

Form of Marriage in Spanish North America

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THE FORM OF MARRIAGE IN SPANISH NORTH AMERICA*

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In his masterful work on comparative law, Professor Schlesinger reminds us that "large sections of the United States have a heritage of Spanish and French law derived from early settlers and conquerors." Although "these remnants of the civil law

* Issue 6 of Volume 60 of the *Cornell Law Review* was a dedication to Professor Rudolf B. Schlesinger. This Article is a part of the *Cornell Law Review's* tribute to Professor Schlesinger.

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This Article is dedicated to "Rudi" Schlesinger who has always been and will long continue to be an inspiration to all of us.

often are hidden under a thick layer of common law," they occasionally rise to the surface even today. Especially when dealing with problems of land titles, mining law, water rights, or matrimonial property in Florida, Louisiana, Texas, New Mexico, Arizona, or California, Schlesinger concludes, lawyers would be well advised to familiarize themselves with the civil law antecedents of currently prevailing rules.¹

Leaving aside Louisiana, where the civil law as such has survived, and Florida, which is not a community property state, lawyers in the Southern, Southwestern, and Western United States would readily accept Professor Schlesinger's thumbnail sketch of currently viable legal institutions derived from the civil law so far as their own states are concerned. With considerable effort, they might augment or perhaps even marginally enlarge some of his finds;² if historically oriented, they might even add some almost archeological discoveries of their own, such as succession to church property,³ or the influence of Spanish law on early Texas civil procedure.⁴

Texas lawyers, in particular, would be likely to make two rather fundamental qualifying observations. First, as illustrated by some of the examples just given, historical titles tend to be phased out by prescription,⁵ and judicially adopted (or, perhaps, adapted) rules based on civil law are rapidly absorbed into the general corpus of the common law. Thus, the current relevance of the discovery of the historical roots of legal institutions is rather severely limited. Second, however, Texas lawyers would be quick to acknowledge the abiding indebtedness of their legal order to Spain

¹ R. SCHLESINGER, *COMPARATIVE LAW* 11 (3d ed. 1970) (italics omitted).

² See generally authorities collected in E. VAN KLEFFENS, *HISPANIC LAW UNTIL THE END OF THE MIDDLE AGES* 266-77 (1968). To the cases cited in R. SCHLESINGER, *supra* note 1, at 11 nn.31-36, the author would especially add *State v. Valmont Plantations*, 346 S.W.2d 853 (Tex. Civ. App. 1961), *aff'd*, 163 Tex. 381, 355 S.W.2d 502 (1962); and *Luttes v. State*, 159 Tex. 500, 324 S.W.2d 167 (1958). The former case is discussed in McKnight, *The Spanish Watercourses of Texas*, in *ESSAYS IN LEGAL HISTORY IN HONOR OF FELIX FRANKFURTER* 373, 384-85 (M. Forkosch ed. 1966), and the latter case in Winters, *The Shoreline for Spanish and Mexican Grants in Texas*, 38 TEXAS L. REV. 523 (1960).

³ See, e.g., *San Antonio v. Odin*, 15 Tex. 539 (1855); *Blair v. Odin*, 3 Tex. 288 (1849). The case first cited was a dispute over title to the Alamo.

⁴ See generally McKnight, *The Spanish Influence on the Texas Law of Civil Procedure*, 38 TEXAS L. REV. 24 (1959). Muir, *The Intellectual Climate of Houston During the Period of the Republic*, 62 S.W. HIST. Q. 312 (1959), speaks of "the blending of the civil and the common law, the abolition of special pleading, [and] the marriage of law and equity in a single court, the distinctive contributions of Texas to western civilization." *Id.* at 313. This is, incidentally, a highly amusing and informative article, and of course a very brief one.

⁵ *Amaya v. Stanolind Oil & Gas Co.*, 158 F.2d 554 (5th Cir. 1947). Cf. *Atchley v. Superior Oil Company*, 482 S.W.2d 883, 899-902 (Tex. Civ. App. 1972).

for what they have come to regard as the civil law rule of matrimonial property: the ganancial community of acquests by onerous title during coverture. Their feelings on this subject would be generally shared—possibly with somewhat less emphasis⁶—by lawyers in other Southwestern and Western States where the community property system prevails.

It therefore seems reasonably clear that Spanish law has left a permanent imprint on the matrimonial property law of the Southwestern and Western States, but its influence there has otherwise been temporary and is currently rather insignificant. The explanation for this long-range inconsistency in performance can be sought at two levels. First, it might be asked why Spanish family law has had more staying power than Spanish civil law generally. Second, and on a much lower level of abstraction, there might be speculation as to the reasons for the tenacity of Spanish matrimonial property law as opposed to that of Spanish family law generally.

The first line of inquiry does not seem to promise new insights. For analytical purposes, civil law might be divided along the still widely accepted Pandectist lines into five components or masses: *normae generales*; things (real and personal property); obligations (contracts, unjust enrichment, torts); family law; and successions.⁷ The "general part" of the civil law could not, in the nature of things, survive the wholesale reception of the common law. The Spanish law of real property in what is now Anglophonic North America was primarily and almost exclusively a public law system of land allocation by the sovereign rather than a private law system regulating land transfers between individuals. At least during Spanish rule, personal property rights, especially those of Anglo-Saxon immigrants, were of little consequence, since most of these immigrants were desperately poor. For the same reasons, the law of contracts was of little practical importance. Torts, one gathers, tended to be "amerced" by extrajudicial means.⁸ If the rather fully

⁶ TEX. CONST. art. XVI, § 15 (1876), defines the separate property of the wife and thus, indirectly, community property. See generally Huie, *The Texas Constitutional Definition of the Wife's Separate Property*, 35 TEXAS L. REV. 1054 (1957). Only two other states have constitutional provisions dealing with this subject. See McKnight, *Texas Community Property Law—Its Course of Development and Reform*, 8 CALIF. W.L. REV. 117, 118 n.7 (1971). Recent reform projects, although designed to streamline the Texas constitution, have not even questioned the current justification of the separate property provision.

⁷ See R. SCHLESINGER, *supra* note 1, at 220-21, 371-76.

⁸ E. BARKER, *THE LIFE OF STEPHEN F. AUSTIN* 153 (1925), states that "[t]here was some petty thieving, some litigation about contracts, some suits to collect notes, some gambling, and, judging from Austin's occasional outburst of exasperation against drunkards, too much

documented early legal and social history of Texas is accepted as reasonably illustrative of conditions generally prevailing in the Spanish and Mexican Southwest, the primary function of what might be called the "market transactions" sector of the then prevailing law of things and obligations was the protection of the immigrants from their American creditors.⁹

The "family wealth" sector, on the other hand, presents a different picture. The acquisition, improvement, and familial transmission of land was the basic aim of Anglo-Saxon settlement in Spanish and Mexican North America. The ganancial system of matrimonial property was readily accepted by the settlers as best designed for local conditions, and it has survived because, with appropriate modifications, it is even today demonstrably superior to any other.¹⁰ Forced heirship, however, rapidly succumbed to the individualistic spirit of Anglo-American law.¹¹

If the main contours of Spanish matrimonial property law survived more or less intact, why did Spanish family law as a whole fail to persevere? The present study is, at base, a search for an answer to that question. As already indicated by the title, however, our inquiry will be limited to one issue: the form of marriage. There are several reasons for narrowing the scope of our inquiry.

drinking" in Austin's colony. As for the inclination towards self-help in a slightly later period, see W. HOGAN, *THE TEXAS REPUBLIC, A SOCIAL AND ECONOMIC HISTORY* 267-90 (1946).

⁹ See generally London, *The Initial Homestead Exemption in Texas*, 57 S.W. HIST. Q. 432 (1954), and sources cited therein; Nackman, *Anglo-American Migrants to the West: Men of Broken Fortunes? The Case of Texas, 1821-46*, 5 W. HIST. Q. 441 (1974). As early as Dec. 22, 1824, Stephen Austin had recommended to the Legislature of Coahuila and Texas the enactment of a law "protecting the new Emigrants from all old foreign debts for at least Twelve Years." *The Austin Papers*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1919, at 996-97 (E. Barker ed. 1924) [hereinafter cited as *AUSTIN PAPERS* 1919]. Upon his renewed request in 1828, such a moratorium law was enacted in 1829. State of Coahuila and Texas, Decree No. 70, art. 2, 1 THE LAWS OF TEXAS 1822-1897, at 220, 221 (H. Gammel ed. 1898) (10 vols.) [hereinafter cited as *GAMMEL*; all page references are to renumbered pages]. The specific contributions of Texas in this connection include the abolition of imprisonment for debt because of inability to pay (TEX. CONST. OF 1836, Declaration of Rights, § 12, 1 *GAMMEL* 1069, 1083) and a provision in the Bankruptcy Act to the effect that, subject to some qualifications as to judgments in rem and in admiralty, "no suit, proceeding, judgment or decree, shall be brought, prosecuted, or sustained in any court or judicial magistracy of this republic, on any judgment or decree of any court or tribunal of any foreign nation, state or territory . . ." Act of Jan. 19, 1841, Rule 12, § 2, 2 *GAMMEL* 502, 508. "Foreign," of course, was actually a synonym for the United States. See *Lambeth v. Turner*, 1 Tex. 364 (1847).

¹⁰ Glendon, *Matrimonial Property: A Comparative Study of Law and Social Change*, 49 TUL. L. REV. 21 (1974).

¹¹ Forced heirship was codified in Texas in 1840. Wills Act of 1840, §§ 13, 15, 2 *GAMMEL* 341, 344. These provisions were repealed, and freedom of testation was introduced in 1856. Laws of the State of Texas, 1856, ch. 85, § 7, 4 *GAMMEL* 421, 423. Note the similarity in the development of Canadian law, where freedom of testation was introduced in 1774. Quebec Act, 14 Geo. 3, c. 83, § 10 (1774).

To start with the most obvious one, wherever Spanish or Mexican law had no pertinent rules at the time the umbilical cord was severed, it could not influence future developments. The prime example is divorce, but this is likely to include most of custody and much of alimony and support. At the other extreme, there are some remnants of Spanish family status law rules that do survive, but these are either not specifically Spanish, or have merged into the general corpus of enlightened American statutory family law reform. Examples that readily come to mind in this connection are putative marriage,¹² legitimation,¹³ and adoption.¹⁴

The rules governing the formal validity of marriage in Spanish North America, on the other hand, were, at least in their severity, uniquely Spanish. They were also intimately linked to the law of family wealth transmissions. This interrelationship was, as will be seen, quite well known to the non-Spanish settlers. Especially for this reason, a study of the history of the form of marriage in Spanish North America is likely to afford new insights into the question of the comparative viability of "legal transplants."¹⁵

I

"MARRIAGE BY BOND" IN COLONIAL TEXAS

The title of this section is borrowed from a recent study by Bennett Smith,¹⁶ which has brought back to memory an almost

¹² This was first applied in *Smith v. Smith*, 1 Tex. 621, 627-34 (1847), most recently in *Davis v. Davis*, 521 S.W.2d 603 (Tex. 1974). See McKnight, *supra* note 6, at 123, 132.

¹³ Intestate Succession Act of 1840, § 15, 2 GAMMEL 306, 309, construed in *Hartwell v. Jackson*, 7 Tex. 576, 580 (1852) (now TEX. PROB. CODE § 42 (1956), and TEX. FAM. CODE § 12.02(b) (pamph. 1973)). See Smith, *Commentary*, 5 TEXAS TECH. L. REV. 389, 415 (1974). See also Legitimation Act of 1841, 2 GAMMEL 678; note 37 *infra*.

¹⁴ The Spanish and Mexican law of adoption is discussed, and applied to pre-1840 adoptions, in *Teal v. Sevier*, 26 Tex. 516, 520 (1863), and in *Ortiz v. de Benavides*, 61 Tex. 60, 67-68 (1884). The second Texas adoption statute (and also the second such statute enacted in the United States outside of Louisiana) dates from 1850. Laws of the State of Texas, 1850, ch. 39, 3 GAMMEL 439, 474. The state of Texas law of adoption between the reception of the common law in 1840 (see note 49 *infra*) and the enactment of that statute remains obscure. However, there were a number of special laws approving or authorizing individual adoptions. See Act of Dec. 20, 1841, 2 GAMMEL 693; Act of Jan. 10, 1845, *id.* at 1060; Act of Feb. 1, 1845, *id.* at 1106; Act of Mar. 13, 1848, ch. 210, 3 GAMMEL 385. Since such special laws were also enacted after the passage of the 1850 Adoption Act (e.g., Act of Feb. 3, 1860, ch. 82, 5 GAMMEL 134-35; Act of Dec. 31, 1861, ch. 39, *id.* at 542-43) these enactments prove no more than a very hospitable legislative attitude toward adoptions. The same tendency has characterized Texas case law. See Bailey, *Adoption "By Estoppel,"* 36 TEXAS L. REV. 30 (1957).

¹⁵ See generally A. WATSON, *LEGAL TRANSPLANTS* (1974).

¹⁶ B. SMITH, *MARRIAGE BY BOND IN COLONIAL TEXAS* (1972). The present study was to a considerable extent prompted and inspired by that handsome volume.

forgotten bit of Texas folklore. The practice itself is best illustrated by a letter of one of the signers of the Texas Declaration of Independence, Thomas Barnett, to Stephen Austin, dated June 15, 1831. In pertinent part, it reads as follows:

I have recently understood that yourself and Padre Muldoon will shortly pay a visit to the Fort Settlement, where the neighbourhood will assemble for the purpose of marriages, and Christening. Owing to the extreme indisposition of myself and the helpless situation of my family it will be inconvenient for me to attend. I have therefore to request you, and through you the Rev father Muldoon to call at my house on your way down. [*sic*] to the end that the marriage contract betwixt myself and my wife may be consummated and my children christened.¹⁷

The marriage contract between the author of this letter and Nancy Tubbs (Spencer) was evidenced by a marriage bond dated April 20, 1825, which is still extant and on file.¹⁸ Its wording is virtually identical to that used in other marriage bonds executed in Austin's colony at the time. After reciting the wish of the parties to unite in marriage, the absence of a Roman Catholic priest in the colony to perform the ceremony, and the agreement of the parties to take each other as lawful spouses, the Barnett-Spencer bond provides that the parties bind and obligate themselves to one another, under the penalty of \$10,000, "to have our marriage solemnized by a Priest of this Colony or some other priest authorized to do so as soon as an opportunity offers."¹⁹

As suggested by Thomas Barnett's letter, the occasional appearance of a priest led to substantial gatherings for the purpose of solemnizing marriages and baptizing children—for the intent expressed in the marriage bond seems to have been very present and real.²⁰ There is no record of a forfeiture of the penalty stipulated, which varied from Mex\$ 2,000 to 60,000.²¹ On the other hand, it has been reported by contemporary authority that

¹⁷ *The Austin Papers*, in 2 ANNUAL REPORT OF THE AMERICAN HISTORICAL ASSOCIATION FOR THE YEAR 1922, at 666-67 (E. Barker ed. 1928) [hereinafter cited as AUSTIN PAPERS 1922].

¹⁸ Thomas Barnett and Nancy Tubbs (Spencer), Apr. 24, 1825, Marriage Bond Records 7 (Office of the County Clerk of Austin County, Bellville, Texas). For a listing of this and other marriage bonds on file there, see B. SMITH, *supra* note 16, at 63-66.

¹⁹ Barnett-Spencer marriage bond, *supra* note 18. A copy was procured by the author from the county clerk of Austin County at Bellville, Texas. See also Crownover-Castleman bond, Apr. 29, 1824, B. SMITH, *supra* note 16, at 9-10; Burns-Kurykendall bond, Apr. 20, 1826, *id.* at 11-12.

²⁰ Thomas and Nancy Barnett had six children, at least three of whom were born before 1831. L. KEMP, THE SIGNERS OF THE TEXAS DECLARATION OF INDEPENDENCE 17-18 (1944).

²¹ B. SMITH, *supra* note 16, at 27.

[m]any couples . . . not finding the marriage state to possess all the alluring charms which they had figured in their fond imaginations have taken advantage of this slip-[k]not plan—sought the bond, and by mutual consent committed it to the flames—returned to the world as young as ever and free as the air.²²

The legal reasons behind this quaint Texas custom are not difficult to fathom. As will be seen below,²³ Spanish law generally proscribed non-Roman Catholics from the Empire. Accordingly, the communication of the Spanish Governor of Texas to Moses Austin stipulated that the original three hundred settler families had to be Catholics, or agree to become such, before entering Spanish territory.²⁴ The same requirements were repeated in the authorization which Stephen Austin received from Emperor Iturbide, and in the Colonization Law of the Mexican State of Coahuila and Texas.²⁵ Mexican independence as such did not mitigate the requirement that all inhabitants of the country be Roman Catholics. Quite the contrary, as article four of the Mexican Constitution of 1824 specifically provided: "The religion of the Mexican nation is and shall perpetually remain the Roman Catholic and Apostolic. The nation protects it by just and wise laws, and prohibits the exercise of every other."²⁶ The outward compliance of the Anglophonic settlers with this religious requirement was complete. As Stephen Austin reported to Father Juan Nepomuceno Peña in 1824: "Todas las familias que han emigrado de otros países ó naciones á habitar en estas Colonias de mi Cargo, son Católicos"²⁷

The real situation seems to have been quite different. It is estimated that only about one-fourth of the pre-independence settlers were Roman Catholics or converts to that faith.²⁸ The latter category included a number of prominent Texans, such as Presi-

²² Smith, *Reminiscences of Henry Smith*, 14 TEX. HIST. ASS'N Q. 24, 31 (1910) (reproduction of a letter dated Nov. 18, 1836). For an example of such an early variant of "common law divorce," see *Nichols v. Stewart*, 15 Tex. 226, 233-34 (1855). This case is discussed at notes 74-81 and accompanying text *infra*.

²³ See notes 205-12 and accompanying text *infra*.

²⁴ Letter from Gov. Martínez to Moses Austin, Feb. 8, 1821, 1 GAMMEL 25, 26.

²⁵ Decree of the Emperor, Feb. 18, 1823, fifth recital, 1 GAMMEL 31; Colonization Law, arts. 3, 5, *id.* at 40, 41.

²⁶ MEX. CONST. OF 1824, art. 4, 1 GAMMEL 61.

²⁷ "All the families which have emigrated from other countries or nations to live in these colonies under my charge are Catholics." Letter from Stephen Austin to Father Juan Nepomuceno Peña, Aug. 26, 1824, AUSTIN PAPERS 1919, at 1032 (trans. by author).

²⁸ W. RED, *THE TEXAS COLONISTS AND RELIGION 1821-1836*, at 5 (1924). See also *Fitzmorris, Four Decades of Catholicism in Texas 1820-1860*, at 10-11, in 35 CATHOLIC UNIVERSITY OF AMERICA DISSERTATIONS (1926); 7 C. CASTAÑEDA, *OUR CATHOLIC HERITAGE IN TEXAS, THE CHURCH IN TEXAS SINCE INDEPENDENCE* 2-3 (1958).

dents Houston and Lamar. At least in some instances, however, one may well doubt whether conversion was accompanied by the intent requisite for canonical validity.²⁹ To cite but one example, another President of Texas, David Burnet, is reported to have remarked about Mirabeau Lamar's oath to defend the Catholic faith that "oaths like that have no importance. Oaths like that are made only to be broken."³⁰

Be that as it may, it seems clear that in their dealings with the Mexican authorities, the settlers from the United States were careful not to disturb the legal presumption that they were adherents of the Roman Catholic religion. The issue of tolerance was, in Austin's words, "a dangerous subject to touch," one he never raised officially with the Mexican authorities.³¹

Consequently, all Anglophonic settlers of Mexican Texas were legally deemed to be, and accepted being treated as, adherents of the Roman Catholic faith. From this, it followed in the view of both the Mexican authorities and of the settlers themselves that the latter could validly marry only in solemn Roman Catholic form, *i.e.*, through a ceremonial marriage assisted by a duly ordained and authorized Roman Catholic cleric of the requisite rank. The difficulty that arose in this connection was not attributable to any reluctance of lukewarm or sham converts to go through a ceremony in an unfamiliar ritual, but, much more simply and fundamentally, to the absence of priests in the Anglo-Saxon settlements.

Stephen Austin sought to remedy this situation by securing the permanent assignment of a priest to his settlement, but mainly for financial reasons was unsuccessful.³² Faced with a situation where priests were likely to be available only intermittently, he brilliantly improvised by sanctioning "marriages by bond" as described above. He duly reported this practice to the Mexican authorities, but received no official sanction³³—indeed, it seems unlikely that any could have been given.

²⁹ See generally Hughes, *The Juridical Nature of the Act of Joining the Catholic Church*, 8 *STUDIA CANONICA*, CAN. CANON L. REV. 45 (1974). Msgr. Jean Marie Odin, the Vicar Apostolic of Texas and later the first Bishop of Galveston, regarded adults baptized under such circumstances, and without prior instruction, Roman Catholics "but in name." Letter from Bishop Odin to Card. Fransoni, Sept. 22, 1851. Odin Transcripts, Catholic Archives of Texas, Austin, Texas. This document is entitled "Petite Notice Sur la Diocèse de Galveston Texas." Like most of Bishop Odin's correspondence, it is in French.

³⁰ Letter from Dubois de Saligny to Louis Thiers, Dec. 24, 1840, in 1 *THE FRENCH LEGATION IN TEXAS* 178, 181 (N. Barker ed. 1971).

³¹ Quoted in E. BARKER, *supra* note 8, at 260.

³² *Id.* at 261.

³³ Letter from Stephen Austin to José Antonio Saucedo, June 20, 1824, 2 *AUSTIN*

What, then, was the perceived legal effect of marriages by bond before the "consummation" of the marriage contract by a marriage ceremony *in facie ecclesiae* (before the church)? Seemingly Austin's primary concern was the prevention of the scandal of manifestly illegal cohabitation. The marriage bond removed this element of scandal, but it could not achieve much more. This had some potentially dangerous implications for the legitimacy of offspring. The Barnett marriage, for instance, was blessed in advance at least three times before the arrival of Padre Muldoon.³⁴

On closer inspection, however, these dangers proved to be more apparent than real, as Mexican law recognized *legitimatio per matrimonium subsequens* (legitimation by subsequent intermarriage of the parents).³⁵ Of course, tragedy might intervene before the arrival of the priest. Indeed, to return one more time to the Barnett example, the previous husband of Mrs. Barnett had been killed by Indians in 1824,³⁶ and a similar fate could easily have befallen her second spouse, Thomas, before the arrival of Padre Muldoon. Events such as this probably explain why the Congress of the Republic of Texas occasionally resorted to the more unusual device of *legitimatio per rescriptum principis* (*scil. Reipublicae*) (legitimation by edict of the prince of the republic).³⁷ With this background, it is hardly surprising that the "civil law" rules on legitimation found ready acceptance into the law of post-independence Texas.³⁸

Nor should it be surprising that the Republic of Texas acted swiftly and decisively to validate pre-independence marriages by bond. The first attempt in this direction even antedates the formal declaration of independence on March 2, 1836. An Ordinance and Decree of the Consultation, dated January 22 of that year, empowered "regular[ly] accredited ministers of the Gospel, of whatever denomination, in addition to "all judges, alcaldes, and commissarios . . . to celebrate the rites of matrimony in their respective

PAPERS 1919, at 836; Letter from José Antonio Sáucedo to Stephen Austin, July 10, 1824, *id.* at 850-51. See also text accompanying note 26 *supra*.

³⁴ See note 20 *supra*.

³⁵ LAS SIETE PARTIDAS, pt. IV, tit. 13, l. 1 [hereinafter cited as PARTIDAS]; 1 NUEVO FEBRERO MEXICANO 100-01 (M. Galván Rivera ed. 1850).

