rights; rather, they concerned the extent of land conveyed by the Indians in these questionable transactions. It will be remembered that the Court in \textit{Spencer's Heirs} referred to the "looseness and irregularity" of these transactions and that the officials seemed either "ignorant, or if not ignorant of, to have entirely disregarded the laws of the Indies." The court seems to

\textsuperscript{162.} \textit{Id.} at 324-26.
\textsuperscript{163.} \textit{RECOPILACIÓN, VI,} 3.20:
Don Felipe III alíi 10 de octubre de 1618.
Don Carlos II y la reina gobernadora.

\textit{Que cerca las reducciones no haya estancias de ganado.}

Ordenamos, que las estancias de ganado mayor no se puedan situar dentro de legua y media de las reducciones antiguas, y las de ganado menor media legua: y en las reducciones que de nuevo se hicieren haya de ser el término dos veces tanto, pena de perdida la estancia y mitad del ganado que en ella hubiere, y todas los dueños le tengan con buena guarda, pena de pagar el daño que hicieren: y los indios puedan matar el ganado que entrare en su tierra sin pena alguna, y en todo sea guardada la ley 12, tit. 12, lib. 4.

\textbf{In English:}
We order that cattle ranches shall not be located within a league and a half from older Indian settlements, and small livestock shall not be grazed within a half league; in newer Indian settlements, the distance shall be twice, and the penalty shall be the loss of the ranch and half of the livestock; all owners shall take care to observe this, otherwise they shall have to pay for damages thus caused; the Indians may kill the trespassing livestock without penalty, taking care to observe. ...

\textit{RECOPILACIÓN, IV,} 12.12.

https://digitalcommons.law.ou.edu/ailr/vol11/iss1/7
have realized that there must have been, at the very least, over-reaching and probably fraud in the land-claims proceedings after the Purchase, and it is not unreasonable to suppose that this was going on under the Spanish regime; indeed, the Miller-Fulton claims lend substance to this supposition.

V. Of Ockham’s Razor, Monads, and the Igorot’s Ranch: The Survivability of Original Indian Title Under American Sovereignty

Although under Chouteau, and Reboul and its progeny, there can be no doubt that Indian ownership can be a valid link in the claim of title, what about Indian title that has not been extinguished? This question is all the more important because there is a notion abroad that Indian title is of a derivative nature, and that Indian occupancy and possession under such title is no better than tenancy at sufferance, or, at best, tenancy at will. Chouteau teaches that the Spanish sovereignty over Louisiana did not extinguish the Indian title already existing under the French. Moreover, although French policy in this respect is far from clear, there does not seem to be any legal framework for the extinguishment of Indian title, and the policy seemed to be that of incorporation of the Indians into the kingdom with the full rights of other French subjects. There is no basis to the notion that the previous French sovereignty had, ipso facto, extinguished aboriginal title, because (1) the regulation of the Intendant Morales specifically invoked the protections of Spanish law for Indian property interests, something which would not have been done had Indian landholdings been canceled by the French authorities, and (2) there was some assiduity by the Spanish colonial officials to protect Indians against their own improvidence, as noted later on by the United States land commissioners.

Thus, Indian title not extinguished according to Spanish law and regulation was full and valid under Spain in 1800. It was certainly not extinguished by the French sovereignty from 1800 to 1803, since Spanish law remained in force until the next change in French authority.


165. See Thomas, Introduction, in INDIAN LAND CESSIONS IN THE UNITED STATES, compiled by C. Royce, 18th ANN. REP. BUREAU AM. ETHNOLOGY (Part 2), 545-49 (1899).

166. See text supra at note 88.
in sovereignty to the United States, effective on December 20, 1803, when the United States came into possession of the Louisiana Territory. At this point, three pertinent provisions of the Louisiana Purchase Treaty came into effect. The first concerned public property in the territory: "Art. II. In the cession made by the preceding article are included the adjacent islands belonging to Louisiana, all public lots and squares, vacant lands, and all public buildings, fortifications, barracks, and other edifices which are not private property." Despite the change in sovereignty, article III of the treaty guaranteed private property:

Art. III. The inhabitants of the ceded territory shall be incorporated in the Union of the United States, and admitted as soon as possible, according to the principles of the Federal constitution, to the enjoyment of all the rights, advantages and immunities of citizens of the United States; and in the meantime, they shall be maintained and protected in the free enjoyment of their liberty, property, and the religion which they profess.

This provision quite clearly applies to everyone; it does not restrict itself to citizens, or subjects, or even permanent residents, but says, broadly, that the "inhabitants of the ceded territory" including "Indians not taxed," "shall be guaranteed the free enjoyment of their property. "Property" is to be given a most liberal interpretation; all species of property, and interests in property, inchoate as well as complete, are protected.

167. Stat. 202. The French text is the definitive one, since the signatories to the Treaty "declarant néanmoins que le présent traité a été rédigé et arrêté en langue Française," Stat. 205, and provides:

ART. II. Dans la cession faite par l'article précédent, sont compris les isles adjacentes dépendantes de la Louisiane, les emplacements et places publiques, les terains vacans, tous les batiments publics, fortifications, cazernes et autres édifices qui ne sont la propriété d'aucun individu.

8 Stat. 203. Because of this provision, it became necessary later on for the United States to convey the Cabildo in New Orleans to the State of Louisiana, since that building, by virtue of Article II, was federal property. See Act of Apr. 29, 1812, ch. 73, 6 Stat. 108, and Mayor of New Orleans v. United States, 35 U.S. (10 Pet.) 662, 736-37 (1836).


ART. III. Les habitans des territoires cédés seront incorporés dans l'union des Etats-Unis, et admis, aussitôt qu'il sera possible, c' après les principes de la constitution fédérale a la jouissance des tous les droits, advantages et immunités des citoyens des Etats-Unis, et en attendant, ils seront maintenus et protégés dans le jouissance de leurs libertés, propriétés, et dans l'exercice des religions qu'ils professent.

The last provision is specifically directed toward Indians, and shows that the United States considered Indian tribes to possess a form of sovereignty: "Art. VI. The United States promised to execute such treaties and articles as may have been agreed between Spain and the tribes and nations of Indians, until, by mutual consent of the United States and the said tribes or nations, other suitable articles shall have been agreed upon." The United States thus pledged to continue the protection of the Indians as they had been protected under Spanish rule. There were many treaties entered into between Spain and various Indian tribes and, under article VI, Spanish treaties with the United States. In one sense, article VI is surplusage because Indian property rights were already protected by article III's general guarantee of property rights. But even if one admits the untenable assumption that article III applies only to non-Indian property rights, article VI guards the rights of Indians as guaranteed by express agreements between them and the Spanish crown, or arising out of the operation of the Recopilación and other protective regulations.

It can therefore be concluded that not only did the United States not extinguish Indian titles upon its purchase of the Louisiana Territory, but it agreed, generally in article III and specifically in article VI, to protect them. What, then, is the present status of aboriginal title in this area? The answer to this question requires an examination of the concept of original Indian title.

The fountainhead of the teaching on Indian title is Johnson & Graham's Lessee v. M'Intosh, a unanimous 1823 decision of the Supreme Court of the United States, authored by Chief Justice Marshall. M'Intosh was an action in ejectment, brought in federal district court under diversity of citizenship, where plaintiffs claimed under purchases from two Indian tribes. Defendant claimed under a grant by the United States; his title prevailed in the lower court, and the Supreme Court affirmed the

170. 8 Stat. 202. In French:
ART. VI. Les États-Unis promettent d' exécuter les traités et articles qui pourraient avoir été convenus entre l'Espagne et les tribus et nations Indigènes, jusqu'à ce que, due consentement mutual des États-Unis, d'une part, et des Indigènes, de l'autre, il y ait été substitué tels autres articles qui seront jugés convenables.

171. See, e.g., the Treaty with the Choctaw of July 14, 1784, the Treaty with the Choctaw and Chickasaw of May 10, 1793, and the Treaty with the Chickasaw and other tribes of October 28, 1793, in ESPANA Y LOS INDIOS CHEROKIS Y CHACTAS 82 (M. Serrano y Sanz ed. 1916).


173. 21 U.S. (8 Wheat.) 543 (1823).