³⁶ L. KEMP, *supra* note 20, at 17.

³⁷ Act of Dec. 18, 1837, 1 GAMMEL 1445; Resolution of May 24, 1838, *id.* at 1515; Act of Jan. 26, 1839, 2 GAMMEL 14. This practice was continued by the Texas Legislature after 1845. See, e.g., Act of Apr. 4, 1846, *id.* at 1715 (legitimizing no less than eight named children of a named couple). It should also be noted that a number of so-called private acts authorizing changes of name might in reality be somewhat more tactful acts of legitimation, or, perhaps, substitutes for adoption. See, e.g., Act of Jan. 18, 1845, *id.* at 1064.

³⁸ See note 13 *supra*.

municipalities.”³⁹ It also validated “all marriages heretofore celebrated by bond or otherwise, under the heretofore existing laws with, however, the proviso that the bond or other evidence of such marriage be filed with the appropriate court records.”⁴⁰

It seems possible that the Consultation lacked legislative power, leaving this decree legally ineffective.⁴¹ However, that defect was cured by legislation of the Republic. Before turning to that legislation, brief mention should be made of the Texas Declaration of Independence, which evidences a remarkable shift of public sentiment on the issue of religion. After describing the priesthood, along with the army, as “the eternal enemies of civil liberty, the ever ready minions of power, and the usual instruments of tyrants,”⁴² and characterizing the prospects of Texas government under Santa Anna as “the most intolerable of all tyrann[ies], the combined despotism of the sword and the priesthood,”⁴³ the document stated that the Mexican government

denies us the right of worshipping the Almighty according to the dictates of our own conscience, by the support of a national religion, calculated to promote the temporal interest of its human functionaries, rather than the glory of the true and living God.⁴⁴

The severity of this language has attracted criticism, some of which can hardly be dismissed as mere apologetics.⁴⁵ Colonial Texas was surely not a priest-ridden country in the grip of the Inquisition. Indeed, as we have seen, a constant complaint of the settlers was that there were not enough priests to administer the Sacraments as required. This is, however, a minor point. The major lesson to be drawn from the events of 1836 in this respect is that Anglo-American settlers in Spanish and Mexican lands in North America expected, in the words of the same Declaration, to “continue to enjoy that constitutional liberty and republican government to which they had been habituated in the land of their birth, the United States of America,”⁴⁶ and that this liberty, as

³⁹ Ordinance and Decree for opening the several Courts of Justice, etc., § 9, 1 GAMMEL 1039, 1041 (emphasis added).

⁴⁰ 1 GAMMEL 1041.

⁴¹ See B. SMITH, *supra* note 16, at 44. Note, however, that § 3 of the Ordinance, which adopted the procedural probate law of Louisiana, 1 GAMMEL 1039, 1040, was routinely given effect in Texas. See, e.g., *Gortario v. Cantu*, 7 Tex. 35, 45 (1851).

⁴² Texas Declaration of Independence, Mar. 2, 1836, 1 GAMMEL 1063.

⁴³ *Id.* at 1064.

⁴⁴ *Id.* at 1065.

⁴⁵ C. CASTAÑEDA, *supra* note 28, at 3-4.

⁴⁶ 1 GAMMEL 1063, 1064. Note the classic retort to this argument by Channing:

perceived by them, definitely included the freedom of religion. This freedom was expressly reaffirmed in the Declaration of Rights of the Constitution of the Republic of Texas.⁴⁷

When the first Congress elected under that constitution assembled, the question of the validity of marriages in Texas had assumed new dimensions. First, the adoption of the principles of freedom of religion and of state neutrality between different denominations militated irresistibly towards the adoption of a prospective law of marriage formalities based on that prevailing in the United States and thus familiar to the Anglophonic settlers. As shown by the precipitate action of the Consultation, this was a system based on the alternative requirements of a ceremonial marriage before designated civil officials or before the minister of any denomination.⁴⁸ Second, given the possible invalidity of the Consultation decree, the problem of the retrospective validation of marriages by bond had to be faced anew. Third, for the same reason, provisions now had to be made for the validation of marriages celebrated pursuant to that decree. Parenthetically, it should be added that the adoption of a system that recognized "common law" marriages, *i.e.*, those entered into by agreement of the parties without official intervention, might have resolved these problems. But the common law as such was not adopted in Texas until January 20, 1840, and as will be seen further below,⁴⁹ the topic of so-called common law marriages was then more complicated than might appear at first sight.

These main problems are summarized with exemplary clarity in the preamble of the Marriage Act of June 5, 1837, which recites that "in many parts of Texas no person legally authorized to

A colony, emigrating from a highly civilized country, has no right to expect in a less favored state the privileges it has left behind. The Texans must have been insane if, on entering Mexico, they looked for an administration as faultless as that under which they had lived. They might with equal reason have planted themselves in Russia, and then have unfurled the banner of independence near the throne of the Czar, because denied the immunities of their native land.

Letter from William E. Channing to Henry Clay, August 1, 1837, in W. CHANNING, *THE WORKS OF WILLIAM E. CHANNING* 752, 756 (1890).

⁴⁷ TEX. CONST. Declaration of Rights 3d: "No preference shall be given by law to any religious denomination or mode of worship over another, but every person shall be permitted to worship God according to the dictates of his own conscience." 1 GAMMEL 1069, 1082.

⁴⁸ See note 39 and accompanying text *supra*.

⁴⁹ See text accompanying notes 420-23 *infra*. As regards the adoption of the common law, see Act of January 20, 1840, 2 GAMMEL 177-78; Hall, *An Account of the Adoption of the Common Law by Texas*, 28 TEXAS L. REV. 801 (1950); Markham, *The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 1840-1859*, 29 TEXAS L. REV. 904 (1951).

celebrate the rites of matrimony has existed," and that "from that cause many persons, have resorted to the practice of marrying by bond, and others have been married by various officers of Justice not authorized to celebrate such marriages,"⁵⁰ and sensibly concludes that "public policy and the interests of families require some legislative action on the subject."⁵¹ The 1837 Act followed the prototype of the 1836 decree. Prospectively, it authorized "all regular ordained Ministers of the Gospel, judges of the district courts, justices of the county courts, and all justices of the peace of the several counties of this republic . . . to celebrate the rites of matrimony."⁵² Retrospectively, it empowered those who had previously intermarried before irregular officials or by bond to go before any of these persons, and to "publicly solemnize the rites of matrimony; and all marriages so solemnized [were] declared of legal and binding effect, from the period the persons had previously intermarried agreeably to the custom of the times,"⁵³ and the issue of such persons were declared legitimate, with the proviso, however, that the validating ceremony took place within six months of the passage of the 1837 Act, *i.e.*, before December 5 of that year. Irregular marriages that could no longer be ratified by a marriage ceremony because one of the spouses had died were validated automatically on the condition that the parties had lived together as husband and wife at the time of the death of either of them.⁵⁴

Less than four years were to elapse after the passage of the enactment just summarized before the Texas Congress acted again, this time in a much more decisive manner. The Act of February 5, 1841, "Legalizing and Confirming certain Marriages therein named,"⁵⁵ recited the same considerations that appeared in the preamble of the 1837 Marriage Act. It then provided that all marriages by bond or by ceremony before authorized justices of the peace entered into prior to the 1837 enactment "are declared legal and valid, to all intents and purposes; and the issue of such persons are hereby declared legitimate children, and capable of inheritance."⁵⁶ Out of what now seems an overabundance of caution, this radical validation was expressly extended to cases where a

⁵⁰ Act of June 5, 1837, Preamble, 1 GAMMEL 1293.

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ Act of June 5, 1837, Preamble, § 2, *id.* at 1293-94.

⁵⁵ Act of Feb. 5, 1841, 2 GAMMEL 640.

⁵⁶ *Id.* at 640, § 1.

spouse had died before the passage of the 1841 act, and the issue of such marriages were "hereby legitimized."⁵⁷

The subject of marriages by bond came up once again at the Constitutional Convention of 1845, which drafted the first constitution of the state-to-be. At that time, it was moved that the state constitution include a section reading as follows:

The legal effects of all marriages now or heretofore subsisting, shall, for the future, be held and taken to be the same as though such marriages had been good and valid from the beginning: *provided*, that nothing herein contained shall work any revocation of vested rights.⁵⁸

This rather inelegant formulation drew opposition on two grounds. First, the tendency of the section would be "to legalize every marriage contracted in Texas, right or wrong,"⁵⁹ and that might produce conflicts between different sets of heirs. Second, Isaak von Zandt said that the matter had been dealt with in a satisfactory manner by the 1837 and 1841 statutes discussed above—the former authorizing parties "to come forward, within a given time, to have the ceremony performed again," and the latter "ratifying all such marriages, whether the ceremony had been performed over again or not."⁶⁰

In opposition, the proponents of the bill argued that "hundreds and thousands had been married in a political form, by bond," and that the proposed section might "prevent a great deal of difficulty with regard to the rights of children now growing up."⁶¹ In reply to the argument that the matter had already been rectified by legislation, it was asserted that "the best lawyers have doubted the constitutionality of the laws referred to"⁶² because of their retrospective operation.

Somewhat surprisingly, Chief Judge Hemphill, who sat in the 1845 Convention as a delegate from Washington County and who headed the all-powerful Committee on the Judiciary, seemed to agree with the proponents of the section, for he is recorded to have said that there were "a good many marriages not covered by the laws

⁵⁷ *Id.* at 640, § 2.

⁵⁸ DEBATES OF THE TEXAS CONVENTION 358 (W. Weeks rep. 1846) (Mr. Brown Aug. 4, 1845).

⁵⁹ *Id.* (Mr. Ochiltree).

⁶⁰ *Id.*

⁶¹ *Id.* (Mr. Jones).

⁶² *Id.* at 359.

referred to.”⁶³ His suggestion that the matter be referred to the Judiciary Committee was thereupon adopted by the Convention.⁶⁴

In its report of August 8, 1845, signed by Chief Judge Hemphill, the Committee on the Judiciary pointed out, first, that “[t]he laws already legalise and confirm marriages where the rites of matrimony have been celebrated by bond, or by officers supposed to be not properly authorized for that purpose.”⁶⁵ Second, it stated that the Legislature would have power to legalize marriages not already confirmed, and, in particular, to regulate the legal consequences of such marriages.⁶⁶ The Committee requested to be discharged from the further consideration of this subject, and on August 9, its report was adopted by the impressive vote of 52 to 4.⁶⁷

This was seemingly the last time that the question of marriages by bond in Texas was considered by an elected chamber, although we are informed by Mr. Smith that a paraphrase of the 1841 enactments managed to survive all statutory revisions until 1969 when it was eliminated by the new Family Code.⁶⁸ There are only a few decisions in point, and these would appear to confirm Mr. van Zandt’s view that the 1841 enactment had cleared up the matter.⁶⁹

In *Smith v. Smith*,⁷⁰ decided at the first term of court after statehood, the Supreme Court of Texas described the pre-1836 Texas law of marriage validity. Chief Judge Hemphill used the following language to characterize the form of marriage observed by one of the parties and her spouse in San Antonio in 1830:

[A]ll the formalities, rites and ceremonies having been duly observed, and proclamation having been made on three festival days, according to the ritual of the holy apostolic Catholic church, and no impediment having been made, the deceased and the appellee were married, in *facie ecclesiae*, by the actual priest of the city of San Antonio.⁷¹

From this, it followed that the marriage in question was “not impeachable for the want of any formality, but was in full compliance with the laws regulating the marriage ceremonial.”⁷² There

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Id.* at 470.

⁶⁶ *Id.*

⁶⁷ *Id.* at 483-84.

⁶⁸ TEX. REV. CIV. STAT. art. 4608 (repealed 1969); B. SMITH, *supra* note 16, at ix-x.

⁶⁹ See text accompanying note 61 *supra*.

⁷⁰ 1 Tex. 621 (1846).

⁷¹ *Id.* at 626.

⁷² *Id.*

was thus no occasion to discuss other forms of marriage or the effects of curative legislation. It should be noted, however, that the terms employed by the learned Chief Judge are a close paraphrase of the marriage legislation of the Council of Trent.⁷³

Nichols v. Stewart,⁷⁴ the next case to be considered, involved two marriages by bond. Rachael's mother (Sarah) had executed a marriage bond with one Roe in November 1832. That bond was filed with an alcalde at Gonzales, but later "cancelled" by mutual consent of the parties. Sarah was at the time of the "cancellation" already living with one William Sowell, and a marriage bond between Sarah and Sowell was executed in 1834 but seemingly not filed. Sowell died in 1837 before the enactment of the validating legislation discussed above. Some time after Sowell's death, his father also died and the estate was divided among the heirs. Rachael, who was born before the execution of the second marriage bond, claimed a part of the estate as the legitimate, or at least legitimated, daughter of William Sowell.

Those opposing Rachael's claim argued that the Consultation decree and the 1837 Act had validated Sarah's 1832 marriage to Roe, so that her 1834 marriage to William Sowell was bigamous and void. They also contended that the 1837 Act could not, in any event, make Rachael a legitimate heir because the constitution of the Republic prohibited "retrospective" laws.⁷⁵ It also seems likely that they urged, in the alternative, the inapplicability of the 1837 Act in its own terms, for Rachael was born before, not after, the "marriage by bond" of her parents. Failure to register the second bond, on the other hand, was harmless, for registration was not required where one of the spouses had died before the effective date of that act and they were living together at the time of death.⁷⁶

Speaking for a unanimous Supreme Court, Judge Lipscomb held, first, that the 1837 Act did not merely legitimate children born after the execution of the marriage bond, but also put the marriages validated by its terms "upon the same footing as if married with the legal sanction of the church."⁷⁷ The consequence of a legal marriage at that time was to make children (acknowl-

⁷³ See note 100 *infra*.

⁷⁴ 15 Tex. 226 (1855).

⁷⁵ *Id.* at 228-29. Section Sixteenth of the Declaration of Rights provided in its second sentence: "No retrospective or ex post facto law, or laws impairing the obligation of contracts, shall be made." 1 GAMMEL 1069, 1084.

⁷⁶ Act of June 5, 1837, § 2, 1 GAMMEL 1293-94.

⁷⁷ 15 Tex. at 233.

edged by the father) legal heirs; this was "the Spanish law and Mexican law at the time the marriage bond was executed."⁷⁸

It thus became necessary to decide whether the 1832 marriage by bond was valid or had been validated. Judge Lipscomb held, as counsel for Rachael had suggested, that this bond "had no validity, and as there was no law to sanction such contract, there was none to enforce it, and it could be violated without any penalty by either party."⁷⁹ It followed that Sarah and Roe were, to introduce a term, "unbonded" when Sarah and Sowell executed the second bond, and that Rachael was legitimated, as to Sowell, by the validation of that marital bond in conjunction with the Spanish and Mexican law of *legitimatio per matrimonium subsequens*.

Judge Lipscomb did not comment on the effect (if any) of the 1836 decree of the Consultation,⁸⁰ but he did make some general comments on the subject of marriage customs in colonial Texas. If, however, there had been no validating legislation on this subject, he wrote,

it would not have followed as a necessary consequence that the children of such parents should become bastardized (in after time, when civil society became better organized) and held to be incapable of holding as heirs to their parents. At the time that these bonds were entered into, there was no means of solemnizing matrimony, in any form recognized by the law of the land, there being no Ecclesiastics to whom resort could be had, who alone, it seems, could solemnize, with the sanctions of the Church, matrimony; and parties were driven back to the primitive elements, constituting the married state: and this, no doubt, was the mutual consent of the parties.⁸¹

This suggestion was followed to its logical conclusion in *Sapp v. Newsom*,⁸² which involved the validity of a marital relationship entered into by bond in 1830. A daughter was born in 1831, but the parents were not living together when the father died in 1835. The marriage bond was therefore not validated by the terms of the Consultation Decree or the 1837 Act, although it was covered by the Act of 1841.⁸³ The court held, however, that this latter statute "could not retroact to divest the rights of those upon whom descent was cast as the heirs of [the ancestor], at the time of his death in

⁷⁸ *Id.*

⁷⁹ *Id.* at 233-34.

⁸⁰ See text accompanying notes 39-40 *supra*.

⁸¹ 15 Tex. at 232.

⁸² 27 Tex. 537 (1864).

⁸³ See notes 39, 55-56 *supra*.

1835.”⁸⁴ Nevertheless, this almost incredible conclusion⁸⁵ was deprived of any significance by a radical validation of all Texas marriages by bond through judicial fiat. Said the court, speaking through Judge Bell:

The condition of Texas . . . in the year 1830, being such as to render it impossible for the inhabitants to celebrate the rite of matrimony in accordance with the forms prescribed by the decrees of the church without going beyond the limits of the province, and subjecting themselves to great dangers in traveling to one or two distant points, where ministers of the established religion could be found, we think it the duty of the courts, upon the highest considerations of public policy, to hold that the marriages contracted in those times should be regarded as mere civil contracts, and should be sustained as valid, whenever the consent of the parties and the intention to enter into the state of matrimony, and to assume its duties and obligations, is clearly shown.⁸⁶

The Court did not deign to mention *Nichols*, which was seemingly direct authority to the contrary,⁸⁷ and it expressly declined to go into the details of Mexican marriage law. It stated, however, that the formalities of marriages in Catholic countries “usually conformed to the decrees and usages of the church.”⁸⁸ As shown by the above-quoted passage, these Roman Catholic “decrees and usages” were simply assumed to require a ceremonial marriage *in facie ecclesiae*.

That assumption was questioned, at long last, in *Rice v. Rice*,⁸⁹ which was an appeal from a judgment denying a decree of divorce and separation of property. The respondent (Clinton) had gone through a marriage ceremony with Wife One before an alcalde in 1830 or 1831, but about two years later, the parties separated. In 1834, Clinton went through a second marriage ceremony with Wife Two (Jane), the appellant in the instant action, again before an alcalde. Clinton and Jane cohabited as husband and wife for some twenty-three years, until 1857, when Clinton left Jane and went through yet another ceremonial marriage with another woman; he was living with her at the time of this action.

The trial court denied this decree, apparently on the ground

⁸⁴ 27 Tex. at 539.

⁸⁵ See generally Smith, *Retroactive Laws and Vested Rights* (pts. 1-2), 5 TEXAS L. REV. 231, 246 & n.99 (1927), 6 TEXAS L. REV. 409, 423-27 (1928).

⁸⁶ 27 Tex. at 540-41.

⁸⁷ 15 Tex. at 233-34.

⁸⁸ 27 Tex. at 540.

⁸⁹ 31 Tex. 174 (1868).

that Clinton's marriage to Wife One had been validated by the 1841 Act, so that his marriage to Jane was bigamous and void. Its decision on this point was reversed by the Supreme Court, which held, sensibly enough, that the Texas Congress had intended to legalize irregular marriages where the parties were then living together in a marital relationship, and not to validate "every act of consturpation which took place in the province anterior to the revolution."⁹⁰ A modern Texas lawyer would no doubt add that the marriage between Clinton and Jane was validated in any event when they continued to cohabit as husband and wife after the impediment was removed through the death of Wife One in 1840 or 1841, but that point had not then been settled.

The distinguishing aspect of *Rice* is not its obviously sound result, but a remarkable dictum by Judge Lindsay:

Whether the civil authority of Mexico, under the dominion of which these marriages were consummated, has ever changed or altered the law of marriage from the canon of the Partidas, as it existed before the Council of Trent, does not appear from any evidence or authority adduced on the trial of the cause; and we might very rationally infer, from the usage in Louisiana, which was once a Spanish colony, as was Mexico, that a similar usage obtained in Mexico, for a like reason—that is, that the canon of the Partidas still prevailed in Mexico—because the decrees of the council of Trent upon the subject of marriage had never been adopted and engrafted into the civil and religious system of its government.⁹¹

The *Partidas*, he added, stood for the rule that "‘all that was necessary to establish a valid marriage was that there should be consent, joined with the will to marry,’ without ceremonies, legal or ecclesiastical, but with the obligation of perpetual union, unless some of the canonical causes for separation supervened."⁹² But, he remarked, "a different rule has been judicially acknowledged by our predecessors in this court to have obtained in Mexico, and it has been assumed that the ceremonials of the Roman Catholic religion must be superadded to give validity to the civil contract under the Mexican laws."⁹³ On this question, Judge Lindsay thought that the court was now bound by prior Texas authority.⁹⁴

⁹⁰ *Id.* at 180.

⁹¹ *Id.* at 178. The term "canon of the Partidas" was seemingly intended as a reference to *LAS SIETE PARTIDAS*, pt. IV, tit. 2, l. 5, which restates the general pre-Tridentine canon law rule that consent alone constitutes marriage. See note 97 and accompanying text *infra*.

⁹² 31 Tex. at 178.

⁹³ *Id.*

⁹⁴ *Id.*, citing *Smith v. Smith*, 1 Tex. 621 (1846), and *Nichols v. Stewart*, 15 Tex. 230 (1855), "besides other cases."

To sum up: Settlers in colonial Texas had to be Roman Catholics, and were willing to be treated on that assumption. They themselves believed, and Texas legislative and judicial authorities accepted without question until 1868, that under the Spanish and Mexican law prevailing until Independence or, perhaps, the Consultation decree, the only valid form of marriage in Texas was that prescribed by the Council of Trent, *i.e.*, a ceremonial marriage *in facie ecclesiae* with the assistance of a Roman Catholic cleric of the requisite rank and authority. Nevertheless, mainly because priests were not readily accessible, the practice of "marriage by bond" developed, and the Congress of the Republic of Texas eventually validated, or at least undertook to validate, marriages entered into in colonial Texas either in bond or before unauthorized public officials.⁹⁵

The Supreme Court of Texas accepted this basic frame of reference. It consistently held that under Spanish and Mexican law, as applicable in Texas before Independence, a ceremony in Tridentine form was a legal prerequisite for the formal validity of marriages. It coped with the social problems created by this impractical rule by giving generous effect to validating legislation enacted by the Republic. Only when the issue of unconstitutional retroactivity appeared did the Supreme Court of Texas develop an alternative rule of validation, based on contemporary Texas public policy.

Until the *Rice* case it was assumed that the marriage legislation of the Council of Trent had been in effect in Texas in its pristine form until 1836. Everything else turned on that assumption, which was questioned at long last by Judge Lindsay in the *Rice* case. To what extent, if any, were his misgivings justified? That is the subject to be discussed in the next sections.

II

THE CANON LAW BACKGROUND

A. *The General Framework*

The rules of the canon law of the Roman Catholic Church pertaining to the formal validity of marriages underwent four distinct changes in the course of approximately one millennium. The following is a brief summary of these rules in historical sequence. It should be noted at the outset that our discussion is

⁹⁵ See also the summary by Chief Judge Roberts in *Lewis v. Ames*, 44 Tex. 319, 338-40 (1875).

limited to *formal* validity: the absence of impediments is presumed, and their nature and effect is not examined. One need hardly add that what is thus left out is—although not material for present purposes—the very essence of the history of the canon law of marriage.⁹⁶

In the initial period, which extended until 1563, there were no formal requirements other than the mutual expression of consent. As Pope Nicholas put it in 866, in a rescript addressed to the Bulgarians: "Sufficiat solus secundum leges consensus eorum, de quorum quarumque coniunctionibus agitur."⁹⁷ In due course, both the Church and some states (including Spain) enacted increasingly severe penalties against so-called clandestine marriages, a somewhat indefinite category that came to include not only marriages in secret, but also nonceremonial marriages generally and even ceremonial marriages without the publication of banns.⁹⁸ Despite these prohibitions, "clandestine" marriages continued to be accepted as valid if the requisite intent existed. This proposition was expressly approved, for the past, in the first clause of the marriage decree adopted by the Council of Trent in 1563, which starts with the word *Tametsi*.⁹⁹

That decree marked the beginning of the second of the four eras here discussed. It prescribed, *pro futuro*, the assistance of a priest and the presence of two or three witnesses at all marriages of the Faithful, and decreed the invalidity of marriages not celebrated in what has come to be called Tridentine form.¹⁰⁰

⁹⁶ The classic work on the general subject is still A. ESMEIN, *LE MARIAGE EN DROIT CANONIQUE* (2 vols. 1891) (Burt Franklin reprint 1968).

⁹⁷ "Under the laws, the consent of those whose marital union is at issue is sufficient by itself" C. XXVII, q. 2, c. 2 (trans. by author). For variants, see *Decretum Magistri Gratiani*, in *CORPUS IURIS CANONICI* 1063 (E. Friedberg ed. 1879). The method of citation here used, which is commonly accepted, is explained in T. BOUSCAREN, A. ELLIS & F. KORTH, *CANON LAW* 12-14 (4th ed. 1966) [hereinafter cited as BOUSCAREN]. See also 1 A. ESMEIN, *supra* note 96, at 95-98.

⁹⁸ 2 P. MURRILLO VELARDE, *CURSUS JURIS CANONICI HISPANI ET INDICI* 31 (3d ed. 1791) [hereinafter cited as VELARDE]; PARTIDAS, IV, 3, 1.

⁹⁹ 33 J. MANSI, *SACRORUM CONCILIORUM NOVA ET AMPLISSIMA COLLECTIO* 1, at col. 152 (1902) (reprint 1961) [hereinafter cited as MANSI].

¹⁰⁰ Qui aliter, quam praesente parochio, vel alio sacerdote de ipsius parochi seu ordinarii licentia, et duobus vel tribus testibus matrimonium contrahere attentabunt, eos sancta synodus ad sic contrahendum omnino inhabiles reddit, et huiusmodi contractus irritos et nullos esse decernit, prout eos praesenti decreto irritos facit et annullat.

This may be translated as follows:

As for those who attempt to contract marriage otherwise than in the presence of the parish priest or of another priest delegated by him or the Ordinary [bishop] and two or three witnesses, the Holy Synod renders such persons totally incapable of contracting in that manner, and declares such contracts to be invalid and null, just as by the present decree it invalidates and annuls them.

The adoption of the decree *de reformatione matrimonii* (reformation of marriage) was one of the last acts of the Council of Trent, which was, of course, the great Council of the Counter-Reformation. Less than a decade earlier, at the peace of Augsburg, the principle of *cuius regio eius religio* (compulsory adherence to the sovereign's faith) had been adopted.¹⁰¹ There was no inclination at that time to permit exceptions for Christians who were not in communion with Rome. *Tametsi*, in other words, was intended to govern all baptized persons, even if they were not Roman Catholics.

In time, as religious toleration gained acceptance in major political units, this extreme position had to be relaxed. On November 4, 1741, Pope Benedict XIV issued a declaration, now commonly termed the Benedictine Declaration (or Privilege, or Dispensation),¹⁰² which rendered the decree *Tametsi* inapplicable to marriages between non-Roman Catholics, and even to "mixed" marriages, *i.e.*, marriages between Roman Catholics and baptized persons not in communion with Rome. *Tametsi*, as modified by the Benedictine Dispensation, marks the third epoch of the Roman Catholic law in the formal validity of marriages, which lasted from 1741 until the first decade of the twentieth century.

The fourth and present era of Catholic marriage validity law is of no immediate interest for the purposes of the present study. So far as the United States is concerned, it is relevant only as a matter of conscience, not in (secular) courts of law. It is summarized here merely for the sake of completeness. Pursuant to the decree *ne temere* of 1908¹⁰³ as incorporated, with modifications, in the *Codex Iuris Canonici* of 1918, the Tridentine form is now prescribed for all marriages by Roman Catholics, including their "mixed" marriages with non-Roman Catholics. Marriages concluded in violation of this prescription are fundamentally and radically invalid.¹⁰⁴ On the other hand, the canon law of the Roman Catholic Church no longer undertakes to regulate the formal validity of marriages by or between baptized persons where neither party is a Roman

C. Trident., Sess. XXIV, *de reformatione matrimonii* c. 1, § 5, MANSI col. 152 (trans. by author). The text of the decree is reprinted in E. FRIEDBERG, *LEHRBUCH DES KATHOLISCHEN UND EVANGELISCHEN KIRCHENRECHTS* 350-51 (2d ed. 1884).

¹⁰¹ For more background on Augsburg, see H. HOLBORN, *THE HISTORY OF MODERN GERMANY, THE REFORMATION* 243-46 (1964).

¹⁰² 2 A. ESMEIN, *supra* note 96, at 231-35.

¹⁰³ BOUSCAREN 585.

¹⁰⁴ *CODEX IURIS CANONICI* can. 1094 & 1099 § 1 (Gasparri ed. 1918) [hereinafter cited as *CIC*], lists the historical derivations in the annotations. *Id.* at 312 n.1, 314 n.2.

Catholic (although it continues to assert jurisdiction as to other aspects of such marriages).¹⁰⁵

To summarize: Until 1563, the consent of the parties was sufficient for the formal validity of marriages—*consensus facit nuptias*.¹⁰⁶ Between 1563 and 1741 (the Tridentine period) marriages of baptized persons had to be celebrated, on pain of absolute invalidity, *in facie ecclesiae* with the assistance of a Roman Catholic cleric of the requisite rank and authority. Between 1741 and 1907, non-Roman Catholics were exempted from this rule, so that their marriages, including their marriages with Roman Catholics, were formally valid if in compliance with pre-Tridentine canon law or subsequent secular law. Since 1908, the Roman Catholic Church has undertaken to regulate only the form of marriages by Roman Catholics, including their marriages with non-Roman Catholics; under pain of absolute invalidity, these must be celebrated in Tridentine form as currently defined.

American courts have surmised with some frequency that the requirement of a ceremonial marriage *in facie ecclesiae*, which has been the basic rule since the Council of Trent, is in some way connected with the fundamental notion of the Roman Catholic faith that marriage is a sacrament.¹⁰⁷ This view of the matter almost seemed to be inherent in the logic of history, for the Tridentine form was decreed at exactly the same time when Protestant and Roman Catholic theology parted ways over the sacramental character of marriage, with the former taking the negative and the latter the affirmative position. Even in secular societies, such as the United States and the Republic of Texas, this basic fact of Reformation and Counter-Reformation history was familiar to the judiciary, especially to those of its members who were prominent laymen.¹⁰⁸

¹⁰⁵ CIC can. 1099, § 2, as amended; CIC can. 1016. See generally BOUSCAREN 584-86, 595-96, 471-73.

¹⁰⁶ This was also the traditional rule of the civil law and of the *Partidas*, see *supra* note 91. See, e.g., DIGEST 50.17.30 (Ulpian): "Nuptias non concubitus, sed consensus facit" ("not cohabitation but consent makes a marriage") (trans. by author).

¹⁰⁷ See, e.g., *Phillips v. Gregg*, 10 Watts (Pa.) 158, 161-62, 168 (1840), discussed in notes 302-323 and accompanying text *infra*; *Sapp v. Newsom*, 27 Tex. 537 (1864), discussed in notes 82-88 and accompanying text *supra*.

¹⁰⁸ Judge Lipscomb, the author of the opinions in *Blair v. Odin*, 3 Tex. 288 (1849), and *Nichols v. Stewart*, 15 Tex. 226 (1855), has been described as an outstanding biblical scholar. J. LYNCH, *THE BENCH AND BAR OF TEXAS* 89-90 (1885). Justice Grier, the author of the opinion in *Hallett v. Collins*, 51 U.S. (10 How.) 174 (1851), discussed in notes 192-95, 353-79 and accompanying text *infra*, who was also the trial judge in *Phillips v. Gregg*, 10 Watts (Pa.) 158 (1840), was the son and grandson of Presbyterian ministers and a leading Presbyterian layman. Goble, *Grier, Robert Cooper*, 4 *DICTIONARY OF AMERICAN BIOGRAPHY* pt. 1, 612 (A. Johnson & D. Malone eds. 1960).

This assumption of a direct causal connection between marriage as a sacrament and the requirement of Tridentine formalities is, however, quite unjustified. Indeed, the absence of such a connection appears quite clearly from the very clause of the Tridentine decree *de reformatione matrimonii* which starts with the words by which that decree is cited. The Council expressly confirmed the validity and the sacramental character of clandestine marriages theretofore celebrated between baptized persons, and it declared this proposition to be one of dogma, sanctioned by excommunication.¹⁰⁹ The Tridentine form of marriage, prescribed by the same decree for subsequent marriages of baptized persons was therefore, in the terminology of canon law, a rule of ecclesiastical rather than divine law.¹¹⁰

As will appear below,¹¹¹ this point is of crucial significance for present purposes. It is perhaps best illustrated when the requirement of marriage in Roman Catholic form is compared with another rule of canon law at least similarly familiar to laymen—the indissolubility of valid marriages. It is dogma that marriage between baptized persons is a sacrament, and it is also dogma, based on divine law, that a valid and consummated sacramental marriage may not be dissolved by any human authority. These propositions cannot be changed by ecclesiastical law, nor—at least in the eyes of the Church—by secular law.¹¹² On the other hand, a marriage

¹⁰⁹ *Tametsi dubitandum non est, clandestina matrimonia, libero contrahentium consensu facta, rata et vera esse matrimonia, quamdiu ecclesia ea irrita non fecit, et proinde iure damnandi sunt illi, ut eos sancta synodus anathemate damnat, qui ea vera ac rata esse negant . . .*

This may be translated as follows:

It is not to be doubted that clandestine marriages concluded with the full consent of the contracting parties are sacramental and true marriages; and so long as the church does not invalidate them, those who deny such marriages to be sacramental and true are to be condemned by the law, so that the Holy Synod damns them with anathema.

C. Trident., Sess. XXIV, *de reformatione matrimonii* c. 1, MANSI col. 152 (trans. by author). The basic proposition itself is stated in C. Trident., Sess. XXIV, *de sacramento matrimonii* c. 1, as follows:

Si quis dixerit, matrimonium non esse vere et proprium unum ex septem legis evangelicae sacramentis a Christo Domino institutum sed ab hominibus in ecclesia inventum, neque gratiam conferre: anathema sit.

This may be translated as follows:

If anyone says that marriage is not truly and properly one of the seven evangelical sacraments instituted by the Lord Christ, but is invented by men in the church, and that it confers no grace, let him be anathema.

Id. col. 150 (trans. by author). The matter is described accurately in Patton v. Philadelphia and New Orleans, 1 La. Ann. 98, 102-104 (1846), discussed in notes 324-52 and accompanying text *infra*.

¹¹⁰ BOUSCAREN 472; 2 VELARDE 34-35.

¹¹¹ See notes 137-44 and accompanying text *infra*.

¹¹² CIC can. 1118. See generally BOUSCAREN 473-74, 613.

between baptized persons is only sacramental if it is valid, and it is valid only if it was brought into being by a valid contract. The contract, however, is subject to regulation by ecclesiastical law, and by interposing the requirement of form as a precondition for the validity of the indispensable agreement of the parties to marry, the Church simply prevents the sacrament from arising without it.¹¹³

This explains why the canon law rules governing formal validity could be subjected to such frequent change. It also explains, more fundamentally, how there could be different rules for the formal validity of Roman Catholic, Protestant, and "mixed" marriages although all three of these were sacramental. Even more importantly for present purposes, the classification of the Tridentine rule as one of "mere" ecclesiastical rather than divine or natural law meant that, like other norms of ecclesiastical law, it was subject to the general rules of canon law governing territorial applicability, modification by custom, and supplementation by secular legislation. As will be seen presently,¹¹⁴ these three factors, alone or in combination, are at the base of the subject of the present study.

B. Territorial Scope

In the penultimate clause of the decree *Tametsi*, the Council of Trent exhorted the bishops to implement that decree in their respective dioceses as soon as prudently advisable. The final clause then specified that the decree was to become effective in each parish thirty days after its original publication.¹¹⁵ These two rules drastically limited the territorial applicability of Tridentine marriage legislation. The decree itself was not published in several important countries, most notably Scotland, England, and France; in some others, it was published only in selected localities. The Benedictine Declaration,¹¹⁶ too, was of limited territorial scope. It was, of course, enacted only where the decree *Tametsi* was in effect, but the territorial scopes of these two sources are not identical. The Declaration was first enacted for Belgium and the Netherlands, and then extended, in time, to most religiously mixed communities where *Tametsi* was already in effect. Most significantly, for present purposes, the Benedictine Declaration was never extended to Spain, or to any part of the Spanish Empire then under Spanish rule.¹¹⁷

¹¹³ BOUSCAREN 472-73; 2 VELARDE 34-35.

¹¹⁴ See notes 115-44 and accompanying text *infra*.

¹¹⁵ C. Trident, Sess. XXIV, *de reformatione matrimonii* c. 1, §§ 12, 13, MANSI col. 152.

¹¹⁶ See note 102 and accompanying text *supra*.

¹¹⁷ See, e.g., W. SHIELS, KING AND CHURCH, THE RISE AND FALL OF THE PATRONATO REAL

Quite apart from these fundamental geographic limits upon the applicability of Tridentine marriage legislation and its Benedictine modification, the requirement of publication in each parish seemed to contain the germs of an at least equally restrictive principle. Much of Spanish North America remained unsettled or very sparsely settled until the end of Spanish or Mexican rule, and due to sparsity of settlement and the initially all-important role of the missionary or "regular" clergy, the Tridentine notions of parish and parish priest could be transplanted to the Indies only with substantial modifications.¹¹⁸ As will be seen, this potential gap in territorial coverage was filled by a curious but internally consistent amalgam of secular legislation, customary law, and curial practice. That process was not, however, complete as a matter of canon law until long after this question ceased to be of significance for American secular marriage law.¹¹⁹

C. *Reception or Desuetude by Custom*

The relationship of custom (*consuetudo*) to statute (*lex*) is one of the most fascinating topics in canon law. Like its parallels in the civil-law and common-law worlds, it goes to the very heart of the constitutional system, and again not unlike these two parallels, it reflects, in the main, shifts in the locus of political and constitutional power.¹²⁰ In the present context, however, there is no need to explore this subject comprehensively. We are here concerned solely with the relationship of *lex* to *consuetudo* in canon law, as a self-contained system, between the mid-sixteenth and the early nineteenth centuries, and even then only with the relationship of two rules of ecclesiastical statute law (the decree *Tametsi* and the Benedictine Dispensation) to relevant ecclesiastical custom.

The ground rules are soon stated. The decree *Tametsi* could be received by custom where it was not enacted by ecclesiastical legislation; it could also be abrogated by contrary custom where so

189-90 (1961). For criticism of the explanation given there, see notes 437-40 and accompanying text *infra*. The Declaration itself was initially issued for formerly Spanish territory. See also text accompanying notes 129, 235 *infra*.

¹¹⁸ The matter is well described in R. GOMEZ HOYOS, *LA IGLESIA DE AMÉRICA EN LAS LEYES DE AMÉRICA EN LAS LEYES DE INDIAS* 155-75 (1961). See also *RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS*, bk. I, tit. 14, l. 47 [hereinafter cited as *RI*], (confirming the *Breve Exponi Nobis*, of Mar. 24, 1567, of Pope Pius V); *id.* I, 14, 18 (declaring the Religious in charge of *Doctrinas* (missionary parishes) to be legitimate *Parrocos* (parish priests) with respect to Spaniards locally resident).

¹¹⁹ See note 124 *infra*.

¹²⁰ The leading study in point is still R. WEHRLE, *DE LA COUTUME DANS LE DROIT CANONIQUE* (1928).

enacted.¹²¹ The basic ingredients of customary law were then, as they are now, a rational custom and tacit approval by the legislator, *i.e.*, the Holy See. There were, however, different periods prescribed before the custom could become established, depending on whether it was an extension of preexisting law (*praeter legem*) or an abrogation of preexisting statute (*contra legem*). In the former case, the durational requirement for tacitly tolerated practice was ten years. Customary law *contra legem*, on the other hand, came into being only after forty years' practice if based on a claim of right, or practice for time immemorial in the absence of such a claim.¹²²

There is solid and uncontradicted evidence indicating that the decree *Tametsi* was regarded as being in effect in all settled parts of Spanish North America, regardless of the date or the nature of the acquisition of sovereignty, and also regardless of diocesan organization.¹²³ There appear to have been doubts, however, as to the applicability of that decree in areas that were not inhabited under Spanish rule. It was only in 1882, long after the termination of Spanish or Mexican rule, that this question was answered in the affirmative by the Sacred Congregation of the Holy Office.¹²⁴

It is doubtful, however, if this extension of the decree *Tametsi* to Spanish North America without publication in individual parishes as provided in the decree itself, and to areas where there were no parishes and even no inhabitants, was the result of customary law *praeter legem*. A more likely explanation is that the decree was thus extended not by custom but through legislation by secular authority. Before examining that process, it seems appropriate to discuss the possibility of the local abrogation, or modification, of the decree *Tametsi* by contrary custom or by pertinent general principles of law.

There are really two issues involved here. The first arises from the general principle, recognized by canon law, that "*nemo potest ad impossibile obligari*."¹²⁵ As Murillo Velarde stated in his leading

¹²¹ A. LEINZ, DER EHEVORSCHRIFT DES CONCILS VON TRIENT, AUSDEHNUNG UND HEUTIGE GELTUNG 57-71, 83-91 (1888); 2 VELARDE 35.

¹²² 1 VELARDE 37-39. Cf. CIC can. 25-30. The derivations can be traced through GASPARRI, *supra* note 104, annotations at 5-6.

¹²³ See text accompanying notes 180-214, 233-257 *infra*.

¹²⁴ The Vicar Apostolic of Arizona inquired whether the decree must be deemed to have been promulgated for the entire region formerly under Spanish rule, or solely for that part of those regions that then had inhabitants. This inquiry was answered by the Holy Office in the former sense on January 23, 1882. Z. ZITELLI, APPARATUS IURIS ECCLESIASTICI 430 (2d ed. 1888).

¹²⁵ "Nobody can obligate himself to do the impossible." *Liber Sextus V*, 12, 6 in 2 E. FRIEDBERG, *supra* note 97, at 1122 (trans. by author).

canon law treatise which was written with special reference to the Indies and which went through three editions in the eighteenth century, the decree *Tametsi* need not be complied with in Holland (although it had been published there) if a priest could not be found or was not "safely accessible."¹²⁶ Subsequent practice, including practice in those areas of the United States where *Tametsi* was in effect, supports the proposition that as little as one month's absence of a parish priest or other competent cleric would suffice to excuse noncompliance with *Tametsi*.¹²⁷ It would thus appear that but for Spanish Royal legislation and contrary custom described below, the marriages celebrated by bond in Texas would have been canonically valid.

This exception, which is based on general principle, applies to marriages of Roman Catholics as well as mixed or non-Catholic marriages. A similar but related question is whether a case could be made for the tacit reception of a variant of the principle expressed in the Benedictine Declaration in Spanish America. That Declara-

¹²⁶ 2 VELARDE 36. The towering importance of Pedro Murillo Velarde may be gleaned from COMP. LAWS, N.M., ch. 2, § 1 (1865), which reads as follows:

The laws heretofore in force concerning descents, distributions, wills and testaments, as contained in the treatise on these subjects, written by Pedro Murillo [Velarde] De Lordé, shall remain in force so far as they are in conformity with the Constitution of the United States and the state laws in force for the time being.

1 N.M. STAT. ANN., Kearny Code § 1 (1954). This section was construed in *Bent v. Thompson*, 5 N.M. 408, 418-21, 23 P. 234, 236-37 (1890), and in *Gildersleeve v. New Mexico Mining Co.*, 6 N.M. 27, 27 P. 318 (1891). The reference is to P. MURILLO VELARDE, *PRÁCTICA DE TESTAMENTOS, EN QUE SE RESUELVEN LOS CASOS MÁS FRECUENTES QUE SE OFERECEN EN LA DISPOSICIÓN DE LAS ÚLTIMAS VOLUNTADES*. (Practice of testaments in which are resolved the cases that arise most frequently in the disposition of last wills). This little booklet, v + 95 pages in Pott-octavo, with draft forms of a seven-witness will at pages 79-89 and a nuncupative will at pages 90-95, went through several printings in Spain and in Mexico in the eighteenth and nineteenth centuries. The copy used is a Mexican reimpression, dated 1790, available at the New York Public Library. See also A. POLDERVAART, *MANUAL FOR EFFECTIVE NEW MEXICO LEGAL RESEARCH* 16 n.18 (1955). It seems likely that the *Practica* was carried by priests, as occasion demanded, along with their breviaries, and that the wills drafted in Spanish North America followed, by and large, Murillo Velarde's precedents.

¹²⁷ A. LEINZ, *supra* note 121, at 117. See also Bishop Odin's instruction as to the activities of two impostors in clerical garb in the Brownsville area:

Tous les mariages qu'ils ont célébrés dans les lieux où l'on pouvait recourir facilement au prêtre, légitime pasteur, sont nules. Dans les lieux trop éloignés de la résidence du pasteur ils peuvent être considérés comme mariages célébrés devant un juge civile, valides à la vérité, mais non mariages ecclésiastiques.

This may be translated as follows:

All the marriages which they have celebrated in those places where one could readily have recourse to the priest, the legitimate pastor, they may be considered as marriages celebrated before a civil magistrate, valid indeed, but not ecclesiastical marriages.

Letter from Bishop Odin to Father Verdet, Sept. 16, 1852, Odin Transcripts, *supra* note 29 (trans. by author).

tion was to some extent a confirmation of prior custom, and it was regarded as such by some contemporary authorities. Indeed, such a view of the matter seems to have been taken, or at least entertained, by the Bishop of Havana in 1791 as regards Spanish East Florida, and expressly adopted by the Bishop of Quebec for the formerly French portions of Illinois territory.¹²⁸

While it is now settled that the territorial applicability of the Benedictine Declaration as legislation was contingent upon papal action,¹²⁹ the action of the Bishop of Quebec was probably sufficient to constitute custom *praeter* or possibly even *contra legem*, and it seems highly likely that this is the basis for the applicability of the Benedictine Declaration in non-Spanish territories east of the Mississippi.¹³⁰ As discussed in greater detail below,¹³¹ the possibility of the application of the Benedictine Declaration in Spanish North America was expressly rejected in 1792 by the competent Spanish secular and ecclesiastical authorities, which held that *Tametsi* had to be strictly complied with even by tolerated Protestants.

It thus seems clear that the reception of *Tametsi* in the missionary territories and the unsettled areas of Spanish North America through customary law *praeter legem* is a distinct possibility (although as will be seen presently,¹³² not a very important one). On the other hand, it is clear that the Tridentine decree was not abrogated or modified under Spanish rule by customary law *contra legem*.

D. Adoption and Extension by Secular Legislation

As noted in a standard source-book of canon law, the decree *Tametsi* was enacted in the Spanish kingdoms "Philip II im-

¹²⁸ See note 235 *infra*; Letter from Bishop Briand to Father Meurin, Aug. 7, 1767, reprinted in 11 ILL. HIST. COLL. 587, 588-89 (C. Alvord ed. 1916). See also F. WALKER, THE CATHOLIC CHURCH IN THE MEETING OF TWO FRONTIERS: THE SOUTHERN ILLINOIS COUNTRY (1763-1793), at 44-46 (1935). It is now clear that the Benedictine Declaration was extended to Canada by decree of Pope Clement XIII, dated November 29, 1764. H. TÊTU & C. GAGNON, MANDEMENTS, LETTRES PASTORALES ET CIRCULAIRES DES EVÊQUES DE QUÉBEC 360 n. a (1888). It seems likely, however, that this decree was communicated to Canada only after some delay, since the position of the Roman Catholic Bishop of Quebec, his right to communicate with Rome, and Rome's power to enact ecclesiastical legislation in respect of Canada remained doubtful so long as the Church of England credibly claimed to be the only state church in Canada under British rule. See, e.g., Morrissey, *The Juridical Situation of the Catholic Church in Lower and Upper Canada from 1791 to 1840*, 5 STUDIA CANONICA, CAN. CANON L. REV. 279, 284-85 (1971).