174. Id. at 561.
judgment when brought up by writ of error. 175 Although conceding that the question presented was not a difficult one, Chief Justice Marshall wrote a long opinion to address the "able and elaborate arguments of the bar" arising out of "the magnitude of the interest in litigation," 176 which adopted the view "that discovery gave title to the government by whose subjects, or by whose authority, it was made, against all other European governments, which title might be consummated by possession." 177 Such sovereign title was exclusive, good against the whole world, but limited in its effect on the aboriginal owners:

In the establishment of these relations, the rights of the original inhabitants were, in no instance, entirely disregarded; but were, necessarily, to a considerable extent, impaired. They were admitted to be the rightful occupants of the soil, with a legal as well as just claim to retain possession of it, and to use it according to their own discretion; but their rights to complete sovereignty, as independent nations, were necessarily diminished, and their power to dispose of the soil at their own will, to whomsoever they pleased, was denied by the original fundamental principle, that discovery gave exclusive title to those who made it.

While the different nations of Europe respected the right of the natives, as occupants, they asserted the ultimate dominion to be in themselves; and claimed and exercised, as a consequence of this ultimate dominion, a power to grant the soil, while yet in possession of the natives. These grants have been understood by all to convey a title to the grantees, subject only to the Indian right of occupancy. 178

Spain did not rely solely upon the papal donation, but, Chief Justice Marshall said, based her title "on the rights given by discovery." 179 This statement, as has been seen, is correct only insofar as Spain asserted dominion over vacant lands. Lands over which Indians had possession and some form of governmental dominion were unaffected by the Spanish overlordship; indeed, as Book VI of the Recopilación exhaustively shows, Spanish legislation went to elaborate lengths to protect and preserve Indian landholdings.

175. Id. at 605.
176. Id. at 604.
177. Id. at 573.
178. Id. at 574.
179. Id.
Chief Justice Marshall did not stop at asserting discovery title; in a passage worthy of Ginés de Sepúlveda, he argued that title by conquest was attained because of Indian "savagery":

But the tribes of Indians inhabiting this country were fierce savages, whose occupation was war, and whose subsistence was drawn chiefly from the forest. To leave them in possession of their country, was to leave the country a wilderness; to govern them as a distinct people, was impossible, because they were as brave and as high-spirited as they were fierce, and were ready to repel by arms every attempt on their independence.

What was the inevitable consequence of this state of things? The Europeans were under the necessity either of abandoning the country, and relinquishing their pompous claims to it, or of enforcing those claims by the sword, and by the adoption of principles adapted to the condition of a people with whom it was impossible to mix, and who could not be governed as a distinct society, or of remaining in their neighborhood and exposing themselves and their families to the perpetual hazard of being massacred.

Frequent and bloody wars, in which the whites were not always the aggressors, unavoidably ensued. European policy, numbers and skill prevailed. As the white population advanced, that of the Indians necessarily receded. The country in the immediate neighborhood of agriculturists became unfit for them; the game fled into thicker and more unbroken forests, and the Indians followed. The soil, to which the crown originally claimed title, being no longer occupied by its ancient inhabitants, was parcelled out according to the will of the sovereign power, and taken possession of by persons who claimed immediately from the crown, or mediately, through its grantees or deputies.\footnote{Id. at 590-91; compare text, supra at notes 49-54.}

Up to this point, the Chief Justice's opinion poses no logical or analytical difficulty. He has posited that since discovery extinguished Indian title, \textit{ergo}, an Indian tribe could not convey a title that had been invalidated by discovery. But then he arrives at the real reason for upholding the grant from the United States, and in so doing, discards the rationale of title by discovery:

Another view has been taken of this question which deserves to be considered. The title of the crown, whatever it might be, could be acquired only by a conveyance from the crown. If
an individual might extinguish the Indian title for his own benefit, or in other words, might purchase it, still he could acquire only that title. Admitting their power to change their laws or usages, so far as to allow an individual to separate a portion of their lands from the common stock, and hold it in severalty, still it is a part of their territory, and is held under them, by a title dependent on their laws. The grant derives its efficacy from their will; and, if they choose to resume it, and make a different disposition of the land, the courts of the United States cannot interpose for the protection of the title. The person who purchases lands from the Indians, within their territory, incorporates himself with them, so far as respects the property purchased; holds their title under their protection, and subject to their laws. If they annul the grant, we know of no tribunal which can revise and set aside the proceeding. We know of no principle which can distinguish this case from a grant made to a native Indian, authorizing him to hold a particular tract of land in severalty.