¹²⁹ A. LEINZ, *supra* note 121, at 50-52.

¹³⁰ See note 173 *infra*.

¹³¹ See text accompanying notes 238-41 *infra*.

¹³² See text accompanying notes 180-214 *infra*.

perante" (by the order of King Philipp).¹³³ The legislation of the Council of Trent received its ecclesiastical sanction by a papal bull on January 22, 1564, but that bull did not as such become legally effective in Spain as a matter of secular or even ecclesiastical law. The explanation is simple: pursuant to the rules governing the relationship between the Vatican and the Spanish monarchs, which are collectively denominated *Patronato Real*, papal acts became effective in Spain only after they received royal approval, the so-called *pase regio*.¹³⁴

On July 12, 1564, Philipp II signed a cedula which "accepted and received" the entire body of the legislation of the Council of Trent, and ordered the execution of that legislation throughout his kingdoms.¹³⁵ That cedula is the source of the authority of the decree *Tametsi* in the Spanish realms. Its impact upon the Spanish law of the Indies will receive special attention below,¹³⁶ but first a somewhat more basic, but more limited question, will be discussed: How could the King of Spain enact a rule of canon law?

The answer seems disarmingly simple. As Dr. Bruno puts it in his definitive canonist study of the public law of the Church of the Indies: "Puede la ley civil corroborar, con sanción propia, lo que es conforme al derecho canónico vigente o a privilegios ciertamente concedidos."¹³⁷ Indeed his prime example for the exercise of such power *secundum legem* by the secular arm is the cedula just mentioned.¹³⁸

It might be contended that the delay of Philipp II in giving effect to the legislation of the Council of Trent within his realms was contrary to canon law. This argument goes to the ultimate validity of the *Patronato Real* and one of its most powerful tools, the *pase regio*,¹³⁹ but it need not be pursued here, since for present purposes, it was overtaken by events in 1564. A second objection is, however, more troublesome. As will be seen, the intended scope of

¹³³ Z. ZITELLI, *supra* note 124, at 428.

¹³⁴ See generally RI I, 9. Section 2 reproduces a cedula dated Sept. 6, 1538. The *pase regio* is discussed in W. SHIELS, *supra* note 117, at 169-94, and (with more moderation) in C. BRUNO, *EL DERECHO PÚBLICO DE LA IGLESIA EN INDIAS* 192-206 (1967).

¹³⁵ NGVÍSIMA RECOPIACIÓN, bk. I, tit. 1, law 13 [hereinafter cited as NOVÍSIMA] quoted and discussed in notes 178-80 and accompanying text *infra*.

¹³⁶ See text accompanying notes 181-214 *infra*.

¹³⁷ "The secular law could reinforce, with appropriate sanction, that which is in conformity with canon law or with privileges clearly conceded." C. BRUNO, *supra* note 134, at 169 (emphasis in original) (trans. by author).

¹³⁸ *Id.* at 169.

¹³⁹ See note 134 and accompanying text *supra*. A prime purpose of the *pase regio* was of course the protection of zealous Regalists from excommunication. I J. LYNCH, *SPAIN UNDER THE HAPSBURGS* 258 (1964).

the territorial applicability of the 'cedula was considerably wider than that built into the decree *Tametsi*. Could the King of Spain, by secular legislation, extend norms of canon law beyond their canonically designated sphere?

Again, it seems that even contemporary legalists and canonists could have agreed on an answer without committing treason or lapsing into heresy, respectively. Legislation was then, as it is now, part of *potestas iurisdictionis*, supposedly conferred upon the Pope by divine law but delegable by him to others.¹⁴⁰ In principle, that power could be delegated only to clerics, but the rule thus limiting the delegation of *potestas iurisdictionis* was one of ecclesiastical rather than divine or natural law. It was thus subject to modification both by legislation and by custom.¹⁴¹ It was beyond dispute that such delegation had occurred through the famous fifteenth and sixteenth-century papal bulls of the reconquest of the peninsula and settlement of the Indies,¹⁴² and that it had been enhanced by custom at least tolerated by papal authority. The extent of this delegation was controversial, but there could be no dispute over the existence of royal power to extend the sphere of the applicability of norms of mere ecclesiastical law, such as the marriage legislation of the decree *Tametsi*.¹⁴³

It follows that within the Spanish realms, the sphere of the applicability of that decree was subject to determination, even as a matter of canon law, by royal legislation. In particular, the cedula of 1564 could extend the effect of that decree beyond what was provided in the decree itself (or, it should be added, in other rules of canon law governing the personal and territorial scope of norms of ecclesiastical law). To what extent such an extension did indeed occur in the Spanish Indies will be examined in the next section.¹⁴⁴ Before turning to that crucial question, however, it seems appropriate to put the matter into sharper geographic focus.

¹⁴⁰ CIC can. 219, 199, §§ 1-2, 118; derivations in GASPARRI, *supra* note 104, at 27-28 n. 4, 50 nn.3 & 4, 56 n.2.

¹⁴¹ C. BRUNO, *supra* note 134, at 151-54.

¹⁴² Especially pertinent are the bulls *Orthodoxe fidei propagationem*, of Innocent VIII, of Dec. 13, 1486; *Inter caetera* (or *Donation*), of Alexander VI, of May 3, 1493; *Universalis ecclesiae*, of Julius II, of July 28, 1507; an *Omnimoda*, of Adrian VI, of May 9, 1552. These are discussed in C. BRUNO, *supra* note 134, at 99-129, and W. SHIELS, *supra* note 117, at 66-70, 78-81, 212-14, with extensive translation. The latter reproduces the originals at 277-82, 283-87, 310-13, but omits the *Omnimoda*.

¹⁴³ See, e.g., C. BRUNO, *supra* note 134, at 169.

¹⁴⁴ See text accompanying notes 180-214 *infra*.

E. *Ecclesiastical Jurisdiction in Spanish North America*

In the course of the first half of the nineteenth century, the United States acquired four major territories that were at the time, or had been until recently, Spanish possessions. In historical sequence and in then current terms of geographical description, these were Louisiana (1803); the Floridas (1819); Texas (1846); New Mexico (1848); and California (1848). Today, the area of the Louisiana Purchase includes Louisiana, Missouri, Arkansas, Iowa, North and South Dakota, Nebraska, Oklahoma, and parts of Colorado, Wyoming, Montana, and Minnesota.

The acquisition of Florida included parts of what are now Alabama and Mississippi. Texas has actually decreased in size when compared to its initial borders as defined by Texas law.¹⁴⁵ It should also be noted that although the date of the establishment of United States sovereignty over Texas, as acknowledged by Texas, is 1846 (or, according to United States authorities, 1845),¹⁴⁶ the

¹⁴⁵ The Act of Dec. 19, 1836, 1 GAMMEL 1193-94, defined the boundaries of the Republic of Texas as

beginning at the mouth of the Sabine River, and running west along the Gulf of Mexico three leagues from land, to the mouth of the Rio Grande, thence up the principal stream of said river to its source, thence due north to the forty-second degree of north latitude, thence along the boundary line as defined in the treaty between the United States and Spain to the beginning

Id. This included not only the controversial strip between the Nueces and the Rio Grande, see note 279 *infra*, but also most of the present state of New Mexico, as well as portions of the present states of Oklahoma, Kansas, Colorado, and Wyoming. See maps in C. PAULLIN, *ATLAS OF THE HISTORICAL GEOGRAPHY OF THE UNITED STATES* pl. 46c (J. Wright ed. 1932), and W. BINKLEY, *THE EXPANSIONIST MOVEMENT IN TEXAS*, map 2, at 24-25 (1925). The present boundaries of Texas were proposed by the United States in the Act of Sept. 9, 1850, ch. 49, 9 Stat. 446, and accepted by Texas through the Act of Nov. 25, 1850, ch. 2, 3 GAMMEL 832. See also the Presidential Proclamation of Dec. 13, 1850, ch. 49, 9 Stat. 1005. The United States undertook to pay \$10 million consideration for this settlement, and some of the bonds issued in payment later figured in *Texas v. White*, 74 U.S. (7 Wall.) 700 (1868), and subsequent cases. For details, see 6 C. FAIRMAN, *HISTORY OF THE SUPREME COURT OF THE UNITED STATES: RECONSTRUCTION AND REUNION 1864-88* pt. 1, 628-76 (1971).

¹⁴⁶ The official position of Texas was that the Republic came to an end, as provided in § 12 of the 1845 Constitution, with organization of the state government, which was achieved on February 16, 1846. *Cocke v. Calkin & Co.*, 1 Tex. 541 (1847), *rev'd*, 55 U.S. (14 How.) 227 (1852). As there stated, the position of the United States is that Texas became a state when it was admitted to the Union by Joint Resolution of Dec. 29, 1845, 9 Stat. 108. Act of Dec. 29, 1845, ch. 1, 9 Stat. 1, extended "all the laws of the United States" to Texas, effective immediately. In *Lee v. King*, 21 Tex. 577 (1858), the following remarks were addressed to the ruling of the Supreme Court in *Calkin*:

The government of Texas having employed counsel to sustain the defense in that cause and having manifested no special purpose to contest further the positions assumed in support of the Federal authority, this Court, though not assenting to these assumptions, or that they arise fairly upon the acts of the parties resulting in

displacement of Spanish and Mexican law in the Republic commenced with its independence in 1836.¹⁴⁷ The 1848 acquisitions include Arizona, Nevada, Utah, and parts of Oklahoma, Colorado, Kansas, and Wyoming, in addition to New Mexico and California.¹⁴⁸

There were also some relatively minor territorial adjustments involving territories then or previously under Spanish rule. Several boundaries, including some international ones, were controversial. The most important among the controversial boundaries was the boundary between Texas (or, after 1845, of the United States) and Mexico, which Mexico would draw (if at all) along the Nueces, and which Texas and the United States would draw along the Rio Grande.¹⁴⁹

The present study does not attempt to cover all of these states. Many of them had no permanent settlements while under Spanish rule; in others, Spanish influence was ephemeral, unrecorded, or both. This applies especially to the central and northern portions of the Louisiana Purchase territory,¹⁵⁰ and seems to be more generally the case outside the so-called Spanish borderlands. In the following, attention will focus on these areas, and more particularly on Texas, Louisiana, New Mexico, and Spanish Florida. The inclusion of the Floridas is justified because despite the ephemeral character of Spanish rule in that area, there is solid documentation on the questions discussed here. California should perhaps receive more attention, but does not appear to afford different insights.

A brief historical sketch of Roman Catholic ecclesiastical jurisdiction, or diocesan geography, within these areas from the first assertion of such jurisdiction to the severance of ecclesiastical ties with the hierarchies of Spain or Mexico seems useful. The area west of the Sabine River, encompassing Texas, New Mexico, and California, was part of the ecclesiastical province of Mexico, which became

annexation, felt under no obligation to continue the controversy, and has felt none to renew it as often as occasion might present itself.

Id. at 582.

¹⁴⁷ See text accompanying notes 39-48 *supra*.

¹⁴⁸ See C. PAULLIN, *supra* note 145, pl. 46c. This description accepts the 1850 settlement of the northern and western boundaries of Texas as reflecting the status quo ante.

¹⁴⁹ See W. BINKLEY, *supra* note 145, at 43-67, 123-94; D. PLETCHER, *THE DIPLOMACY OF ANNEXATION: TEXAS, OREGON, AND THE MEXICAN WAR* 352-92 (1973); note 279 and accompanying text *infra*.

¹⁵⁰ See, e.g., Bannon, *The Spaniards in the Mississippi Valley—and Introduction*, in *THE SPANISH IN THE MISSISSIPPI VALLEY 1762-1804*, at 3, 11 (J. McDermott ed. 1974); *THE SPANISH REGIME IN MISSOURI* (L. Houck ed. 1909) (2 vols.), especially the report of Zenon Trudeau of Jan. 15, 1798, 2 *id.* at 247-58.

independent of Seville in 1545. All of the northern borderlands of that province were initially part of the diocese of Guadalajara, which was established in 1560. It seems that the Bishop of Guadalajara actually exercised jurisdiction in the three borderlands in inverse proportion to their distance from his See: contacts were ample with Texas, less ample with New Mexico, and virtually nonexistent with California.¹⁵¹ Nevertheless, when Texas was transferred in 1777 to the newly created diocese of Linares (Monterrey, Nuevo León), the cedula delimiting the boundaries of the new diocese expressly mentioned the inconvenience of the distance between Guadalajara and Texas as a reason for this reorganization.¹⁵² In 1620, New Mexico became part of the diocese of Durango, and in 1779, California was transferred to the diocese of Arizpe (Sonora). This arrangement, which seems quite logical, prevailed until the changes in sovereignty in the first half of the nineteenth century.

There were vast differences in the actual exercise of ecclesiastical authority. Contacts with Texas existed in fact as well as in law. The Bishop of Linares made a visitation of that area in 1805, inspecting the cities of Goliad, Nacogdoches, and, of course, San Antonio.¹⁵³ Contacts between Durango and New Mexico were too intense for the orderly administration of the latter; after repeated efforts in that direction, Santa Fe was designated a diocese by decree of the Cadiz Cortes in 1813.¹⁵⁴ Due to military and political events, however, that decree never took effect, and New Mexico was still part of the diocese of Durango when Santa Fe was occupied by the United States in 1846.¹⁵⁵ In California, on the other hand, there is little evidence of the assertion of ecclesiastical authority by the Bishop of Sonora. In 1840, a new diocese of both Californias was established, but that diocese was destined to be ephemeral so far as present United States territory is concerned.¹⁵⁶

The system just outlined was severely weakened and ultimately destroyed by three nineteenth-century developments. First, the Mexican War of Independence caused severe losses in lives and property in the borderlands, and destroyed much that had been

¹⁵¹ See Ryan, *Ecclesiastical Jurisdiction in the Spanish Colonies*, 5 CATH. HIST. REV. 3, 4-18 (1919).

¹⁵² Quoted in W. SHIELS, *supra* note 117, at 191.

¹⁵³ Benson, *Bishop Marín de Porras and Texas*, 51 S.W. HIST. Q. 16, 19-30 (1947).

¹⁵⁴ Decree No. 217, Jan. 26, 1813. An English translation is in H. CARROLL & J. HAGGARD, *THREE NEW MEXICO CHRONICLES* 188 n.281 (1942).

¹⁵⁵ Ryan, *supra* note 151, at 9-11.

¹⁵⁶ See Geary, *Transfer of Ecclesiastical Jurisdiction in California (1840-1853)*, 22 HIST. RECORDS STUD. 101, 112-36 (1932); Ryan, *supra* note 151, at 16-18.

accomplished by colonization.¹⁵⁷ Second, independence, once achieved; led to a suspension of Episcopal authority. The bishops selected by the King by virtue of the *Patronato Real*¹⁵⁸ were, as a rule, loyal to the Crown; new appointments could only be made after the Vatican decided to disregard Spanish pretensions to Mexico. That step was taken in 1831; the independence of Mexico was not recognized by Spain and the Holy See until 1835 and 1836, respectively.¹⁵⁹ The See of Linares, for instance, was vacant from 1815 until 1831, which were critical years for Stephen Austin's colony in Texas.¹⁶⁰

The third development, and ultimately the most decisive one, was the change of territorial sovereignty that brought secular government and disestablishment to Texas in 1836 and to California and New Mexico in 1848. The Vatican generally reacted to these changes by separating the areas lost to Mexico from their Mexican diocesan connections and by incorporating them into the Roman Catholic hierarchy of the United States.¹⁶¹ There are, of course, differences between the respective changes in sovereignty and papal reactions thereto. These are usually explained by delays in communication, uncertainty as to geographic details, and, particularly in the case of Texas, political uncertainty. (Mexico never recognized the independence of the Republic of Texas; San Antonio was twice briefly occupied by Mexican troops before 1846.¹⁶²)

Nevertheless, there is one significant divergence from this pattern of the more or less automatic adaptation of ecclesiastical jurisdiction to international boundaries. Mexico went to some trouble to assure the continued freedom of access of Roman Catholics in New Mexico to their religious superiors in Mexico. A treaty provision expressly guaranteeing that right was included in the Treaty of Guadalupe Hidalgo as submitted to the United States Senate which, however, rejected it. Mexico accepted the treaty with this deletion, among others, and the United States made some assurances of a more general nature as to the freedom of reli-

¹⁵⁷ For a detailed account of the Mexican War of Independence, see 6 C. CASTAÑEDA, *OUR CATHOLIC HERITAGE IN TEXAS: THE FIGHT FOR FREEDOM 1810-1836*, at 1-175 (1970).

¹⁵⁸ See text accompanying notes 201-04 *infra*.

¹⁵⁹ For a detailed account of the relations between church and state in the first decade of Mexican Independence, see Shiels, *Church and State in the First Decade of Mexican Independence*, 28 CATH. HIST. REV. 206 (1942).

¹⁶⁰ See text accompanying notes 16-33 *supra*.

¹⁶¹ See R. BAYARD, *LONE-STAR VANGUARD, THE CATHOLIC RE-OCCUPATION OF TEXAS* (1838-1848), at 19 *passim* (1945); Geary, *supra* note 156, at 148-63.

¹⁶² See S. SIEGEL, *A POLITICAL HISTORY OF THE TEXAS REPUBLIC 1836-1845*, at 192-94, 203-04 (1956).

gion.¹⁶³ No doubt encouraged by these assurances, the Bishop of Durango continued to exercise ecclesiastical jurisdiction over New Mexico after its cession to the United States, and he even made a formal visitation of Santa Fe in 1850.¹⁶⁴ The continued connection of the Roman Catholic clergy and the population of New Mexico with the Mexican Bishop of Durango had far-reaching consequences for the canon law of marriage in the ecclesiastical province of Santa Fe, and even for the secular marriage law of New Mexico.¹⁶⁵

East of the Sabine River, Spain was the territorial sovereign of the Louisiana territory from 1763 to 1803, and of the Floridas from 1783 to 1819.¹⁶⁶ These territories were part of the ecclesiastical province of San Domingo, which, like that of Mexico, was created in 1545. Until 1795, the Floridas and Louisiana were part of the diocese of Havana. There was, however, an auxiliary bishop in residence in Louisiana. Between 1795 and 1803, Louisiana was a diocese within the province of San Domingo, but the relations between that diocese and the Floridas were uncertain for some time.¹⁶⁷ In any event, Havana exercised ecclesiastical jurisdiction over the Floridas until their cession to the United States in 1819.¹⁶⁸ Although the transfer of ecclesiastical jurisdiction was not without

¹⁶³ As originally submitted to the United States Senate, the last paragraph of Article IX of the Treaty of Guadalupe Hidalgo provided:

Finally, the relations and communication between the Catholics living in the territories aforesaid, and their respective ecclesiastical authorities, shall be open, free and exempt from all hinderance whatever, even although such authorities should reside within the limits of the Mexican Republic, as defined by this treaty; and this freedom shall continue, so long as a new demarcation of ecclesiastical districts shall not have been made, conformably with the laws of the Roman Catholic Church.

5 TREATIES AND OTHER INTERNATIONAL ACTS OF THE UNITED STATES OF AMERICA 242 (H. Miller ed. 1937). The Senate eliminated this provision and the treaty was concluded without it. Treaty of Peace, Friendship, Limits, and Settlement with the Republic of Mexico, Feb. 2, 1848, art. IX, 9 Stat. 930 (1854), T.S. No. 207. Mexico was assured, however, that the Constitution of the United States guaranteed freedom of worship, that the Catholic Church had found this guarantee sufficient, and that no difficulties had arisen in this connection when Louisiana and the Floridas were incorporated into the United States. Letter from James Buchanan to the Minister of Foreign Relations of the Mexican Republic, Mar. 18, 1848, 5 TREATIES, *supra*, at 253, 255.

¹⁶⁴ Ryan, *supra* note 151, at 10. The establishment of the Diocese of Santa Fe and the termination of the ecclesiastical jurisdiction of the Bishop of Durango over New Mexico are now fully discussed and documented in P. HORGAN, *LAMY OF SANTA FE* 61-183 (1975). See especially *id.* at 141-42.

¹⁶⁵ See text accompanying notes 390-413 *infra*.

¹⁶⁶ Spain was also the territorial sovereign of the Floridas from 1565 to 1763. For an account of that period, see Ryan, *Diocesan Organization in the Spanish Colonies*, 4 CATH. HIST. REV. 170, 170-76 (1918).

¹⁶⁷ See Curley, *Church and State in the Spanish Floridas (1783-1822)*, at 63-64, 249-84, in 30 CATH. HIST. STUD. (1940) [hereinafter cited as Curley].

¹⁶⁸ Ryan, *supra* note 166, at 178-80.

difficulty, it seems clear that the end of Spanish sovereignty both in Louisiana and in the Floridas was perceived as implying, more or less automatically, the termination of the jurisdiction of the Spanish hierarchy.¹⁶⁹

In summary, Spanish North America east of the Sabine River was part of the ecclesiastical province of San Domingo, while the Spanish and Mexican Southwest and West belonged to the ecclesiastical province of Mexico. Spanish rule in Louisiana and in the Floridas ended in 1803 and 1819, respectively; except for some minor problems of transition, these dates also signify the end of Spanish ecclesiastical jurisdiction in what is now the Southeastern United States. Texas, New Mexico, and California, as parts of the dioceses of Linares, Durango, and Sonora, passed into the Mexican hierarchy after 1821, and were severed from that hierarchy as a result of the independence of Texas (1836), and the cession of New Mexico and California (1848). Again, the change in political sovereignty brought with it a realignment of ecclesiastical jurisdiction along national lines, but the process of transition was slower and more confused in the Southwest. There was one remarkable exception: New Mexico continued to be subject to the jurisdiction of the Mexican Bishop of Durango until 1850.

At this point, it should be recalled that until the beginning of the present century, there was no uniform rule of Roman Catholic canon law on the formal validity of marriages. In some areas, the Tridentine form was prescribed for all baptized persons; in others, only for intermarriages of Roman Catholics.¹⁷⁰ Where neither the decree *Tametsi* nor its Benedictine modification had been enacted, the pre-Tridentine rule of marriage by consent alone prevailed.¹⁷¹ A brief look at the geographical incidence of these three systems in the United States will reveal some remarkable parallels with the history of diocesan geography sketched above. As reported by the Third Plenary Council of Baltimore in 1884, the decree *Tametsi* was at that time not in force in the ecclesiastical provinces of Baltimore, Philadelphia, New York, Boston, Oregon, Milwaukee, and (subject to exceptions to be mentioned presently) Cincinnati, St. Louis, and Chicago.¹⁷² *Tametsi*, it will be recalled, had never been enacted in England or in Scotland, and these nine Roman Catholic ecclesiastical provinces cover, in essence, the area of origi-

¹⁶⁹ See Curley 282-83, 333-34.

¹⁷⁰ See text accompanying notes 116-18 *supra*.

¹⁷¹ See text accompanying notes 96-106 *supra*.

¹⁷² ACTA ET DECRETA CONCILII PLENARII BALTIMORENSIS TERTII CVII (1886) (letter of Card. Gibbons).

nal English colonization plus those parts of the Midwest and the West that were originally occupied by settlers from the United States.

The decree *Tametsi* was in effect, on the other hand, in the ecclesiastical provinces of New Orleans, San Francisco, and Santa Fe, plus the diocese of Vincennes (Indiana), the city and some of the environs of St. Louis, and four named places in the diocese of Alton (Illinois). These three ecclesiastical provinces are virtually congruent with present mainland United States territories previously subject to Spanish rule, to Mexican rule, or to both of these. The nature of the exceptions seems apparent from their names, such as St. Louis, Vincennes, Prairie du Rocher, or French Village. These are surviving islands of French settlement in the northern Louisiana territory.¹⁷³

By 1884, the Benedictine Declaration had been extended to most areas subject to *Tametsi*. There were, however, two exceptions. First, the Benedictine Declaration was not in effect in the ecclesiastical province of Santa Fe. Second, as Cardinal Gibbons put it: "Quoad dioceses vero S. Antonii, Galvestonensem, Brownsvillensem, quae pertinent ad provinciam Neo-Aurelianensem, res est dubia, utrum necne declaratio Benedictina extensa fuerit."¹⁷⁴ The ecclesiastical province of Santa Fe has been described as including, at the time, "the archdiocese of Santa Fe in New Mexico; the diocese of Gallup, including parts of New Mexico and Arizona; the diocese of El Paso in its New Mexican section; the present diocese of Tucson; and the large province of Los Angeles."¹⁷⁵

The Roman Catholic hierarchy of the United States represented at the Third Plenary Council of Baltimore requested that the Benedictine Declaration be extended to those parts of the United States where it was not yet in effect or where its status was doubtful, *i.e.*, to the province of Santa Fe and to Texas, respec-

¹⁷³ See generally F. WALKER, *supra* note 128. It should be noted, however, that the French settlements on the left bank of the Mississippi (*e.g.*, St. Louis and St. Genevieve) were under Spanish rule in the last three decades of the 18th century. This probably meant that the Benedictine Declaration was not permanently received there in the manner suggested at note 128 *supra*. Trudeau noted in 1798 that Protestants in Spanish territories were "obliged to celebrate their marriages and baptisms by means of our Catholic priests." L. HOUCK, *supra* note 150, at 256. The Benedictine Declaration was expressly extended to the Diocese of St. Louis by papal decree in 1824. See text accompanying note 255 *infra*.

¹⁷⁴ "As for San Antonio, Galveston, and Brownsville, which belonged to the Province of New Orleans, it is doubtful whether the Benedictine Declaration was extended there." Gibbons, *supra* note 172, at 108 (trans. by author). The author is endeavoring to resolve these doubts. That issue is, however, only of interest to bistorians of canon law and will be treated separately.

¹⁷⁵ W. SHIELS, *supra* note 117, at 190.

tively. After study and affirmative recommendation by the Holy Office, Pope Leo XIII granted both of these requests on November 25, 1885.¹⁷⁶

This brief glimpse into the latter part of the nineteenth century seems irrelevant and almost constitutionally suspect to modern lawyers. The Roman Catholic canon law of marriage was of course not at that time in effect as, or in lieu of, secular marriage law anywhere in the United States (although, as will be seen further below,¹⁷⁷ that development was then of much more recent origin than might be assumed). Nevertheless, especially in the context of the present study, the situation in 1884, even seen through the eyes of the Holy See, provides some useful insights. First, it strongly reinforces the natural assumption that *Tametsi* came to North America from Spain, and that its traces in the South and the Southwest were Spanish and Mexican legacies. Second, the recommendation of the Third Plenary Council of Baltimore and the prompt reaction of the Pope provide a tentative answer to the question posed at the beginning of this Article: the Spanish law as to the form of marriage did not survive because even those who were not out of sympathy with it deemed it to be fundamentally incompatible with the constitutional commitment of the United States and its people to secularism and pluralism.

III

THE CEDULA OF 1564 IN SPANISH NORTH AMERICA

On July 12, 1564, King Philipp II signed a cedula in Madrid on the subject of the Council of Trent. The cedula begins by describing, as certain and notorious, the obligation of kings and ecclesiastical princes to obey, defend, and observe, in their respective kingdoms, estates, and seigneuries, the decrees and commands of the holy Mother Church, and to assist, aid, and favor the implementation and observation of these decrees and commands. This obligation, flowing from the position of kings and ecclesiastical princes as obedient sons, protectors, and defenders of the Church, is then expressly stated to include the duty to observe and to implement the decisions of the universal Councils with the

¹⁷⁶ Response of the Sacred Congregation of the Holy Office to the letter of Card. Gibbons, *supra* note 172, at 107-08. Heneghan, *The Decree "Tametsi" in the United States*, 3 THE JURIST 318, 322 (1943), inexplicably fails to note that the Benedictine Declaration was thus extended to the Province of Santa Fe, and W. SHIELS, *supra* note 117, at 190, repeats the error.

¹⁷⁷ See text accompanying notes 390-413 *infra*.

authority of the Holy See. The cedula then briefly recites the history of the most recent of these Councils, held at the Italian city of Trent, making special mention of the participation of Spanish prelates from the Spanish kingdoms in the work of that Council.¹⁷⁸ The recitals end with the statement that a printed and authentic text of the decrees of the Council of Trent had been received from the Pope. The King then provides as follows:

We as the Catholic King, and as an obedient and true son of the Church, wishing to satisfy and fulfill the obligation which we carry, and following the example of our Royal predecessors of illustrious memory, have accepted and received, and do accept and receive, the said holy Council. It is our will that it be defended, observed, and implemented in these our kingdoms.

For the purpose of such implementation and observance, and for the protection and defense of that which the Council ordains, we give and lend our aid and favor, interceding with our Royal Power when necessary and convenient.

Furthermore, we charge and direct the Archbishops and Bishops and other Prelates, and the Generals, Provincials and Priors, Guardians of the Orders, and all others affected, to see to the publication of the said holy Council in their Churches, districts, or dioceses, and in other convenient locations.

Furthermore, we order our Council, Presidents and our Audiencias, and the Governors, Corregidores and other courts of whatever kind, to give and lend the favor and aid required for the implementation and observance of the said Council and of what is ordained by it.¹⁷⁹

This is followed by an expression of special royal concern for compliance with the orders just quoted, which are declared to be of great importance to the welfare of the Church.

A. *Transmission to Mexico*

A provision of the Royal Council, dated December 6, 1564, instructed the *Justicias* (tribunals) to accord to ecclesiastical prelates the favor and aid required for the implementation and observance of all the decrees of the Council of Trent.¹⁸⁰

¹⁷⁸ Cf. J. LYNCH, *supra* note 139, at 243-45. Note, incidentally, that Philipp II went to some trouble to prevent the participation of clergy residing in the Indies in the Council of Trent. See de Leturia, *Perché la Nascente Chiesa Ispano-Americana Non fu Rappresentata a Trento*, I IL CONCILIO DI TRENTO 35 (Rome 1942), in I P. DE LETURIA, *RELACIONES ENTRE LA SANTA SEDE E HISPANOAMÉRICA* 495 (A. de Egaña ed. 1959). The Crown was motivated by the desire to prevent long absences of bishops from missionary territory, the wish to assert royal authority, and the fear of contamination with "Lutheran" heresy. RI I, 7, 36, which prohibits the return of archbishops or bishops from the Indies to Spain without royal permit, was a product of this policy. P. DE LETURIA, *supra*, at 505.

¹⁷⁹ NOVISIMA I, 1, 13.

¹⁸⁰ 7 LOS CÓDIGOS ESPAÑOLES CONCORDADOS Y ANOTADOS 5 n.10 (1850).

The cedula itself could not have arrived in the New World in 1564, for the armada of 1564 had sailed in March or April, several months before the King had acted. It now seems certain, however, that both the cedula and the text of the Tridentine legislation reached Mexico with the next fleet, which left Spain on June 6, 1565, and arrived in Vera Cruz on September 20.¹⁸¹ On October 11 of that year, the Archbishop and the Bishops of Mexico submitted a petition to the Audiencia of New Spain concerning the observation of the provisions of the Council of Trent, and on other matters pertaining to the ecclesiastical and civil government of those parts. The petition referred to the familiarity of the President of the Audiencia with the message from the King, ordering the observation and implementation of the decrees of the Council of Trent in all of his kingdoms, seigneuries, and territories.

The petition then recited that the "very extensive" text of these decrees had been given to the bishops by a secretary of the Audiencia, and that the bishops had been directed by the visitor, de Valdemarra, to gather in Mexico in order to discuss, and decide upon, current issues. After reciting some eighteen items of requests for legal sanction not relevant here, the petition concluded by requesting the granting of royal assistance where necessary, to which assistance the bishops felt entitled by virtue of session 25, chapter 22, of the Tridentine decrees,¹⁸² which they cited as authority. It appears from the copy of this petition made by the scribe of the Audiencia of New Spain on October 15, 1565, and from the scribe's annotation thereto, that the petition was accepted in its entirety by the Audiencia.¹⁸³

The Second Provincial Council of Mexico was convened by the Archbishop Montufar at approximately the same time, primarily for the purpose of implementing the work of the Council of Trent.¹⁸⁴ This was achieved through the adoption, on November

¹⁸¹ The 1564 and 1565 sailings are exhaustively documented in 3 H. & P. CHAUNU, *SÉVILLE ET L'ATLANTIQUE* 60, 68 (1955).

¹⁸² The correct citation should have been to C. Trident. Sess. XXV, c. 20, MANSI col. 170.

¹⁸³ The petition of Oct. 11, 1565, and the scribe's annotation of Oct. 15 of that year, are reprinted in 13 *COLECCIÓN DE DOCUMENTOS INÉDITOS DEL ARCHIVO DE INDIAS* 283-93 (1870) (1st series). See also 2 E. SCHAEFER, *ÍNDICE DE LA COLECCIÓN DE DOCUMENTOS INÉDITOS DE INDIAS* 407 No. 2.925 (R. Konezke ed. 1947). The key to these sources was graciously supplied by Professor G. Floris Margadant of the Faculty of Law, National Autonomous University of Mexico. A. CARREÑO, *UN DESCONOCIDO CEDULARIO DEL SIGLO XVI* (1944), reproduces several sixteenth-century cédulas on the implementation of the disciplinary decrees of the Council of Trent in New Spain. The first of these, *id.* at 290-91, is dated Mar. 24, 1566; it is addressed to the Archbishop of Mexico and to the dean and chapter of the cathedral there. This source was brought to the author's attention by Dr. I. Rubio Mañé, Archivo General de la Nación, Mexico City.

¹⁸⁴ *CONCILIOS PROVINCIALES DE MÉXICO* 187-88 (introd. No. 13) (F. Lorenzana ed.

11 of that year, of a canon which received the work of the Tridentine Council in its entirety and which specified to be "castigando, y corrigiendo por todo rigor de Derecho, si (lo que Dios no quiera) hubiese alguno, que de palabra, o hecho contradixese lo assi ordenado, y establecido por el dicho Santo Concilio Tridentino."¹⁸⁵ In a place where the Spanish Inquisition was in operation, that was hardly an idle threat.¹⁸⁶ At its final meeting in December, 1565, the Provincial Council issued instructions which gave notice to the synodals that Tridentine legislation on, among other matters, clandestine marriages, took precedence over the acts adopted by the First Mexican Provincial Council.¹⁸⁷

The Third Mexican Provincial Council, which met in 1585, enacted a detailed code of ecclesiastical legislation, including, among other matters, the subject of marriage. After restating, with appropriate citation, the rule laid down in the decree *Tametsi* that marriages celebrated without the assistance of a priest and two or three witnesses are void, the Provincial Council increased penal sanctions for those who should nevertheless attempt to contract invalid clandestine marriages.¹⁸⁸ This legislation by the Third Mexican Provincial Council was approved by a papal bull and, after examination by the Council of the Indies, by cedula on February 9, 1621.¹⁸⁹

In view of what has been reported above, there can be no doubt that the decree *Tametsi* was in effect in New Spain, and that the scope of its applicability was determined by the cedula of 1564, with the result that the territorial sphere of its applicability was coextensive with Spanish sovereignty. One example (although no doubt a significant one) is that in a report dated March 6, 1762, on the activities of the missions in Texas, it is stated that at these missions, "los cristianos se casan . . . por la Yglecia, y conforme al

1769). The papal bull *Benedictus Deus*, approving the work of the Council of Trent, was printed and published in Mexico in 1565 under the authority of the Archbishop of Mexico. A copy is on file in the University of Texas library at Austin.

¹⁸⁵ The canon specified to be "castigated, and disciplined by the full rigor of the law, anyone who by word or deed contradicts what is here ordered and established by the said holy Council of Trent." 1 Decrees of the Second Council, c. 1, *Id.* at 188 (trans. by author).

¹⁸⁶ See text accompanying notes 208-14 *infra*.

¹⁸⁷ F. LORENZANA, *supra* note 184, at 207-08. Canon 38 of the First Mexican Provincial Council, held in 1555, enacted severe penalties against clandestine marriages. *Id.* at 98-100. A note at 98 (*) states that the marriages thus prohibited had later been declared null by C. Trident. Sess. XXIV, *de reformatione matrimonii* c. 1, MANSI col. 152.

¹⁸⁸ CONCILIIUM MEXICANUM PROVINCIALE III, Lib. IV, tit. 1, § 3, 270-71 (F. Lorenzana ed. 1769).

¹⁸⁹ That act of royal approval is duly reported in RI 1, 8, 7. Note that this fragment expressly refers to the Council of Trent.

Santo Concilio de Trento" ("Christians are married in church and in conformity with the holy Council of Trent").¹⁹⁰ Spanish and Mexican authors have never assumed otherwise.¹⁹¹ Yet in *Hallett v. Collins*,¹⁹² the Supreme Court of the United States reached a contrary conclusion. Speaking through Justice Grier, the Court said:

In Spain [*Tametsi*] was received and promulgated by Philip the Second in his European dominions. But the laws applicable to the colonies consisted of a code issued by the Council of the Indies antecedent to the Council of Trent, and are to be found in the code or treatise called Las Siete Partidas and the Laws of Toro. The law of marriage as contained in the Partidas is the same as that which we have stated to be the general law of Europe antecedent to the council; namely, "that consent alone, joined with the will to marry, constitutes marriage." We have no evidence, historical or traditional, that any portion of this code was ever authoritatively changed in any of the American colonies; nor has it been shown, that in the "Recopilacion de los Indies," digested for the government of the colonies by the order of Philip the Fourth, and published in 1661, nearly a century after the Council of Trent, any change was made in the doctrine of the Partidas on the subject of marriage, in order to accommodate it to that of the council. It may be supposed, that, as a matter of conscience and subjection to ecclesiastical superiors, a Catholic population would in general conform to the usages of the Church. But such conformity would be no evidence of the change of the law by the civil power.¹⁹³

It seems that the Court did not then have the benefit of the exact text of the cedula and of Mexican provincial ecclesiastical legislation, and consequently could not determine the significance of the cedula of February 9, 1621. Justice Grier was nevertheless correct in his assertion that the act of King Philipp II sanctioning,

¹⁹⁰ Relación del Estado en que se hallan todas y cada una de las Misiones, en el Año de 1762., dirigido al Muy Reverendo Padre Guardian Fray Francisco Xavier Ortiz, in DOCUMENTOS PARA LA HISTORIA ECLESIASTICA Y CIVIL DE LA PROVINCIA DE TEXAS O NUEVAS PHILIPINAS 1720-1779, at 245, 262 (1961) (trans. by author). This was a report on the status of each and every one of the missions in Texas in the year 1762.

¹⁹¹ See, e.g., C. BRUNO, *supra* note 134, at 178-79; J. OTS Y CAPDEQUÍ, MANUAL DE HISTORIA DEL DERECHO ESPAÑOL EN LAS INDIAS 92 (1945); I M. GALVÁN RIVERA, *supra* note 35, at 36 & n.1; most recently G. MARGADANT, INTRODUCCIÓN A LA HISTORIA DEL DERECHO MEXICANO 126 (1971). Llorca, *Aceptación en España de los decretos del concilio de Trento*, 39 ESTUDIOS ECLESIASTICOS 341, 459 (1964) (Madrid), concludes that there can be no doubt whatever that the Tridentine decrees were received and implemented in their entirety in all Spanish territories, not only in the peninsula but also in the Netherlands and in America. *Id.* at 358.

¹⁹² 51 U.S. (10 How.) 174 (1850).

¹⁹³ *Id.* at 181-82. This case is discussed extensively at notes 353-79 and accompanying text *infra*.

for his realms, the work of the Council of Trent, is not textually reflected in the *Recopilación* of the Indies or, for that matter, as might have been added, in the *Nueva Recopilación*.¹⁹⁴ The full text of the cedula of 1564 does, however, appear as book one, title one, law thirteen of the *Novísima Recopilación* of 1805. Despite the late date of its publication, the *Novísima* was in effect in Mexico, including Texas,¹⁹⁵ so that the holding in *Hallett* is manifestly irrelevant for Spanish North America west of the Sabine River, at least for the time of Anglophonic settlement under Spanish Floridas after 1805. *Hallett* arose in the Floridas, but the marriage there at issue was celebrated in 1805. Thus the question remains: Is there any merit to the contention that the decree *Tametsi* was not extended to the Indies by or by virtue of the cedula of 1564, within the terms provided by that act itself?

The answer follows quite readily from the three basic constitutional rules of the Spanish colonial empire prevailing at the times here material: royal absolutism in Castile and its appendage, the Indies; the *Patronato Real* and through it, the domination of the Church by the Crown; and last but certainly not least, the position of the Roman Catholic Church as the established church of the Spanish realms.

Since the King was the absolute ruler of the Kingdom of Castile, and since the Indies were part of that Kingdom,¹⁹⁶ it follows that the question of the applicability of the cedula in the Indies is purely one of royal intent. It is true that the *Recopilación* of the Indies laid down the rule that cedulas, *provisiones* and *pragmáticas* did not take effect in the Indies unless approved by the Council of the Indies and dispatched pursuant to royal authority; but that rule was established, at the earliest, by a cedula dated December 14, 1614.¹⁹⁷ The cedula of 1564 was promulgated a half century earlier, and its language, as reproduced above, leads to the conclusion that all realms subject to royal fiat were intended to be covered. The reality of that intent is amply corroborated by implementing acts, both ecclesiastical and royal, in or with respect to

¹⁹⁴ See note 189 *supra*.

¹⁹⁵ See, e.g., 1 NOVÍSIMO SALA MEXICANO 15-16, 22-23 (M. Dublan & L. Mendez eds. 1870); *Babb v. Carroll*, 21 Tex. 765, 771 (1858). But cf. note 297 and accompanying text *infra*.

¹⁹⁶ See Manzano Manzano, *Adquisición de las Indias por los Reyes Católicos y su Incorporación a los Reinos Castellanos*, 21 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 5 (1951); García Gallo, *La unión política de los Reyes Católicos y la incorporación de las Indias*, 30 REVISTA DE ESTUDIOS POLÍTICOS 179 (1950).

¹⁹⁷ RI II, 1, 39 & 40. See García Gallo, *La ley como Fuente del Derecho en Indias en el Siglo XVI*, 21 ANUARIO DE HISTORIA DEL DERECHO ESPAÑOL 607, 614-15 n.15 (1951).

New Spain.¹⁹⁸ In addition to the acts already noted, the latter include almost innumerable references to the Council of Trent in the *Recopilación* of the Indies. For example, book one, title fourteen, law seventy-two¹⁹⁹ provided that in executing sanctions imposed upon the religious by their superiors, the Audiencias were to be guided by the general law, the canon law, and the Council of Trent, and law seventy-four²⁰⁰ directed the archbishops and the bishops to supervise the disciplining of the religious by their superiors pursuant to the rules of the Council of Trent.

This reading of the cedula as encompassing the Indies is further supported, if need be, by a consideration of the nature and purposes of the *Patronato Real*. The King regarded himself as the crusading champion of the Roman Catholic faith, especially in the Indies.²⁰¹ Under the *Patronato Real*, he had powers ranging from the nominating and exiling of archbishops to the constructing of churches, and even more importantly, he had the power to approve or to veto ecclesiastical legislation.²⁰² It seems difficult to believe that in a matter which, according to the very words of the cedula, was of the greatest significance for the Roman Catholic faith and the Church, he did not intend to use his powers to the utmost. As to the extent of these powers, Judge Lipscomb observed, in *Blair v. Odin*:²⁰³

"Pope Alexander the VI. granted to the crown of Spain the tithes in all the newly discovered countries, on condition that provision should be made for the religious instruction of the natives." Soon after this, Julius II. conferred on Ferdinand and his successors the right of patronage, and the absolute disposal of all ecclesiastical benefices. . . . In consequence of those grants, the Spanish monarchs became, *in effect, the heads of the Catholic church* in their American possessions. In them, the administration of the revenues was vested. Their nominations of persons to supply vacant benefices was instantly supplied by the pope. Thus, in all Spanish America, authority of every species vested in the crown. Then, no collision was known between spiritual and temporal jurisdiction.²⁰⁴

Finally, it must be remembered that, at the time, the Roman Catholic Church was the established church of the Spanish Empire.

¹⁹⁸ See text accompanying notes 184-89 *supra*.

¹⁹⁹ RI I, 14, 72.

²⁰⁰ RI I, 14, 74.

²⁰¹ See, e.g., C. BRUNO, *supra* note 134, at 131.

²⁰² See authorities cited in note 134 *supra*.

²⁰³ 3 Tex. 288 (1849).

²⁰⁴ 3 Tex. at 294, quoting *Antones v. Heirs of Eslava*, 9 Port. (Ala.) 527, 543-44 (1839).

Family law, so far as status was concerned, was administered by ecclesiastical tribunals. These exercised jurisdiction in Mexico until 1857, and also in Louisiana under Spanish rule.²⁰⁵ In Castile itself, after the expulsion of the Jews (coinciding with the discovery of America), there was no place for non-Catholics: Moors and Jews accepting baptism (*conversos*) could remain, but heresy and apostasy were treason, punishable by death at the stake.²⁰⁶ In the Indies, the rules were, if anything, much more strict: neither Moorish nor Jewish *conversos*, nor their children, could enter the Indies without special permission. A like prohibition applied to those convicted of heresy and reconciled, and to the children and even the grandchildren of those convicted of heresy or apostasy.²⁰⁷

In New Spain, these prohibitions were rigorously enforced by the Inquisition.²⁰⁸ Officially at least, there were no atheists, Protestants, or Jews in Mexico until well into the nineteenth century. When Stephen Austin visited Mexico City in 1822, he described it as "a City where untill [*sic*] very recently foreigners were prescribed [*sic*] by the Laws and Discountenanced by the people from prejudice."²⁰⁹ He attributed the latter to the power of the clergy and to religious fanaticism.

In Mexico as in Texas,²¹⁰ the formal texts of the law did not entirely reflect reality, and there were those whose public adherence to the Roman Catholic faith was merely a cover for other religious practices at home. There were even some marriage customs among Mexican dissidents that bore some similarity to

²⁰⁵ As to Mexico, see text accompanying note 285 *infra*; as to Louisiana, see *Meilleur v. La Coste* (Miro, Gov., La. 1783), abstracted in Porteous, *Index to the Spanish Judicial Records of Louisiana*, LIII, 20 LA. HIST. Q. 518, 526, 536, accepting the validity of "the sentence of separation pronounced by Reverend Father Friar Cirilo de Barcelona, Ecclesiastical Judge of this Province and the actual Auxiliary Bishop of the Island of Cuba." *Id.* at 536. In *Patton v. Philadelphia and New Orleans*, 1 La. Ann. 98, 104 (1846), it is stated that ecclesiastical courts were never established under Spanish rule in Louisiana. This error might be attributable in part to the efforts of the Spanish authorities to avoid publicity in that respect. See Letter from Uzanga to Bishop of Havana, 1772, in 1 L. HOUCK, *supra* note 150, at 114, 119-20. See also note 254 *infra*.