As such a grant could not separate the Indian from his nation, nor give a title which our courts could distinguish from the title of his tribe, as it might still be conquered from, or ceded by his tribe, we can perceive no legal principle which will authorize a court to say that different consequences are attached to this purchase, because it was made by a stranger. By the treaties concluded between the United States and the Indian nations, whose title the plaintiffs claim, the country comprehending the lands in controversy has been ceded to the United States, without any reservation of their title. . . . Their cessation of the country, without a reservation of this land, affords a fair presumption, that they considered it as of no validity. They ceded to the United States this very property, after having used it in common with other lands, as their own, from the date of their deeds to the time of cession; and the attempt now made, is to set up their title against that of the United States.181

Marshall thus recognized that, despite discovery or conquest, Indian title exists until extinguished by a government exercising ultimate sovereignty. Therefore, the extensive discussion in M'Intosh of title being acquired by discovery or conquest is obiter. Using Ockham's Razor to excise the excess Marshallian rhetoric,

181. Id. at 592-94.
182. Ockham's Razor is the analytical tool whereby unnecessary assumptions are discarded or ignored in attempting to analyze causality. It was honed by the medieval
it is clear that what the plaintiffs asserted title over, and what the Indians had sold their predecessors in title, was *vacant land*, land which the Indians did not possess. In the passage just quoted, Marshall observes that when the Indians ceded the land to the United States, they did not reserve the land previously conveyed to plaintiffs' ancestor in title since it can be fairly presumed that "they considered it [the grants] as of no validity,"\(^\text{183}\) that is, it was a grant of land over which the Indians did not exercise the rights of use and occupancy. Further, Marshall cites the British Royal Proclamation of 1763 reserving vacant lands as not those occupied and possessed by Indians, and "the vacant soil is to be disposed of by that organ of government which has the constitutional power to dispose of the national domains, by that organ in which all vacant territory is vested by law."\(^\text{184}\) Assuming for the sake of argument that there exist "vacant lands" unused by Indians for seasonal subsistence purposes,\(^\text{185}\) and also assuming, *arguendo*, that a foreign sovereign can arrogate to himself these "vacant lands" by discovery, if the Piankeshaw and Illinois Indians purport to convey such vacant and unoccupied lands to a third person, they convey nothing.

That is the real holding in *M'Intosh*. Why so few persons, even those sympathetic to Indian rights,\(^\text{186}\) have not carefully read *M'Intosh* is itself something of a mystery, especially when it is quite obvious that Marshall gives the game away in the concluding pages of his opinion.

Finally, it must be noted that Marshall insists that, even under the rubric of conquest, where incorporation of the conquered with the victorious nation is practicable, "the rights of the conquered to property should remain unimpaired,"\(^\text{187}\) and that, even though "the Indian inhabitants are to be considered merely as occupants, philosopher William of Ockham (?1290-1349) as an analytical tool. See 3 F. COPLESTON, *A History of Philosophy* (Part I), 80-87 (1963).

183. 21 U.S. (8 Wheat.) at 594.
184. *Id.* at 595.
Indian possession or occupation was considered with reference to their habits and modes of life; their hunting-grounds were as much in their actual possession as the cleared fields of the whites; and their right to its exclusive enjoyment in their own way and for their own purposes, were as much respected, until they abandoned them, made a cession to the government, or an authorized sale to individuals.
186. Such as Justice William O. Douglas, who, as a dissenter in *Shoshone Indians v. United States* 324 U.S. 335, 349 (1945) states that the United States might have "extinguished Indian title by the sword. . . ."
187. 21 U.S. (8 Wheat.) at 589.

Published by University of Oklahoma College of Law Digital Commons, 1983
[they are] to be protected, indeed, while in peace, in the possession of their lands. . . ."\(^{188}\)

Subsequent decisions on aboriginal title have unquestioningly followed *M'Intosh*, the most recent, and most egregious, being *Tee-Hit-Ton Indians v. United States.\(^{189}\) Yet even *Tee-Hit-Ton*, horrid as its obiter dicta is, can be cut down to size by Ockham's Razor. The Tee-Hit-Tons, a clan of Tlingits in southeast Alaska,\(^{190}\) brought an action in the Court of Claims for damages to timber cut from their ancestral lands, approximately 352,800 acres of land and 150 square miles of water within the Tongass National Forest.\(^{191}\) The Court of Claims found that immemorial possession of the land and water claimed had not been proved because the clan had become decimated by smallpox, alcoholism, and other civilized discontents, so that they were "physically incapable of controlling or exploiting the area which was once the sole support of a large number of people. . . ."\(^{192}\) Citing *M'Intosh*, the Supreme Court found that since Congress had never recognized any legal interest of the Tee-Hit-Ton clan, the clan could not recover damages for any violated right of occupancy.\(^{193}\) After these gratuitous thoughts, Justice Reed, as had Chief Justice Marshall, got down to the facts of the case. Echoing the finding of the Court of Claims that the decrease in the clan's population meant the clan could not possibly assert use and occupancy over such a wide area, the Court described the Tee-Hit-Tons' case as "more a claim

---

188. *Id.* at 591.
192. 128 Ct. Cl. at 98. This statement makes the highly questionable assumption that the relinquishment of the claimed area was an intentional and voluntary one, whereas the court's own findings of fact indicate that it was caused by factors out of the people's control:

Smallpox, hard liquor, and loose living decreased both the number of Tee-Hit-Ton and the authority of local clan officials over individuals. At about the turn of the century, the clan had only one woman of child-bearing age. Since that time, the clan has had 65 or fewer people. Because of this population decrease, and changes in the economic patterns brought about by such things as the use of powerboats for fishing, the Tee-Hit-Ton are and have been physically incapable of controlling or exploiting the area which was once the sole support of a larger number of people, particularly because significant amounts of time must be spent gaining a livelihood today under conditions which preclude extensive use either of small fishing streams or hunting areas.

of sovereignty than ownership." 194 The proof, then, could only show a diffuse and scattered use and occupancy and thus the Indians could not make a case under the Indian Claims Commission Act. 195

M'Intosh and Tee-Hit-Ton do not, therefore, stand for the proposition that aboriginal title has been extinguished in the United States by discovery or conquest. These cases show a failure of proof, and the question naturally arises as to what is Indian title and in what guise does it exist today?

Indian title is the Great Monad 196 of property rights in the United States, that is, it is the underlying and immutable concept from which all property rights can be traced and from which all property rights can be derived. This is a sweeping, even all-inclusive statement, but it can be readily validated. The Philippines was formerly a domain of Spain where, as in Louisiana, the Recopilación de las Indias was law. 197 When Spain lost the archipelago in the Spanish-American War in 1898, the United States undertook to administer it with a guarantee of all property rights. 198 Under the neocolonial legislation promulgated by the United States, a landowner was obligated to register his land, and Mateo Caríño, a member of the Igorot ethnic group of Benguet Province, attempted to do so, only to have his application turned down by one court after another, up to the Supreme Court of the Philippines.

Caríño claimed that he and his ancestors had run cattle on the land "according to the custom of the country" 199 from time immemorial, but the courts in the Philippines turned down his claim

194. Id. at 287. Only one witness, the chief of the clan, testified as to this use and occupancy, and he was only able to mark six places within the 350,000-acre area to show use of the land. Id. at 285-86.


196. A monad is the basic substance of an existent being that is the principle and source of its activities, but which fundamentally is impenetrable, indivisible, inert, and indiscernible. Leibniz: The Monadology and Other Philosophical Works 37-38, 45-47, 219 (R. Latta tr. and ed. 1898).

197. Recopilación, VI, 1.15 (Philip II, Nov. 7, 1574).


by asserting that since Spain’s conquest of the Philippines gave it title to all the land within the archipelago and, as the land was public, it could not be acquired by adverse possession.\textsuperscript{200} Carìño applied to the Supreme Court of the United States for a writ of error to review the judgment of the Philippine Supreme Court and to his good fortune Oliver Wendell Holmes, Jr., wrote the unanimous opinion of reversal in \textit{Carìño v. Insular Government}.\textsuperscript{201}

Justice Holmes begins his analysis by saying that “every presumption is and ought to be against the government in a case like the present.”\textsuperscript{202} He turned to “a subtle examination of ancient texts” and the attitude of Spanish law,\textsuperscript{203} that is, to the \textit{Recopilació}:

If the applicant’s case is to be tried by the law of Spain, we do not discover such clear proof that it was bad by that law as to satisfy us that he does not own the land. To begin with, the older decrees and laws cited by the counsel for the plaintiff in error seem to indicate pretty clearly that the natives were recognized as owning some lands, irrespective of any royal grant. In other words, Spain did not assume to convert all the native inhabitants of the Philippines into trespassers or even into tenants at will. For instance, Book 4, title 12, Law 14 of the \textit{Recopilació} de Leyes de las Indias, cited for a contrary conclusion in \textit{Valenton v. Murciano}, 3 Philippine, 537, while it commands viceroys and others, when it seems proper, to call for the exhibition of grants, directs them to confirm those who hold by good grants or \textit{justa prescripción}. It is true that it begins by the characteristic assertion of feudal overlordship and the origin of all titles in the king or his predecessors. That was theory and discourse. The fact was that titles were admitted to exist that owed nothing to the powers of Spain beyond this recognition in their books.