²⁰⁶ 3 M. MENÉNDEZ PELAYO, *HISTORIA DE LOS HETERODOXOS ESPAÑOLES: ERÁSMISTAS Y PROTESTANTES*, in *OBRAS* vols. 37-40 (Nacional ed. 1947-48) (completed 1882), discusses the trials and tribulations of heretics in Spain rather approvingly. See especially 38 *OBRAS*, *supra*, at 410-22. For a brief account, see J. LYNCH, *supra* note 139, at 20-28.

²⁰⁷ RI IX, 26, 15 & 16.

²⁰⁸ See generally J. JIMÉNEZ RUEDA, *HEREJÍAS Y SUPERSTICIONES EN LA NUEVA ESPAÑA (LOS HETERODOXOS EN MEXICO)* *passim* (1946); S. LIEBMAN, *THE JEWS IN NEW SPAIN: FAITH, FLAME, AND THE INQUISITION* 113-285 (1970).

²⁰⁹ Address by Stephen Austin to Colonists, June 5, 1824, AUSTIN PAPERS 1919, at 811, 815; Letter from Stephen Austin to "Amigos Míos," May 28, 1823, *id.* at 652, 656; Letter from Stephen Austin to J.E.B. Austin, June 13, 1823, *id.* at 670, 671.

²¹⁰ See text accompanying notes 27-31 *supra*.

marriage by bond in Texas. The following is a description of the marriage custom among secret adherents of the Mosaic faith in colonial Mexico:

When no rabbi was in New Spain, the couple would solemnize their marriage by a written contract in the presence of their families and friends. This contract was in accordance with Jewish law. The couple would then have a Catholic ceremony. Later, when a rabbi was available, he would repeat the marriage ceremony and add his prayers for blessings for the couple.²¹¹

It should be noted, however, that there were two essential differences between such marriages and marriages contracted by bond in Texas. The latter were known to the authorities but legally invalid. The former were valid because they were formally celebrated *in facie ecclesiae*, but their private aspects were carefully kept secret. The penalty for secretly practicing Judaism was death at the stake.²¹²

This serves to underline the essential point where the Supreme Court went astray in *Hallett*.²¹³ The Kings of Spain interceded with their "brazo Real" (royal arm) wherever this was necessary to secure compliance with those laws of the Church which they had accepted.²¹⁴ Within the ambit thus circumscribed, the distinction between civil power and ecclesiastical legislation was quite immaterial. By virtue of its approval, adoption, and if need be, enforcement by royal authority, the legislation of the Council of Trent simply was the law of the land in Spanish North America.

B. *Louisiana and the Floridas*

The Spanish North American territories east of the Sabine River differed in several important respects from New Spain and the ecclesiastical province of Mexico. First, they were not, or at least not entirely, original Spanish settlements. The Louisiana territory was acquired from France; the Spanish regime in the Floridas was interrupted by two decades of British rule.²¹⁵ Second,

²¹¹ S. LIEBMAN, *supra* note 208, at 75. It seems that the subsequent religious ceremony in the presence of a rabbi was not essential to the validity of the marriage under Jewish law. Z. FALK, *JEWISH MATRIMONIAL LAW IN THE MIDDLE AGES* 42, 81-82 (1966).

²¹² See e.g., S. LIEBMAN, *supra* note 208, at 245-50. The penalties imposed by the Inquisition were executed by the "secular arm" pursuant to RI I, 19, 18; cf. RI I, 19, 1.

²¹³ 51 U.S. at 181-82, discussed in notes 192-93 *supra* and notes 353-79 *infra*.

²¹⁴ See the cedula of 1564, quoted at text accompanying note 179 *supra*; RI I, 14, 72 & 74, text accompanying notes 199-200 *supra*; RI I, 19, 1 & 18, note 212 *supra*; *Antones v. Heirs of Eslava*, 9 Port. (Ala.) 527, 543-44 (1839); *Blair v. Odin*, 3 Tex. 288, 294 (1849).

²¹⁵ See generally C. MOWAT, *EAST FLORIDA AS A BRITISH PROVINCE 1763-1784* (1943).

Spanish rule in this part of North America was comparatively brief; the important developments were mainly concentrated between approximately 1769 and 1820. Third, for much of this period, a mighty shadow was cast over much of this area by the United States, a secular and predominantly Protestant republic with a footloose and land-hungry population.

These geographic, historical, and political realities had a substantial impact on Spanish ecclesiastical law and policy in Louisiana and the Floridas. The Inquisition was not introduced to these areas;²¹⁶ the Enlightenment combined with political necessity to bring the beginnings of toleration. There were a number of Protestant families—Swiss, German, and perhaps French—who lived in and around New Orleans under French rule;²¹⁷ they were apparently not disturbed when Spain assumed control. More importantly, tolerance was granted in 1785 to British settlers who elected to remain in the Floridas, and to selected new settlers from the United States after 1787.²¹⁸ As then understood, tolerance consisted, in the main, of the right to practice one's heterodox faith in private on condition of taking an oath of allegiance to Spain. It was thought at the time that both the British loyalists and the immigrants from the United States could be peacefully converted to Catholicism through the work of Irish missionaries trained in Spain, and that once converted, they would form a powerful population barrier against further incursions from the United States.²¹⁹

This presence of a tolerated Protestant population on Spanish soil was bound to raise the question of the local and personal effects of the Tridentine marriage legislation as sharply as it ever had to be faced in a Spanish colonial possession. Before discussing that issue, however, some mention must be made of the French law on the formal validity of marriages prevailing in the Louisiana territory at the time of the transfer of sovereignty to Spain.

The charter granted by Louis XIV to Antoine Crozat on September 14, 1712, provided that "Nos Édits, Ordonnances Et Coutumes Et les usages de la Prevosté et Vicomté de Paris seront

²¹⁶ Curley, *supra* note 167, at 121-22, 126-28.

²¹⁷ See C. O'NEILL, *CHURCH AND STATE IN FRENCH COLONIAL LOUISIANA* 256-82 (1966). Professor Charles E. O'Neill, S.J., of the Department of History, Loyola University, New Orleans, has given very valuable assistance to the author in the preparation of this study.

²¹⁸ See generally Din, *The Immigration Policy of Governor Esteban Miró in Spanish Louisiana*, 73 S.W. HIST. Q. 155, 156-65 (1969).

²¹⁹ *Id.* at 157, 159; Curley, *supra* note 167, at 90, 164-211.

observés pour Loix et Coutumes dans le d. Pays de la Louisiane."²²⁰ This is the basic source of Louisiana law both in the company period and in the royal period which started in 1733. In both of these periods, the law was administered by a Superior Council which had the same status as a Conseil Supérieur in France itself.²²¹

The formula just cited closely resembles those employed in like grants half a century earlier with respect to Canada.²²² In the absence of reliable Louisiana authority in point, it seems permissible to rely on Canadian authority for the construction of the reception clause for Louisiana.²²³ On that basis, the clause carried with it (1) the Custom of Paris and other customs there prevailing in 1712, and (2) the royal edicts and ordinances that were effective in Paris in 1712 by virtue of being registered with the *Parlement* of Paris as required by French law. The Superior Council being, in essence, a local *Parlement*, French royal legislation enacted after 1712 did not become effective in Louisiana unless and until registered with the Superior Council of that colony.²²⁴

Although the decrees of the Council of Trent were not officially enacted in France,²²⁵ French canon law texts routinely report that the substance of Trent was either received in France by ecclesiastical custom or through enactment into secular law.²²⁶ The culmination of the former process was a resolution of the clerics of France in Assembly, dated July 7, 1615, that they "received the Council by their seals and their oaths."²²⁷ This declaration was communicated to King Louis XIII soon afterwards and received by

²²⁰ "Our edict, ordinances, and customs and the usages of the viscounty of Paris shall be observed as laws and customs in the said country of Louisiana." The text of the charter is in 4 PUB. LA. HIST. SOC. 17 (1908) (trans. by author).

²²¹ See generally Dart, *The Legal Institutions of Louisiana*, 3 SOUTHERN L.Q. 247 (1918).

²²² Commission of the Intendant for Canada, June 1675, reprinted in J. CASTEL, *THE CIVIL LAW SYSTEM OF THE PROVINCE OF QUEBEC* 12-13 (1962); Edict of Creation of the Sovereign [Superior] Council of New France, *id.* at 9-10.

²²³ *Symes v. Cuvillier*, 5 App. Cas. 138, 149-50 (P.C. 1880); *Les Soeurs Dames Hospitalières v. Middlemiss*, 3 App. Cas. 1102, 1117-19 (P.C. 1878); *Hutchinson v. Gillespie*, 13 Eng. Rep. 349, 351-52 (1844). This proposition has, however, been challenged. See *Inverness Ry. & Coal Co. v. Jones*, 40 Can. S. Ct. 45, 50-55 (1907) (Girouard, J., dissenting). No relevant Louisiana authority on this rather basic question could be located.

²²⁴ One example is the so-called Black Code of 1724, which was "formally registered by the Superior Council and then published." C. O'NEILL, *supra* note 217, at 269.

²²⁵ See text accompanying notes 115-16 *supra*.

²²⁶ See, e.g., F. WALTER, *MANUAL DEL DERECHO ECLESIASTICO UNIVERSAL* § 118, at 165 (2d ed. 1852) (Spanish translation of the French original). The Holy See appears to take the position that despite royal opposition, the disciplinary decrees of the Council of Trent became immediately effective in France. See Z. ZITELLI, *supra* note 124, at 428.

²²⁷ P. BLET, *LE CLERGÉ DE FRANCE ET LA MONARCHIE* 131 (1959) (trans. by author).

him without sign of objection or approval; it was never sanctioned by royal edict.²²⁸

The substance of the decree *Tametsi* was enacted into French law by the Ordinance of Blois, in 1579,²²⁹ and by subsequent royal ordinances and decrees, the last of which was adopted in 1697.²³⁰ Since this was well before the creation of the Superior Council of Louisiana, it follows that the substance of *Tametsi* was in effect in French Louisiana territory in the form of a secular enactment. In administering the sacrament of marriage within the ambit of that legislation, however, the clergy were acting directly pursuant to the disciplinary decrees of the Council of Trent, which had been "received" by the Assembly of the Clergy in France in 1615. Was this sufficient for the reception of *Tametsi* by custom? It seems reasonably clear that eighteenth-century authors on canon law such as Murillo Velarde, primarily had France in mind when they wrote of the reception of the decree in this manner. When last raised in 1822, however, this question was left unanswered by the Holy See and, as will be seen presently,²³¹ it seems to be of theoretical concern only.

Legal historians still disagree about the extent of the displacement of French law by Spanish law in Louisiana between 1769 and 1803;²³² the re-introduction of Spanish law in the Floridas after 1783 does not appear to have been studied in detail. The present inquiry, however, is limited to the much narrower question: To what extent, if any, was the decree *Tametsi* in effect in the Floridas and in Louisiana under Spanish rule?

The problem is quickly put into focus by the following passage in a leading historical study on church and state in Spanish Florida:

²²⁸ *Id.* at 131-33.

²²⁹ Articles 40, 44, and 181 of the Ordinance of Blois, 1579, 14 ISAMBERT, RECUEIL GÉNÉRAL DES ANCIENNES LOIS FRANCAISES 380, 391-92 (1829).

²³⁰ The Ordinance of Jan. 1629, arts. 39 & 40, 16 *id.* at 223, 234-35; the Declaration of Nov. 26, 1639, art. 1, 16 *id.* at 520, 521-22; the Edict of Mar. 1697, arts. 1-3, 20 *id.* at 287, 288-90. These enactments are discussed in 2 A. ESMEIN, *supra* note 96, at 201-07.

²³¹ See text accompanying notes 238-41 *infra*.

²³² This issue is debated at the present mainly in the context of the legislative history of the Louisiana Civil Code of 1808. See Batiza, *The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance*, 46 TULANE L. REV. 4 (1971); Pascal, *Sources of the Digest of 1808: A Reply to Professor Batiza*, 46 TULANE L. REV. 603 (1972); Batiza, *Sources of the Civil Code of 1808, Facts and Speculation: A Rejoinder*, 46 TULANE L. REV. 628 (1972). The Spanish period as such has not been examined exhaustively, but Col. John H. Tucker, Jr., the President of the Louisiana Law Institute, has recently completed a detailed investigation into this phase of Louisiana legal history. He has graciously made available his manuscript draft, and has made a number of other valuable suggestions, which are gratefully acknowledged here. See J. TUCKER, EFFECT ON THE CIVIL LAW OF LOUISIANA BROUGHT ABOUT BY THE CHANGES IN ITS SOVEREIGNTY 2-42 (Society of Bartolus, Juridical Studies, No. 1 (1975)).

Spanish law apparently made no provision for non-Catholics desirous of marrying before a minister of their religion or before a civil official. Since many non-Catholics remained in East Florida, some of them, particularly in the northern districts bordering on the State of Georgia, contracted marriages by calling in neighbors, in default of clergymen, to act as witnesses to this ceremony. After signifying their intention of taking the man or woman of their choice as a life partner, they simply recorded the ceremony in a book. Others crossed the border and were married before non-Catholic clergymen in the United States.²³³

This situation, which prevailed in Florida in 1790, bears considerable resemblance to that existing in Texas three decades later. There are, however, three significant differences between these otherwise quite similar settings:²³⁴ the non-Catholics in Florida were not required by law to embrace the Roman Catholic religion; the possibility of a ceremony in another country was not a realistic alternative for Texans in Austin's colony; and perhaps most importantly, a priest was readily available in Florida.

Indeed, it was this priest (Father Hassett, the *vicario* at St. Augustine) who raised the issue with Havana. The first response by Bishop Trespalacios was hardly very enlightening: the Bishop reminded Father Hassett in general terms of the Benedictine Declaration²³⁵ and furnished him with a copy of the constitution of the Synod of Havana which required the rectification, in Tridentine form, even of marriages of "Englishmen, or other heretics of whatever sect"²³⁶ moving to that ecclesiastical province.

A second inquiry in connection with a runaway Georgia marriage, however, proved ultimately more productive. This time, Father Hassett referred the matter to the Governor, who sought a ruling from the Council of the Indies. After considerable discussion, which included a consultation with the Grand Inquisitor,²³⁷ the Council of the Indies drew up regulations which were issued on December 16, 1792, in the form of a Royal Order to the Bishop of Havana, the governor of East Florida, and the governor of New Orleans.²³⁸

²³³ Curley, *supra* note 167, at 224 (footnote omitted).

²³⁴ See text accompanying notes 31-33 *supra*; Curley, *supra* note 167, at 90, 214-31.

²³⁵ Letter from Bishop Trespalacios of Havana to Hassett, July 16, 1791, Curley, *supra* note 167, at 225. The Declaration is discussed in the text accompanying note 102 *supra*.

²³⁶ Constitution on marriages, Diocesan Synod of Cuba, Const. 8, 1680, in 4 J. ZAMORA Y CORONADO, BIBLIOTECA DE LEGISLACIÓN ULTRAMARINA 241, 243-44 (1845).

²³⁷ Curley, *supra* note 167, at 227-29.

²³⁸ Royal Order of Dec. 16, 1792, in J. ZAMORA Y CORONADO, *supra* note 236, at 244-46; Curley, *supra* note 167, at 229-30.

This Royal Order is styled "Instruction to the vicars, priests, and other ecclesiastics who exercise the care of souls in the provinces of Louisiana and the Floridas, for the celebration of marriages of the English, Anglo-American, and other foreign Protestant settlers."²³⁹ It ordered these settlers to obey, and the governors and *Justicias* to enforce, the following rule:

Protestants of whatever sect, when intermarrying among themselves or when marrying a Catholic, must celebrate their marriages in the presence of a Catholic priest, and of two or three witnesses, pursuant to the form established by the sacred Council of Trent in its 24th session *de reformat.*, chap. 1., and in observance of the repeated declarations of the sacred congregation of that Council holding the same to apply without distinction, to marriages of Catholics and Protestants, or heretics domiciled in Catholic countries where it has been received and published, and, in accordance with those resolutions and the laws of the monarchy, marriages celebrated in the future by settlers in Spanish territory before ministers, or before foreign protestant magistrates, or in any form other than that here prescribed, are null and void, and subject those acting in such manner to the confiscation of their goods and to permanent banishment from the Spanish domains.²⁴⁰

The Royal Order then specified the rites to be followed by the Roman Catholic clergy in assisting at the celebration of marriages here regulated, and gave instructions for the recordation of such marriages. It also prescribed that marriages celebrated elsewhere in non-Tridentine form had to be ratified in Tridentine form. The penal sanctions of the Royal Order were waived for those who did so ratify their marriages, including spouses who, before the local publication of the Order, had entered into runaway marriages in non-Tridentine territory. A final clause instructed the Royal Governors to exercise to the fullest their powers under the *Patronato Real* to secure compliance with all of the provisions of the instant Royal Order.²⁴¹

In the face of the Royal Order, it seems pointless to question the applicability of the Tridentine form requirement under Spanish law as prevailing in the Floridas and in Louisiana. The effectiveness of that order in actual practice, however, was another matter. Sometime later, in *Hallett v. Collins*,²⁴² the Supreme Court

²³⁹ Royal Order of Dec. 16, 1792, in J. ZAMORA Y CORONADO, *supra* note 236, at 244 (trans. by author).

²⁴⁰ *Id.* at 245 (trans. by author).

²⁴¹ *Id.* at 245-46, arts. 2-6.

²⁴² 51 U.S. (10 How.) 174 (1851).

observed that it was "a matter of history, that many marriages were contracted in the presence of civil magistrates, and without the sanction of a priest, in the Spanish colonies which have since been ceded to the United States."²⁴³

How accurate was that observation? Considerable light is thrown on that question by some recent research into the genealogical history of Fort Miro (the present city of Monroe, Louisiana), which was the military post of the Ouachita District and a pioneer settlement under Spanish rule. Between 1790 and 1799, the commandant of that post, Juan Filhiol, officiated at the conclusion of some twenty marriage contracts, duly registered in the post archives.²⁴⁴ There will be occasion below²⁴⁵ to consider one of these contracts in greater detail. These "Filhiol marriages" recited, in language quite similar to that to be found four decades later in Texas marriage bonds, that there was no priest in the area, and that the parties agreed to have the marriage solemnized subsequently "before our Mother, the Holy Catholic Apostolic Church, as soon as possible, as long as one party shall request this of the other."²⁴⁶ This standard clause occurred in the marriage contracts of Protestants as well, but Protestants were a decided minority in Fort Miro under Spanish rule.

Filhiol did not officiate at any of these marriage contracts after the arrival of the parish priest, Father Juan Brady, in Fort Miro in 1800. However, his past activities soon came to the attention of the Bishop of Louisiana and the Floridas, Luis de Peñalver y Cardenas, in connection with inquiries by Father Brady, and with matrimonial proceedings instituted before Father Brady's arrival. The most important of the latter was the d'Anemours-White nullity action,

²⁴³ *Id.* at 180.

²⁴⁴ Eighteen of these contracts are listed in Gianelloni, *Genealogical Data from the Records of the Diocese of Louisiana and the Floridas Pt. 2*, 18 LA. GENEALOGICAL REG. 302, 306-07 (1971) (cal. date Mar. 2, 1802). This list is based on microfilms of these records, presently on file at the University of Notre Dame. For a general description of the Notre Dame collection, see T. McAVOY & L. BRADLEY, GUIDE TO THE MICROFILM EDITION OF THE RECORDS OF THE DIOCESE OF LOUISIANA AND THE FLORIDAS 1576-1803 (1967). The documents are cited here according to the calendar date in the Notre Dame collection. Xerox copies of these documents, and of others relating to the Ouachita District, were made available to the author by the historian of the Ouachita settlement, Professor Russ Williams of Northeast Louisiana University.

One marriage contract not contained in Gianelloni's list, the Morehouse-Hook contract of September 19, 1799, is discussed at notes 326-52 *infra*. The Ouachita Parish records indicate that another such contract, between Pedro Olivo and Julia Etier, was recorded by Filhiol on October 20, 1798. The Gianelloni Index, *supra*, at 305, shows that Filhiol officiated at another marriage contract, between Jose Farar and Isabel Olivo, on March 13, 1799.

²⁴⁵ See text accompanying notes 326-52 *infra*.

²⁴⁶ Morehouse-Hook contract, quoted in text accompanying note 326 *infra*.

which dealt with the allegation, *inter alia*, that the Chevalier d'Anemours had purported to go through a "Filhiol marriage" with Lucile White (or LeBlanc) while still married to another.²⁴⁷

In a communication in this matter from Bishop Peñalver to Father Brady, dated May 27, 1800, it was indicated that the d'Anemours-White marriage contracted before Filhiol was "clandestine and null." Father Brady was instructed to obtain all of the Ouachita marriage contracts from the archives, to revalidate in canonical form the marriages thus purportedly contracted, to inform Filhiol that he was to authorize no more such marriages, which (the Bishop wrote) were "detested by the Church and prohibited by the King for all of his dominions,"²⁴⁸ and to prepare a report on the matter for submission to the Spanish political authorities. The d'Anemours-White nullity case was concluded by the Bishop's judgment of October 26, 1801, which, among other things, declared the Fort Miro marriage contract to be "clandestino y nulo, no habiendo intervenido Párroco" ("clandestine and void, no priest having attended").²⁴⁹ In response to other inquiries by Father Brady, Bishop Peñalver also made similar rulings on some other Fort Miro marriage contracts, which were handled less formally.²⁵⁰

In the meantime, proceedings were pending against Juan Filhiol, the Commandant of the Ouachita District.²⁵¹ Father Brady transmitted a file containing eighteen marriage contracts to Bishop Peñalver in February 1801, and the latter referred these to the Promotor Fiscal (public prosecutor in matters ecclesiastical) in New Orleans. From the file forwarded by Father Brady, it appears that he had, in accordance with the Bishop's instructions of May 1800, revalidated the marriages contracted before Filhiol, using the canonical form for Roman Catholics and the special Protestant form²⁵² of the Royal Order of 1792 for Protestants. Filhiol filed a number of defenses in these proceedings, among them the contention that his official acts were simple witnessings of mere civil

²⁴⁷ The d'Anemours-White nullity action is calendared under Aug. 29, 1801. See Gianelloni, *supra* note 244, at 302. The text accompanying notes 247-49 is based on a photocopy of the file of this action.

²⁴⁸ d'Anemours-White nullity action note 247 *supra*, entry for May 27, 1800 (trans. by author).

²⁴⁹ *Id.*, entry for Oct. 26, 1801 (trans. by author).

²⁵⁰ The Olivo-Etier and the Farar-Olivo cases, *supra* note 244, are examples of similar rulings. These rulings of Bishop Peñalver are dated July 15, 1800, and May 23, 1800, respectively.

²⁵¹ Filhiol proceedings, calendared under Aug. 29, 1801. See note 244 *supra*.

²⁵² See notes 238-41 and accompanying text *supra*.

contracts embodying the promise to marry in the future. A report of the Promotor Fiscal, dated February 22, 1801,²⁵³ accepted this defense on the basis of an examination of the Spanish translation of the Fort Miro marriage contracts (which were in French), and recommended that Filhiol be acquitted of the charge of having violated the provisions of the Council of Trent and the Royal Order of 1792. This recommendation was accepted, and the proceedings were thereupon terminated.

These episodes in the Ouachita District are powerful evidence of the efficacy of the decree *Tametsi* and of the Royal Order of 1792 in Louisiana and in the Floridas under Spanish rule. On the other hand, the history of Fort Miro between 1790 and 1800 also shows that where parochial facilities were lacking, civil marriage contracts were not unusual.

Remarkably enough, irregular marriage practices seem to have prevailed at some time even in New Orleans, where the matter had been additionally covered by regulations to the clergy, issued in 1795.²⁵⁴ Again, an extrapolation from subsequent Roman Catholic ecclesiastical history seems necessary. By decree dated September 9, 1824, Pope Leo XII extended the Benedictine Declaration to the diocese of New Orleans, which then included Louisiana, the Floridas, and "other parts previously subject to French or Spanish rule."²⁵⁵ This action was taken in response to a letter from the Bishop of New Orleans which reported that although the older local clerics were of the view that the Council of Trent had never been solemnly proclaimed, the instructions of the previous bishop were based on the view that the Tridentine legislation was locally applicable. The Bishop also pointed out that, given the uncertainty of the situation, many persons had purported to contract marriages in non-Tridentine form.

The Pope, as already mentioned, extended the Benedictine

²⁵³ Filhiol proceedings, note 251 *supra*, entry for Feb. 22, 1801.

²⁵⁴ Curley, *supra* note 167, at 260-61. These Instructions are reprinted in *Instrucción para el gobierno de los párrocos de la Diócesis de la Luisiana*, Dec. 21, 1795, Bishop Louis Peñalver y Cardenas, 1 U.S. CATH. HIST. MAG. 418 (1887). Instructions XXIX-XXXVII deal with marriage. *Id.* at 428-32. Instruction XXXVI expressly refers to, and implements, the Royal Order of Dec. 16, 1792. *Id.* at 430. Instruction XV refers to ecclesiastical tribunals. *Id.* at 422.

²⁵⁵ Decretum, *De Matrimoniis Clandestinis*, Sept. 9, 1824 (trans. by author). The text of this decree, and of the instruction cited in note 256 *infra*, was supplied by the Archives of the Roman Catholic Archdiocese of New Orleans. The First Synod of St. Louis, held in 1839, concluded on the strength of the passage quoted in the text that the Declaration thereby became applicable to the diocese of St. Louis, which was at the time (as Upper Louisiana) part of the diocese of New Orleans. Cap. XIV (2), page 12, of the typescript was graciously supplied by the Archives of the Archdiocese of St. Louis.

Declaration *pro futuro*, but he also resorted to the unusual device of *sanatio in radice*, i.e., retroactive validation of prior marriages that were invalid as to form.²⁵⁶ Both of these actions are of course premised on the applicability of *Tametsi* in Louisiana and the Floridas under Spanish rule. This episode powerfully demonstrates the contemporary uncertainty even of the higher clergy in the face of this quite elementary question of Roman Catholic matrimonial law.²⁵⁷

C. Mexican Postscripts

Two subsequent events in Mexico deserve mention here. One is a curious diplomatic incident with the United States; although ephemeral and hardly noticed,²⁵⁸ it sheds additional light not only on past events, but also on their potential implications as then perceived. The second development is the complete reorientation of church-state relations in the family law area in consequence of the Juarez reforms.²⁵⁹

The diplomatic incident is best described in the succinct language of Daniel Webster, the then Secretary of State of the United States. In a communication dated January 29, 1851, to Robert P. Letcher, Minister to Mexico, he reported the plight of Dr. Grayson M. Prevost (apparently a citizen of the United States), who faced "forcible separation . . . from his wife, a Mexican lady to whom he was married at Brownsville, in Texas, and with whom he is now residing at Zacatecas, in Mexico."²⁶⁰ It was presumed, Mr. Webster

²⁵⁶ Instruction, dated Apr. 24, 1878, by the Archbishop of New Orleans, relating a communication from Rome in response to an inquiry from New Orleans dated Apr. 4, 1822. The latter inquiry prompted the decree cited at note 255 *supra*.

²⁵⁷ Professor Charles E. O'Neill, S.J., of Loyola University in New Orleans, would add the following observation: "The New Orleans inquiry is less powerful when we realize that the region had passed from France to Spain to France to the U.S.A. in a 37-year period. No priest in the area in 1822 had been there under the French in pre-1766. Moreover, there were just 5(?) priests in the diocese in 1822 who had been there under the first-and-last Spanish Ordinary in Louisiana." Letter from Charles E. O'Neill to the author, May 2, 1975.

²⁵⁸ The only two references that could be located are A. NUSSBAUM, *PRINCIPLES OF PRIVATE INTERNATIONAL LAW* 25 n.26 (1943), and Stevenson, *The Relationship of Private International Law to Public International Law*, 52 COLUM. L. REV. 561, 582 (1952).

²⁵⁹ See text accompanying notes 284-90 *infra*.

²⁶⁰ Letter from Secretary of State Daniel Webster to Robert P. Letcher, Minister to Mexico, Jan. 29, 1851, in 14 *THE WRITINGS AND SPEECHES OF DANIEL WEBSTER* 424 (National ed. 1903). The letter is also reproduced in 2 J. MOORE, *INT'L L. DIG.* 484-85. The citation to Sanchez, not reproduced there, is reproduced in D. WEBSTER, *supra*, at 424, 425 n.*. It was taken from the then current edition of J. STORY, *CONFLICT OF LAWS* 113 (3d ed. 1846). From the note, one gathers that the learned Secretary of State derived his information on Pope Clement's regard for Sanchez from an article called *Sanchez* by Bayle, presumably in an encyclopedia. At least he did not refer to the view held by Sanchez as the Sanchez position.

continued, that

the Mexican ecclesiastical authorities found their proceedings upon the fact that the clergyman to whom the parties applied at Matamoras refused to perform the ceremony, and that, as they repaired to Brownsville and were married there in consequence of that refusal, the marriage was illegal according to the Mexican laws, and therefore that the church authorities have a right and are under the obligation to annul it and separate the parties.²⁶¹

While conceding the possibility that the Mexican clergymen concerned had "proceeded in conformity to the laws of the Republic and the rules of the Catholic Church as established in Mexico" so that any official interposition with the Mexican government might be "premature, if not improper," the Secretary of State stated that the matter was nevertheless of some urgency, as "the execution by the priests at Zacatecas of their threats would so certainly excite bad feeling in the United States."²⁶² The Minister to Mexico was instructed to hold direct communication on the subject with the "head of the Church" in Mexico City:

You will . . . request him to instruct the subordinate clergymen in Zacatecas to suspend and if possible discontinue their proceedings, and express a hope that the rules of the church may be so altered as to prevent a recurrence of such cases. From the proximity of the two countries the intercourse between them, and the likelihood of frequent intermarriages between their respective citizens, it is desirable that the rule upon this subject should be uniform in the United States and in Mexico. In this country, in England, and in most nations on the continent of Europe, a marriage is valid if it has been contracted according to the laws of the place where the ceremony was performed. This may be said to be the almost universal rule.²⁶³

This rule, Mr. Webster went on to state, had been established in an English case where "the opinion of the celebrated Spanish jurist Sanchez, in favor of the rule, seems to have been much relied upon."²⁶⁴ The United States Minister was further instructed to tell the Archbishop that Sanchez had been favorably mentioned by Pope Clement VIII, and "ought certainly to be respected by the Mexican church."²⁶⁵

The Secretary of State then referred to the situation prevailing in the United States, stating it to be an "unquestionable fact . . .

²⁶¹ D. WEBSTER, *supra* note 260, at 424.

²⁶² *Id.*

²⁶³ *Id.* at 425.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

that many marriages take place between Catholics and Protestants in which the ceremony is performed by clergymen of both denominations."²⁶⁶ All Christian sects were equal before the law in the United States; offices of honor or trust were open to Roman Catholics on an equal basis although a "large majority" of the population was Protestant. If the Mexican clergy or government and the people of that country should not be prepared to adopt the system of religious toleration then prevailing in the United States, Mr. Webster continued, it was nevertheless hoped that they would "relax the rule which forbids a priest from marrying a Protestant to a Catholic and makes it obligatory upon the clerical and other authorities to disavow and annul such marriage when it has taken place in the United States."²⁶⁷ For if that rule were to be rigidly enforced in Mexico, the Secretary of State concluded, it would "tend to produce an excitement in this country hazardous to its peace and perhaps prejudicial to the interests of Catholics in the United States."²⁶⁸

When Buckingham Smith, the *chargé d'affaires ad interim*, acknowledged receipt of Mr. Webster's communication on March 19, 1851, he was able to include substantial amounts of further information of the Prevost case, for Dr. Prevost had already contacted the Legation in Mexico City in December, 1850, and Mr. Letcher had brought the matter to the attention of the Mexican Minister of Foreign Affairs.²⁶⁹

In a communication to the Foreign Minister, dated December 26, 1851, Mr. Letcher had stated the facts of the Prevost case so far as these were known to him, adding that while "not advised what control or power the Government can exercise in the matter," he was "most entirely satisfied that Mr. Lacunza, prompted by a high sense of justice, of benevolence, of gallantry, will do all that can be done, to prevent the forcible separation of man and wife by the fiat of the Bishop, ventures to submit the case to the consideration of his Excellency."²⁷⁰ Mr. Letcher also had a personal interview with the Foreign Minister at that date. As he reported to Dr. Prevost, Mr. Lacunza "manifested a good deal of interest upon the subject

²⁶⁶ *Id.* at 426.

²⁶⁷ *Id.*

²⁶⁸ *Id.*

²⁶⁹ The account in the text accompanying notes 270-83 is based on the following 1851 dispatches of the United States Legation in Mexico, and their respective enclosures: No. 48, Mar. 19; No. 51, Apr. 10; No. 55, Apr. 24; and No. 62, June 5. These dispatches are recorded on Microcopy, No. M-97, roll 15, United States National Archives.

²⁷⁰ Communication from Minister Letcher to Mexican Minister of Foreign Affairs, Dec. 26, 1850, included in Dispatch No. 48, *supra* note 269.

and said he would do everything he could to prevent any violent means on the part of the Bishop to separate man and wife." He would, so Mr. Letcher felt, write the Bishop "immediately, in very strong and decided terms."²⁷¹

As regards the merits of the controversy, however, Mr. Letcher did not entirely share Dr. Prevost's views, which were identical with those of Mr. Webster.²⁷² The Prevost marriage, he wrote the husband, was "undoubtedly a valid one according to the laws of the U. States . . . [but t]he civil law, in relation to marriages prevails in this country, and it is quite different from ours."²⁷³

If "civil law" as here used is read to designate Tridentine canon law as then prevailing in Mexico, Mr. Letcher's legal views were more accurate on this occasion than were those of his Secretary of State. Daniel Webster hardly shone as a curial advocate in the Prevost case. Runaway marriages in non-Tridentine territory had been held to be invalid by the Congregation of Cardinals, charged with the interpretation of the Council of Trent, in a decision in 1627 which was approved by Pope Urban VIII.²⁷⁴ The instructions for the Floridas and Louisiana took the same position on this issue, as did the Havana Synod.²⁷⁵ Even more to the point, in 1835, the Holy See had held runaway non-Tridentine marriages of Quebec domiciliaries in the United States to be void, a decision readily accessible through a standard text.²⁷⁶

Almost as importantly, as a matter of canon law, the decree

²⁷¹ Letter from Minister Letcher to Dr. Prevost, Dec. 26, 1850, included in Dispatch No. 48, *supra* note 269.

²⁷² Letter from Dr. Prevost to U.S. Legation, Dec. 13, 1850, included in Dispatch No. 48, *supra* note 269. Daniel Webster's views are set out in the text accompanying notes 260-68 *supra*.

²⁷³ Letter from Minister Letcher to Dr. Prevost, Dec. 26, 1850, included in Dispatch No. 48, *supra* note 269. The Minister also said, with refreshing candor, that it seemed to him "for the sake of peace, and to avoid all possible difficulties, and most especially for the comfort of my wife, had I been in your condition I rather think I should have married according to the Mexican ceremonies, every night for a month, if it were required." *Id.*

²⁷⁴ The Congregation of Cardinals had to decide three questions: (1) Could parties domiciled in Tridentine areas marry in non-Tridentine form in a non-Tridentine area while maintaining their domiciles? (2) What if they did this solely to avoid *Tametsi*, and did not change their place of abode? (3) What if both changed their place of abode for the sole purpose of marrying in non-Tridentine form? The Cardinals replied, as to (1) and (2), that marriages thus celebrated were void, but as to (3), that if domicile really had been transferred, the marriage would be valid. This decision was approved by Pope Urban VIII by a *brieve expone nobis* on August 14, 1627. The text may be found in A. LEINZ, *supra* note 121, at 112-13. See also 2 VELARDE 35-36, who reports that this decision rejected the view of Sanchez to the contrary.

²⁷⁵ See text accompanying notes 238-41 *supra*.

²⁷⁶ Instruction of Nov. 17, 1835, reported in 3 F. KENRICK, *THEOLOGIAE MORALIS CONCINNATAE* 354 (1843).

Tametsi was in effect in Brownsville at the time of the Prevost marriage.²⁷⁷ The only conceivable question for a Roman Catholic ecclesiastical tribunal would have been whether the Benedictine Declaration had been extended to the location of the ceremony at the critical date. As already noted, that question was still doubtful even for Galveston and San Antonio as late as 1884.²⁷⁸ Brownsville was in the contested Nueces-Rio Grande strip over which Mexico had exercised sovereignty more often than not between 1836 and 1845;²⁷⁹ this area did not pass under United States sovereignty until 1848. The date of the transfer of ecclesiastical jurisdiction over this territory from Linares to Galveston must have been difficult to ascertain at the time; even today, this was possible only by consulting unpublished archival materials.²⁸⁰

Seemingly with these considerations in mind, the Mexican Foreign Ministry informed the United States chargé on February 21, 1851,²⁸¹ that on the basis of information then before it, the Prevost case was by its nature subject exclusively to ecclesiastical jurisdiction, and that Dr. Prevost would have to resort to all the remedies available under ecclesiastical law. The Mexican government stated that it would take the matter into further consideration only if there were to be a denial of justice on the part of the ecclesiastical authorities.

As a practical matter, things looked a good deal better for Dr. Prevost. He was able to inform Buckingham Smith on April 13, 1851,²⁸² that the President of Mexico had instructed the state government not to lend assistance by the civil power to the Bishop of Guadalajara if the latter should attempt to force the separation of the couple, and this was the end of the case. Nevertheless, the United States chargé wrote Mr. Webster on April 24, 1851, that he would "not . . . lose sight of the suit, and hope[d], sooner or later, to have a favourable decision on marriages with Mexicans con-

²⁷⁷ See text accompanying notes 184-91 *supra*.

²⁷⁸ See note 174 and accompanying text *supra*.

²⁷⁹ *State v. Sais*, 47 Tex. 307, 309-10 (1877); *Trevino v. Fernandez*, 13 Tex. 630, 662-63 (1855); W. BINKLEY, *supra* note 145, at 43-56, 96-106.

²⁸⁰ Bishop Odin requested the transfer in 1848, but the affirmative action of the Holy See was not communicated until some time in 1849. Letter from Bishop Odin to Bishop Blanc, Jan. 18, 1849; Letter from Bishop Odin to Cardinal Barnabo, Sept. 18, 1851. Odin Transcripts, *supra* note 29. The Prevost marriage was celebrated in Brownsville early in 1850, safely after the transfer by a few months. Letter from Dr. Prevost to U.S. Legation, Dec. 13, 1851, included in Dispatch No. 48, *supra* note 269.

²⁸¹ Letter from M. Gomez to Buckingham Smith, Feb. 21, 1851, included in Dispatch No. 48, *supra* note 269.

²⁸² Letter from Dr. Prevost to Buckingham Smith, Apr. 13, 1851, *id*.

tracted abroad, or to produce an act of Congress legalizing them."²⁸³

It seems unlikely that this project was pursued with great energy, and in any event, exertions in that direction by foreign diplomats were soon to become unnecessary. The antipathy exhibited by Daniel Webster towards the assertion of ecclesiastical authority over what were, to him, secular matters, was soon to find a powerful echo in Mexico as well.

A bare outline of the pertinent Juarez Reforms must suffice here.²⁸⁴ The Mexican Constitution of 1857 abolished special courts, including ecclesiastical jurisdiction;²⁸⁵ the Civil Marriage Act of 1859 defined marriage as a civil contract subject to civil authority.²⁸⁶ In 1873, by constitutional amendment, these rules were written into the Federal Constitution itself,²⁸⁷ and the clause then adopted was enacted as article 130 of the Constitution of 1917, which is in effect today. That provision reads as follows:

Marriage is a civil contract. Marriage and any other acts of a person's civil status are in the exclusive competence of the officials and authorities of the civil government in the terms provided by the laws, and they shall have the force and validity that the same attribute to them.²⁸⁸

The fundamental character of the change brought about by the enactments of the reform is best illustrated by the decision of the Supreme Court of Mexico in *Reyes Vda. de Hinojosa Virginia*,²⁸⁹ which involved the constitutionality of a provision of the Tamaulipas Civil Code that recognized informal monogamous unions as civilly effective. In Mexico, as in the United States, family law is within the legislative competence of the states, but there as here, state legislation has to observe specific federal constitutional constraints. The Supreme Court of Mexico held this attempt to validate what may be loosely called "common law marriages" to be in violation of article 130 of the Mexican Constitution. The court said:

²⁸³ Letter from Buckingham Smith to Daniel Webster, Apr. 24, 1851, included in Dispatch No. 55, *supra* note 269.

²⁸⁴ See generally Borah & Cook, *Marriage and Legitimacy in Mexican Culture: Mexico and California*, 54 CALIF. L. REV. 946, 966-71 (1966).

²⁸⁵ CONST. tit. 1, § 1, art. 13 (Mexico, 1857), in F. TENA RAMÍREZ, *LEYES FUNDAMENTALES DE MÉXICO 1808-1967*, at 606, 608 (3d ed. 1967).

²⁸⁶ Act of July 23, 1859, art. 1, *id.* at 642.

²⁸⁷ Amendments of Sept. 25, 1873, art. 2, *id.* at 697-98.

²⁸⁸ CONST. tit. 1, art. 130 (Mexico, 1917), *id.* at 817, 875 (trans. by author). See also Baade, *Marriage and Divorce in American Conflicts Law: Governmental-Interests Analysis and the Restatement (Second)*, 72 COLUM. L. REV. 329, 371-72 (1972).

²⁸⁹ 121 *Semanario* 38 (5th series 1954).

The purpose of the Reform legislation was to remove questions of the validity and the legal incidents of marriage from being regulated by laws of the Church, and to submit them to the laws enacted by civil authority. Article 130 of the Constitution has to be interpreted in accordance with that intention. The effectiveness of that provision requires the express celebration of marriages before public officials, for if the demonstration of the existence of a meeting of the minds to create the bonds of matrimony were sufficient for that purpose, the celebration of a religious marriage would satisfy that requirement, and the purposes of the Constitution would be frustrated.²⁹⁰

IV

JUDICIAL REACTIONS IN THE UNITED STATES

The findings of this study as to Spanish, Mexican, and canon law may be summarized readily. The disciplinary legislation of the Council of Trent, including the decree *Tametsi*, was accepted and received in the Spanish kingdoms by a cedula dated July 12, 1564. This process of reception was effected by the Second Diocesan Council of Mexico, and further implemented by the Third Mexican Council, which latter was confirmed by a cedula published in the *Recopilación* of the Indies.²⁹¹

The effectiveness of *Tametsi* at all times here material within all areas of North America subject to Spanish or to Mexican rule has never been doubted by Spanish or Mexican authority. Its effectiveness in Louisiana and the Floridas was expressly confirmed by Royal Order on December 16, 1792.²⁹² Pursuant to that decree, marriages between baptized persons are formally valid only if celebrated with the assistance of two or three witnesses.²⁹³ The Benedictine Declaration,²⁹⁴ which dispenses with this requirement in favor of mixed and Protestant marriages, was never in effect in Spanish North America or in Mexico at any time here material. *Tametsi* was not merely a matter of faith addressed to the conscience; it was ecclesiastical legislation enacted with secular approval and enforced by secular authority as well.²⁹⁵

It follows that all marriages contracted between baptized persons in non-Tridentine form in Spanish or Mexican territory at any

²⁹⁰ *Id.* at 50 (trans. by author).

²⁹¹ See text accompanying notes 178-89 *supra*.

²⁹² See text accompanying notes 238-41 *supra*.

²⁹³ See text accompanying note 240 *supra*.

²⁹⁴ See text accompanying note 102 *supra*.

²⁹⁵ See text accompanying notes 178-214 *supra*.

time here material were absolutely invalid under the then prevailing *lex loci celebrationis*. This conclusion is supported so overwhelmingly by Spanish and Mexican authority that one is tempted to attribute assertions to the contrary to ignorance, spite, or perhaps a combination of both. Both of these epithets, however, have more polite variants. The former may be paraphrased as obscurity of the law; the latter could readily stand for a strong public policy stemming from a deep-seated judicial hostility to the features of Spanish and Mexican law here at issue. As will be seen, the reaction of some judges in the United States to *Tametsi* in the last century is readily explained in these terms. Fairness, however, requires the prefatory observation that even the record compiled thus far makes obscurity and public policy rather attractive alternative explanations to the harsh terms just suggested.

First, concerning ignorance or obscurity of the law, the cedula of 1564 seemingly was not reprinted until the *Novísima Recopilación*, published in 1805.²⁹⁶ The *Novísima* was therefore not in effect as such in the Louisiana territory. It could perhaps even be argued that such of the provisions of the *Novísima* as had not been expedited by the Council of the Indies did not apply in North America.²⁹⁷ This was a dubious assumption, and a factually incorrect one, but the connection between synodal councils and the *Recopilación* of the Indies was not necessarily apparent even to United States lawyers who had access to both of these texts. The Royal Order of 1792, which is of critical evidentiary value for Louisiana and the Floridas, appeared in print in 1845 at the latest,²⁹⁸ but this is more than two decades after Spanish sovereignty had terminated in any part of the North American continent that passed to the United States. Furthermore, that order settled a matter that had caused controversy at the highest level.²⁹⁹ Finally, even the Roman Catholic bishop in New Orleans was unclear as to the legal situation in 1822, and could not entirely

²⁹⁶ NOVÍSIMA I, I, 13.

²⁹⁷ This argument is made by F. HALL, *THE LAWS OF MEXICO* iii (1885), but is not supported by the case there cited. Manuel Z. de la Garza, 5 *Seminario* 1 (2d Series 1882). In 1 SALA MEXICANO 10-11 (M. Galvan Rivera ed. 1845), Galvan Rivera states that on this question the authorities are divided and, in the main, he limits himself to summarizing the opposing views. There can be little doubt now that the *Novísima* was applicable throughout Hispanic America. See most recently Roca, *La Vigencia de la Novísima Recopilación en Indias*, [1964-I] J.A., Sección Doctrina 17.

²⁹⁸ J. ZAMORA, *supra* note 236. Earlier printed references to this Royal Order could not be traced.