\textit{Prescripción} is mentioned again in the royal cédula of October 15, 1754, cited in 3 Philippine, 546: “Where such possessors shall not be able to produce title deeds it shall be

\textsuperscript{200} \textit{Id.} at 457. This was exactly the argument made by Chief Justice Marshall in \textit{M’Intosh}. See 21 U.S. (8 Wheat.) 543, 572-85 (1823).

\textsuperscript{201} 212 U.S. 449, 455 (1909).

\textsuperscript{202} \textit{Id.} at 460. Justice Holmes later observed: “In dealing with an Iggorot of the Province of Benguet it would be absurd to expect technical niceties, and the courts below were quite justified in their liberal mode of dealing with the evidence of possession and the possibly rather gradual settling of the precise boundaries of the appellants’ claim.” \textit{Reavis v. Fianza}, 215 U.S. 16, 23 (1909).

\textsuperscript{203} 212 U.S. 449, 460 (1909).
sufficient if they shall show that ancient possession, as a valid
title by prescription." It may be that this means possession from
before 1700, but at all events the principle is admitted. As
prescription, even against crown lands, was recognized by the
laws of Spain, we see no sufficient reason for hesitating to ad-
mit that it was recognized in the Philippines in regard to lands
over which Spain had only a paper sovereignty.204

With precision and acuity, Justice Holmes thus recognized that
native title was not vitiated by discovery or war, but continued
to exist, despite the change in sovereignty, since Caríño possessed
and owned the land under "native custom and by long associa-
tion—one of the profoundest factors in human thought..."205

Although a distinction was made in the opinion between the
acquisition of the Philippines by the United States and the settle-
ment of North America by the white race,206 it is a distinction
without a difference. Both the Philippines and North America
were "discovered" and "conquered" by European nations, and
in neither case did these nations presume to invalidate property
holdings. In any case, the holding in Caríño, and specifically Justice
Holmes's construction of the justa prescripción provision, has been

204. Id. at 460-61.
205. Id. at 459.
206. Id. at 458. Justice Reed attempted to distinguish Caríño in a footnote to Tee-Hit-
Ton. 348 U.S. 272, 284 n.1 18. He said that the Caríño Court "relied chiefly upon the
purpose of our acquisition of the Philippines as disclosed by the Organic Act of July
1, 1902, which was to administer property and rights 'for the benefit of the inhabitants
thereof'. 32 Stat. 695." Of course, the United States has pledged itself to administer the
property of the Indians for their benefit as a trustee. United States v. Mason, 412 U.S.
391, 398 (1974). Justice Reed seized upon the statement in Caríño that "[t]he acquisition
of the Philippines was not like the settlement of this white race in the United States,"
whereas "the dominant purpose of the whites in America was to occupy the land," 212
U.S. at 458. While that is a correct differentiation, the fiduciary obligation of the United
States toward the Indians would place precisely the same constraint on its actions vis-à-vis
its Indian wards as was imposed on its actions by the Philippine Organic Act of 1902.
The rights asserted by the Tee-Hit-Tons were, according to Justice Reed, "a rule of sovereign
ownership or dominium," whereas Caríño makes clear that Recopilación IV, 12.14 is of
general application, and "titles were admitted to exist that owed nothing to the powers
of Spain beyond this recognition in their books." 212 U.S. at 461. Since Recopilación
IV, 12.14 was in force in the Americas, it follows that its application cannot be, and
was not, confined to those instances of an "ordinary prescriptive rights situation rather
than to a recognition by this Court of any aboriginal use and possession amounting to
fee simple ownership." 348 U.S. at 284 n.18. But, as has been seen, Recopilación IV,
12.14 was not confined to the individual, and, indeed, was enacted to cover situations
of communal ownership. See text, supra, at notes 93-99.

Published by University of Oklahoma College of Law Digital Commons, 1983
expressly recognized as validating original Indian title in the United States.\footnote{207}

Cariño is not unorthodox or revolutionary in its holding concerning inmemorial possession. At common law, adverse possession of sixty years could be maintained against the British crown under a 1769 statute of George III.\footnote{208} The Bractonian doctrine of \textit{nullum tempus occurit regi} did not apply to possession of crown lands, but rather to franchises, especially those having to do with the administration of justice.\footnote{209} The 1769 statute became part of the common law of the United States upon its independence in 1776,\footnote{210} and Justice Story, sitting in circuit in 1821, expressly recognized the sixty-year period for adverse possession against the crown.\footnote{211} Certainly, any rights acquired by 1776, or on later dates of the imposition of sovereignty, would not be affected by the later statutory rule that adverse possession does not run against the government.

Under British law, conquest, so heavily relied upon by Marshall, was specifically held not to extinguish property rights in the 1774 decision of the King’s Bench in \textit{The Cause of the Island of Grenada}\footnote{212} where Lord Mansfield laid down the rule that if a sovereign conquers another nation, “the conquered inhabitants once received under the King’s protection, became subjects, and are to be universally considered in that light, not as enemies or aliens,” and “that the laws of a conquered country continue in force, until they are altered by the conqueror. . . .”\footnote{213} It necessarily


\footnote{208. 9 Geo. III, ch. 16, 10 Stat. L. 540.

\footnote{209. See 1 F. POLLOCK & F. MAITLAND, HISTORY OF ENGLISH LAW 571-72 (ed. 1898); 2 F. POLLOCK & F. MAITLAND, supra, at 144.


\footnote{213. 1 Cowp. at 208, 209, 98 Eng. Rep. at 1047. The \textit{Grenada} case had been cited to the Court in \textit{M'Intosh}, 21 U.S. (8 Wheat.) 543, 564 (1823). Marshall distinguished the \textit{Grenada} case as a striking down of a tax on a conquered province by proclamation: “[t]he authority of this proclamation, so far as it respected this continent, has never been denied, and the titles it gave to lands have always been sustained by the courts.” 21 U.S. (8 Wheat.) at 597. But Marshall misread the \textit{Grenada} case, as it most certainly held that

https://digitalcommons.law.ou.edu/ailr/vol11/iss1/7
follows that those rights that flow from the conquered government, namely rights to, and arising out of, interests in property, were not invalidated and nullified by the conquest but continue in force after the conquest. Of course, the conquering sovereign may prescribe different modes of protecting private property after military conquest, but, where the sovereign guarantees the right of property, this guarantee vests the property with indefeasible title.\textsuperscript{214}

The fact is that the British sovereign did not extinguish Indian title at any time by proclamation, nor did Parliament enact any such confiscatory legislation.\textsuperscript{215} The 1763 proclamation mentioned by Marshall in \textit{M'Intosh}\textsuperscript{216} expressly guarantees Indian tribes and

\begin{quote}
the royal power did not extend to the confiscation of property of private citizens of a conquered nation. Lord Mansfield says only if the sovereign commits genocide upon a conquered people "all the lands belong to him. If he received the inhabitants under his protection and grants them their property, he has a power to fix such terms and conditions as he thinks proper." 1 Cowp. at 209, 98 Eng. Rep. at 1048. That is precisely what the pre-Independence treaties between the British king and the Indian tribes did, as Marshall acknowledged in his discussion of the Royal Proclamation of 1763. 21 U.S. (8 Wheat.) at 594.
\end{quote}

\textsuperscript{214} It has already been shown how the Philippines, a fruit of military conquest, had the rights of its inhabitants protected under the Organic Act of 1902 (\textit{supra} note 200), and upon which Justice Holmes relied in \textit{Cariño}. See 212 U.S. 449, 459-60. In the Mexican cession, Congress prescribed different modes for the protection of property for different states. The United States undertook to protect property rights under article VIII of the Treaty of Guadalupe-Hidalgo, 9 Stat. 930 (1848), which was modeled upon article III of the Louisiana Purchase Treaty. \textit{See} Letter from Secretary of State Buchanan to Nicholas Trist, Apr. 15, 1847, in S. Ex. Doc. No. 52, 30th Cong., 1st Sess. 83 (1848); Message of President Polk to House of Representatives, Feb. 8, 1849, H. Ex. Doc. No. 50, 30th Cong., 2d Sess. 6 (1849). For some states, Congress prescribed a survey of land claims by the surveyor general, \textit{see} United States v. Santa Fe Pac. R.R., 314 U.S. 339, 348-50 (1941), but for California, Congress passed a statute which required the filing and judicial ascertainment of land claims by all persons who claimed land in that state. Act of Mar. 3, 1851, ch. 41, 9 Stat. 631. The constitutionality of the 1851 Act was specifically upheld in the face of a challenge based upon article VIII that the 1851 Act operated to forfeit the lands of those who had not filed a claim under the Act. 181 U.S. at 487-89. Whatever its other merits or demerits, \textit{Barker} did reaffirm the principle that the property rights of persons within a conquered area were not vitiated or canceled because of the conquest. The \textit{Barker} Court concluded that because the Cúpeño Indians had failed to file a land claim under the 1851 Act, they forfeited their rights as claimants. The decision is only defensible on the somewhat questionable factual ground that the Cúpeño Indians had previously abandoned the property in question, \textit{see} 181 U.S. at 499, even though there is substantial historical documentation to the contrary. \textit{See} L. \textit{BEAN} \& C. \textit{SMITH}, \textit{Cúpeño}, \textit{8 Handbook North American Indians: California}, 588 (1978).

\textsuperscript{215} Cyrus Thomas invokes only discovery as the basis for the extinguishment of Indian title by the British crown in his \textit{Introduction}, \textit{supra} note 165, at 549-61.

\textsuperscript{216} 21 U.S. (8 Wheat.) at 594, 598.
nations living under the protection of the crown freedom from molestation or disturbance. The 1763 proclamation makes it unquestionably clear that the British crown did not consider Indian title as having been destroyed by discovery or conquest since the crown considered lands in the hinterlands, "beyond the heads and sounds of any of the rivers," as without the royal jurisdiction, as were those lands within the colonial territory that had not "been added to, or purchased by" the crown.

Despite this apodictical language, both Marshall and later commentators have maintained that the Indians only have "the usufruct or right of occupancy to such lands as they were in possession," and that this right is not an absolute and untrammeled one. While Indian title does not amount "to nothing," Marshall says, "[t]heir right to possession has never been questioned." But the fact that the crown prescribed restraints on alienation does not amount to a confiscation of that title by the crown since title could be passed by the Indian tribe once permission had been secured from the crown. To repeat, what actually happened in M'Intosh was, at most, a selling of vacant land and a failure to abide by the provisions the crown had set up to protect the Indians. Thus M'Intosh is, in effect, the setting aside of an improvident conveyance by an Indian tribe.

Even if M'Intosh's obiter dicta are conceded to be binding law, the decision does not have any force outside the original area of the thirteen colonies. The 1803 purchase of Louisiana gave the United States no more rights than the Spanish had had in the territory. Since Sublimis Deus in 1537, and the great reform legislation of the sixteenth century, codified into a coherent whole by the Recopilación, the Spanish crown expressly recognized Indian title, protected it, and attempted to preserve it by restraints on alienation. The Mexican Cession of 1848, whereby the United States acquired almost the remainder of its present continental breadth, came about by military conquest, but the Treaty of Guadalupe-Hidalgo preserved the land rights of Indians that had been vested

218. In his Introduction, supra note 165, Cyrus Thomas states as a general principle that the right to own the soil flows from the discovery of the New World. See id. at 527-38, quoting extensively from M'Intosh as the "conclusive" authority. Id. at 533.
219. Id. at 534.
220. 21 U.S. (8 Wheat.) at 603.
in them by the *Recopilación* and that had been further protected by the Plan of Iguala after the independence of Mexico.\(^{221}\)

These rights continue today. In Louisiana, because of a peculiar twist in the law, the *Recopilación* and Spanish law in general survive as positive law. Outside of Louisiana, within the Louisiana Purchase Territory and the Mexican Cession, the rights vested in Indian tribes to their lands are alive and well and await only an advocate to give impetus to the vindication of "just prescriptive rights" too long denied.

\(^{221}\) The Plan of Iguala abolished slavery and made Indians citizens of the Mexican republic, capable of fully exercising their property rights. United States v. Ritchie, 57 U.S. (17 How.) 535, 538-40 (1855).