²⁹⁹ See text accompanying notes 232-41 *supra*.

clarify it from his archives or by questioning older members of the clergy.³⁰⁰

In the face of this obscurity of the law, including uncertainty as to the most basic legal data even among those most immediately concerned, spite may now seem to have been almost a virtue. For United States judges, the issue was the validity of marriages contracted in good faith (or, in any event, without wicked predisposition) by their own people in uncertain border and pioneer conditions. The foreign legal system that was *prima facie* applicable seemed to derive satisfaction from resolving doubts against the validity of marriages—quite contrary, seemingly, to the strongest presumption known to the law. This unusual inclination could readily be attributed to a religious fervor that was bound to touch raw nerves—even those of Daniel Webster.³⁰¹ Finally, as the examples of Texas and those of the Ouachita district show, the East Florida situation, with a priest in ready attendance, was not necessarily the typical one; indeed, it is ludicrous to suppose it was so for the entire Louisiana territory or even for the upper parts of Louisiana and the Floridas. Given these circumstances, there must have been a strong gravitational pull in the direction of a validating rule based on considerations of public policy. It might even have been that spitefulness was at the time more readily attributed to those who sought to invalidate marital unions contracted in formerly Spanish territory by relying on the obscure law of a former foreign sovereign than to those who pretended (or perhaps even prided themselves with) ignorance when called upon to consider Spanish law judicially.

Attitudes such as the ones just alluded to are readily manifest in *Phillips v. Gregg*,³⁰² which is apparently the first published decision in point by a court in the United States. This was a suit to establish title to land in Pennsylvania, and part of plaintiff's cause depended on the legitimacy of a predecessor in title whose parents had been, it was alleged, "married by Justice King, who was duly authorized to do so by the Spanish government, and who was in the habit at that time of marrying a great number of persons."³⁰³ These events had taken place sometime before 1791 in what was then called the Natchez country. That area was at the time under

³⁰⁰ See notes 255-56 and accompanying text *supra*.

³⁰¹ See text accompanying note 268 *supra*.

³⁰² 10 Watts (Pa.) 158 (1840).

³⁰³ *Id.* at 160.

Spanish rule, although in the view of the trial court, this was due to a "mistake of the true boundary line."³⁰⁴ The couple had cohabited as husband and wife for some three years, during which period plaintiff's predecessor in title was born. Later, the mother of the latter had left the father and had entered into a marriage with another man, apparently feeling free to do so on the basis of advice received from a Roman Catholic priest.³⁰⁵ In related proceedings, a brother of the first husband had disclosed that "he communicated to his brother his joy at hearing that his wife had got a divorce from a Catholic priest, and got married again"³⁰⁶

The defendant requested instructions to the effect that the plaintiff had the burden of proving, through expert testimony or by producing pertinent statutory sources, that the marriage at issue was performed in conformity with Spanish law. The trial court refused to give such instructions, stating that given the "absolute" political powers, both legislative and executive, of the Spanish governors, it would be "useless to ransack the musty records of San Ildefonso for the appointment and powers of the governor, or seek for records of his temporary edicts, or to expect a modern Louisiana lawyer to testify to the fleeting customs and changing laws of a government defunct half a century ago."³⁰⁷ The application of the traditional common law rule on proof of foreign law in cases such as this, the trial court went on to observe, "would be hard and unjust, and would be establishing a rule which would bastardize one-half the descendants of the early settlers on the Mississippi."³⁰⁸ The trial judge accordingly instructed the jury to find the Natchez marriage valid if the local marriage customs had been as alleged, and if the parties had had the requisite intent to enter into a valid marriage relationship. In this connection, the

³⁰⁴ *Id.* at 160-61. This was also the view of Chief Justice Marshall in *Henderson v. Poindexter*, 25 U.S. (12 Wheat.) 530, 534-36 (1827). About a century later, a detailed historical analysis arrived at the opposite conclusion. S. BEMIS, *PINCKNEY'S TREATY: AMERICA'S ADVANTAGE FROM EUROPE'S DISTRESS 1783-1800*, at 4-6 (rev. ed. 1960). To the same effect, see Carter, *Some Aspects of British Administration in West Florida*, 1 *MISS. VALLEY HIST. REV.* 364, 365-66 (1914). The crucial point, conclusively established by the latter study, is that the Privy Council did order a change in the boundaries in West Florida in 1764. The Pennsylvania courts cannot, of course, be faulted with sharing the then current views of the United States Supreme Court as expressed by its eminent Chief Justice, who denied the existence of any such royal sanction for the change of West Florida boundaries. See *Harcourt v. Gaillard*, 25 U.S. (12 Wheat.) 523, 526 (1827). It is a different matter, however, to assume that because of Spain's apparently defective title to the Natchez district, Spanish law was not (or not fully) in effect there. See notes 315, 319 *infra*.

³⁰⁵ 10 Watts (Pa.) at 162.

³⁰⁶ *Id.* at 166.

³⁰⁷ *Id.* at 161.

³⁰⁸ *Id.*

President of the District Court of Allegheny County, Judge Grier, is reported as having said to the jury:

[I]f they believe the witnesses, that it was customary for protestants to be married by a justice of the peace, that such a regulation had been made by the governor (who was the government), at the request of the protestant immigrants, and that such marriages were held valid by the political power of the state, it matters little what opinion the catholic priests might have of the matter. It is not probable that ecclesiastics who hold marriage to be a sacrament, or religious ordinance, and therefore, wholly within their control, would be disposed to uphold customs and laws so contrary to their prejudices and interests, although such marriages among protestants are sanctioned by the comity and laws of almost every catholic government in Europe, and reprobated by few, save the ignorant and fanatical rabble of Mexico.³⁰⁹

The author of the passage just quoted will be encountered once more further below,³¹⁰ this time as the author of the opinion of the Supreme Court of the United States in *Hallett v. Collins*,³¹¹ which concerned a similar question. Comments of a more general nature are best deferred until then. In connection with the factual setting of the *Phillips* case, however, a few additional observations seem in order. First, the original permit for the settlement of the Natchez area was procured by one Bryan Bruin from the Spanish governor in 1788 on the representation that the settlers whom he intended to bring with him, being Roman Catholics, could not practice their religion freely in the United States.³¹² Second, the obvious reliance of the mother on a Roman Catholic priest, which is repeatedly mentioned in the opinion, even further undercuts the gratuitous assumption that the parties to the pre-1791 ceremony were Protestants.³¹³ Third, the territorial courts had held, and the

³⁰⁹ *Id.*

³¹⁰ See notes 353-79 and accompanying text *infra*.

³¹¹ 51 U.S. (10 How.) 174 (1851).

³¹² Letter from Bryan Bruin to Gov. Miro, Mar. 31, 1787, summarized in Coker, *The Bruins and the Formulation of Spanish Immigration Policy in the Old Southwest, 1787-88*, in *THE SPANISH IN THE MISSISSIPPI VALLEY, 1762-1804*, at 61, 64 (J. McDermott ed. 1974). Professor Coker earnestly discusses the possible merits of that assertion. He concludes that it was without foundation, but adds: "That such a reason would appeal to His Catholic Majesty had obviously occurred to Bruin." *Id.* at 66-67. Both Bruin's representation as to his and his proposed settlers' religion, and the materiality of this representation in the eyes of the Spanish governor, are documented in 17 AMERICAN STATE PAPERS, 2 PUBLIC LANDS 749, No. 5 (1834). This source was available at least to the Supreme Court of Pennsylvania. See note 319 *infra*.

³¹³ See text accompanying note 305 *supra*. Judge Grier also observed that the priest "may have acted as her conscience keeper." 10 Watts (Pa.) at 162. She also had a daughter named Mary. The religious affiliation of her alleged first spouse, John Ormsby, could not be determined. He arrived in Natchez on July 5, 1788, on the same day as Peter Bruin of

Supreme Court of Mississippi continued to hold, in opinions then readily available in print, that despite the rectification of the border by treaty in 1795,³¹⁴ Spanish law applied in the Natchez area until it was evacuated by the Spanish authorities in 1798.³¹⁵

The jury found for the plaintiffs; a judgment in their favor was affirmed by the Supreme Court of Pennsylvania. That court accepted, as a general premise, the rule that a marriage invalid where celebrated was invalid everywhere, but stated this rule to be subject to certain qualifications, including an exception as to "marriages celebrated in foreign countries by citizens entitling themselves, under certain circumstances, to the benefit of the laws of their own country."³¹⁶ That exception, it said, applied where compliance with the *lex loci* was not possible "on account of legal or religious difficulties."³¹⁷ In such cases, the court seems to have suggested, marriages celebrated in the form recognized as valid and binding in the spouses' own country would be recognized there, adding that the common law, "under which we live, considers marriage as in no other light than a civil contract."³¹⁸ It then pointed out that a marriage such as that celebrated between the parties in the instant case would clearly be good under the *lex fori*. Applying the test thus developed to the case at hand, the court said, somewhat more cautiously:

Now supposing that the colonial laws of Spain viewed marriage as a sacrament to be celebrated only according to the forms prescribed by the Catholic church (of which, by the by, we have not a shadow of evidence,) still it may admit of a very serious doubt, whether, under the very peculiar circumstances of this case, the marriage would be held bad by the courts of this country, so as to bastardize the issue. The marriage took place

Virginia (Bryan Bruin's son), 3 SPAIN IN THE MISSISSIPPI VALLEY, 1765-1794, at 257-58 (L. Kinnaird ed. 1946), but Ormsby was from Cumberland (or Tennessee). It appears, however, that the immigration of non-Catholics was not permitted until December 1788—almost half a year after Ormsby's arrival. Coker, *supra* note 312, at 67 n.19.

³¹⁴ Treaty of San Lorenzo, Oct. 27, 1795, 8 Stat. 138, T.S. No. 325.

³¹⁵ Stark's Heirs v. Mather, 1 Miss. 181 (1825); Winn v. Cole's Heirs, 1 Miss. 119 (1823); Griffing v. Hopkins & Elliott, 1 Miss. 49 (1819); Davis' Heirs v. Foley, 1 Miss. 43 (1818); Chew v. Calvert, 1 Miss. 54 (1819); W. HAMILTON, ANGLO-AMERICAN LAW ON THE FRONTIER: THOMAS RODNEY AND HIS TERRITORIAL CASES 132-36 (1953). The first volume of the Mississippi Reports was published in 1834. The reporter, R. J. Walker, disagreed with the decisions of the state supreme court as to the effect of Spanish law in the Natchez district. Reporter's notes, 1 Miss. at 52-54, 63-64, 193-94.

³¹⁶ 10 Watts (Pa.) at 168.

³¹⁷ *Id.*

³¹⁸ *Id.* In Hantz v. Sealy, 6 Binn. (Pa.) 405, 408 (1814), the Supreme Court of Pennsylvania had approved a lower court instruction to the effect that marriages could be contracted validly without regard to form.

between persons who were subjects of Spain de facto only, in a country the boundaries of which were unsettled, and in dispute between Spain and the United States, both parties claiming it, and which was subsequently found, on accurate survey, to be in truth within our limits.³¹⁹

But, the Supreme Court of Pennsylvania concluded, that question need not be resolved, as the only point to be decided was the manner of proof of Spanish law. On this issue, the court agreed with Judge Grier largely in terms of an expanded but bowdlerized version of the latter's charge to the jury. Nothing much is gained here by repetition, although one sentence stands out: It was, the Supreme Court said, "a matter of no inconsiderable weight, that the adoption of the strict rule [*i.e.*, as to proof of foreign law], in its application to the early settlers on the Mississippi, may jeopard [*sic*] the rights, and bastardize the issue of many of our citizens."³²⁰

³¹⁹ 10 Watts (Pa.) at 168. The court also said:

[I]n the documents collected by order of Congress, we are informed, that the superintendent of the province of Louisiana was authorized to permit intermarriages between new settlers, and Spaniards of both sexes, with a view to the more easy incorporation with the natives. In that instance the laws of marriage were relaxed, and it is very likely that the conscientious scruples of protestant settlers were respected by the colonial government. The witnesses distinctly prove that it was customary for protestants to be married by a justice of the peace, that such a regulation had been made by the governor or superintendent, to whom the power was intrusted at the request of protestant emigrants, and that such marriages so celebrated were held valid by the political power of the state.

Id. at 170. This corn-cob pipe dream version of early Natchez history might be suitably checked against the recollections of a long-time resident of that city:

When the town begun [*sic*] to be built on the hill, the Spaniards settled in this part, and other persons generally built east of the present [*sic*] Commerce Street. These being mostly Irish, this part of the town was called Irish town, whilst the other part was known as Spanish town. The Governor was Don Manuel Gayoso de Lemos, an intelligent and liberal man, educated in England, at Westminster, and speaking English as fluently as a native. The mild, paternal rule of the good Governor makes an old man revert with pleasure to the scenes of his youth, and even at times to regret the change of government.

The Catholic religion was the only one publicly tolerated in the country. The priests exercised much influence, and were very generally loved. They had great power, but used it very mildly. Irish priests were usually selected for Natchez, because there were so many English-speaking people. . . .

Attempts were made by several protestant ministers to preach, but were not encouraged. The only sermon I remember to have heard during the Spanish rule was preached by an Episcopalian named Cloud. Governor Gayoso was present and walked home with my father after the service. He expressed himself in their conversation as being individually in favor of religious toleration, "but," he added, "you know I have a master." The next day Cloud was notified that he must not preach again, but he, persisting in doing so, was shortly arrested and sent out of the country.

Wiley, *Natchez in the Older Times*, in J. CLAIBORNE, *MISSISSIPPI AS A PROVINCE, TERRITORY AND STATE* 527, 527-28 (1880) (reprint 1964). The author of that work adds: "It was gratifying to find that this intelligent and truthful witness cherished a grateful remembrance of the kind and paternal rule of the Spanish provincial authorities." *Id.* at 527 n.*

³²⁰ 10 Watts (Pa.) at 169.

Somewhat surprisingly, the court did not pause to ask how Mississippi had dealt with this question; for surely, the subsequent territorial sovereign had the greatest concern in these Natchez marriages.³²¹ That dereliction, however, is relatively minor when compared with the odd notion that citizens of the United States who swore allegiance to the King of Spain so that they could settle in the Spanish domains somehow managed to remain citizens of the United States, and even more remarkably, to take the common law with them. As already noted, the latter assumption, at least, had at the time been rejected in Mississippi.³²² With respect to the former, we may quote from an almost contemporaneous note of the United States to Mexico, stating that "it has ever been one of the most cherished articles of the political creed of the American people, that every citizen has the absolute and uncontrollable right to divest himself of his allegiance, and to seek, if he think proper, the advancement of his fortunes, in foreign lands."³²³

The next case to be considered is *Patton v. Philadelphia and New Orleans*,³²⁴ a well-known decision of the Supreme Court of Louisiana involving both the Girard estate and the Bastrop concession in Louisiana. The facts are unusually complicated, since the marriage at issue was unquestionably bigamous and hence ultimately void. Under applicable Spanish law, however, innocent parties to putative marriages were entitled to what would be their share of community property in a valid marriage. The threshold requirement for putative marriages covered by that rule was that the second "marriage" be "valid" as to form.³²⁵

The second marital union in question was contracted between the bigamous husband and his trusting second spouse by notarial act passed by the Spanish commandant of Fort Miro (now Monroe) in the Ouachita district of Louisiana, on September 19, 1799. The notarial act starts with the recital that Jean Filhiol, self-described as

³²¹ See text accompanying notes 314-15 *supra*. No Mississippi statute or decision directly in point could be located. *Hargroves v. Thompson*, 31 Miss. 211 (1856), held that the Mississippi marriage statute then in effect had not outlawed marriages contracted informally, and in *Dickerson v. Brown*, 49 Miss. 357 (1873), it was stated that "[t]he right of parties in this State to contract marriage, without formal or ceremonial solemnization is understood to be settled beyond question." *Id.* at 375. There is, however, no connection between these cases and Spanish rule in Mississippi, and in any event, they were decided long after *Phillips*.

³²² See text accompanying note 315 *supra*.

³²³ Letter from U.S. Minister to Mexico to Mexican Minister of Foreign Affairs, Mar. 17, 1846, 8 DIPLOMATIC CORRESPONDENCE OF THE UNITED STATES, INTER-AMERICAN AFFAIRS 1831-1860, at 824, 825 (W. Manning ed. 1937). The reference is to Texas immigrants from the United States who later fought in the Texas War of Independence.

³²⁴ 1 La. Ann. 98 (1846).

³²⁵ *Id.* at 104-05, citing PARTIDAS, IV, 13, 1.

Captain of the Armies of His Majesties and Civil and Military Commandant at Fort Miro, Settlement of Ouachita, in the Province of Louisiana, was here acting "in lieu of a Notary Public or Scribe, there being none in these parts." The key passage reads that the Chevalier d'Anemours gives his charge, Eleanor Hook, in marriage to Abraham Morehouse, the latter having promised, and promising

by these presents, to take her for his legitimate spouse, and to have the marriage solemnized, first according to the manner and usage provided by Ecclesiastical Authority in such cases, with the knowledge of the Government in this province, where it has been agreed that marriages shall be contracted in the presence of the Commandants of the Posts, or other officers of administration, and, later, be solemnized before our Mother, the Holy Catholic Apostolic Roman Church, as soon as possible, and as long as one party shall request this of the other.³²⁶

The marriage contract contained stipulations as to the inheritance rights of the issue of Morehouse as "children of the second marriage." These provisions, it was spelled out, were to apply "whether the children of the second marriage be born after the celebration will have been solemnized before our Holy Mother the Church, as was said hereinabove, or whether born before, or whether, due to circumstances beyond the control of the parties, the said solemnization may not have taken place."³²⁷ The court also had the unusual advantage of the testimony of the daughter of that Spanish commandant. As summarized in Judge Rost's elegant and learned opinion, she testified "that there was no priest at that time in the District of Ouachita; that she was present at the celebration of the marriage before her father; that the usual formalities were complied with; and that immediate cohabitation followed, as was then the custom in the colony."³²⁸

The custom thus recorded and described is almost certainly the origin of marriage by bond in Texas.³²⁹ The promoter of the Ouachita settlement was the "Baron" of Bastrop.³³⁰ Later, as the

³²⁶ An English translation of the marriage contract is reproduced in Mitchell & Calhoun, *The Marquis de Maison Rouge, the Baron de Bastrop, and Colonel Abraham Morhouse—Three Ouchita Valley Soldiers of Fortune*, 20 LA. HIST. Q. 289, 454-56 (1937).

³²⁷ *Id.* at 456.

³²⁸ 1 La. Ann. at 101.

³²⁹ See text accompanying notes 16-95 *supra*.

³³⁰ See Mitchell & Calhoun, *supra* note 326, at 369-405. See generally Barcisse, *Baron de Bastrop*, 58 S.W. HIST. Q. 319, 330 (1955). That latter study conclusively identifies the "Baron" as Philip Hendrik Nering Bögel, born in Paramaribo, Netherlands Guiana, on November 23, 1759. *Id.* at 320-22.

Second Alcalde of Bexar (San Antonio) and as a member of the legislative assembly of Coahuila and Texas, he advised the Austins (especially Stephen Austin) in connection with the administration of Austin's colony.³³¹ One of the witnesses signing the Morehouse-Hook marriage contract was Jose de la Baume, who was Bastrop's best friend, frequent host, and residuary legatee, and also a resident of Bexar in the Spanish-Mexican period.³³² Unlike the Texas marriage bonds of a later date,³³³ the Morehouse-Hook contract contained no penalty clause, but this, too, seems readily explained. The contemplated ceremony *in facie ecclesiae* did not in fact take place, and it is reported that "much criticism on the part of the Catholic population of the little community grew out of the fact that there had been only a civil ceremony."³³⁴ It thus seems likely that the Texas penalty clauses were inspired by the wisdom of hindsight in order to compel full compliance wherever possible.³³⁵

³³¹ Moore, *The Role of the Baron de Bastrop in the Anglo-American Settlement of the Spanish Southwest*, 31 LA. HIST. Q. 606, 639-72 (1948). See generally Hatcher, *The Louisiana Background of the Colonization of Texas 1763-1803*, 24 S.W. HIST. Q. 169 (1921).

³³² Moore, *supra* note 331, at 672-76. The will is reproduced in THE AUSTIN PAPERS 1919, at 1578. A well-known early Texas succession case, *Erskine v. De la Baume*, 3 Tex. 406 (1849), concerns de la Baume's real estate in San Antonio.

³³³ See text accompanying note 19 *supra*.

³³⁴ Mitchell & Calhoun, *supra* note 326, at 425. There was testimony to the effect that Col. Morehouse had "refused, subsequently, to solemnize his marriage before the priest." 1 La. Ann. at 104.

³³⁵ The wording of the Texas penalty clause may have been inspired by section three of the North Carolina Marriage Act of 1741, (also in effect in Tennessee), which required applicants for marriage licenses to file a marriage bond of £50 (later £500), payable to public authority if any impediment to the marriage subsequently came to light. See 1 SCOTT, LAWS OF TENNESSEE 46 (1821); Semonche, *Common-Law Marriage in North Carolina: A Study in Legal History*, 9 AM. J. LEGAL HIST. 320, 334-35 (1965). As Professor Semonche reports, some 2,500 North Carolina marriage bonds made between 1741 and 1778 have been preserved. *Id.* at 335 n.60. Substantially the same requirement existed in Virginia. An Act concerning Marriages, 22 Geo. II, ch. 32, § 2 (Va. 1748), in 6 HENING, STATUTES AT LARGE 81, 82 (1819). Prominent marriage bonds still on record include those of Thomas Jefferson's father and Thomas Jefferson himself. *Marriage Bonds in Goochland County*, 7 WM. & MARY COLLEGE Q. 98 (1899); D. MALONE, JEFFERSON THE VIRGINIAN 159 (1948). A typical Virginia marriage bond is reproduced in Hamphill & Dollers, *Marriages in Albermarle County*, 6 ALBERMARLE COUNTY HIST. SOC. PAPERS 41, 42 (1946). Prof. Joseph W. McKnight of Southern Methodist University has called this Virginia statute to our attention. The following bond, dated Jan. 7, 1794, is probably the most famous such instrument executed in Tennessee:

Know all men by these presents that we, Andrew Jackson, Robert Hays and John Overton, of the County Davidson and Territory of the United States of America South of the River Ohio, are held and firmly bound . . . in the sum of one thousand pounds to be paid . . . if there shall . . . hereafter appear any lawful cause why Andrew Jackson and Rachel Donelson, alias Rachel Roberts should not be joined together in holy matrimony.

M. JAMES, ANDREW JACKSON: THE BORDER CAPTAIN 77 (1933). It seems highly likely that many Texans were familiar with bonds of this type either because their own roots lay in

To return to the *Patton* case: The Supreme Court of Louisiana interpreted the actions of the spouses and of the Spanish commandant as described above as evidencing the intent to enter into marriage *per verba de praesenti* (by agreement to marry then and there) adding, however, that this point was not material here because of the alternative availability of the device of marriage *per verba de futuro cum copula* (agreement to marry in the future followed by cohabitation). The former interpretation was preferred partly because the commandant was "no civilian," and because it was seemingly common for "civil acts" authenticated by such officers to be passed in notarial form.³³⁶

The marriage here celebrated, the court observed, was clandestine in terms of Tridentine legislation. Nevertheless, the Council of Trent did not invalidate clandestine marriages previously concluded, and even after *Tametsi*, the assistance of a priest was not invariably a prerequisite of a sacramental marriage.³³⁷ The decisive question was if, and under what modifications, the disciplinary legislation of the Council of Trent had been enacted at the *locus celebrationis*.

The court knew of the existence of the cedula of 1564, although the text of that instrument was apparently not consulted.³³⁸ While Louisiana had not been settled at the time, Judge Rost was willing to assume, for the sake of argument, that the kings of Spain "intended that their adoption of general councils should extend to all countries which they might subsequently discover or acquire."³³⁹ Nevertheless, he said, the adoption of the Tridentine legislation at the solicitation of Rome did not entail a commitment to enforce all of its provisions at all times and places, subject only to papal dispensation. Judge Rost put the basic proposition as follows:

The avowed object of the Council of Trent was, to reassert and embody the orthodox doctrines of the apostolic church, and to unite the christian sovereigns in their support, against the reformers of Germany. The authority of Rome had, for the first time, been successfully resisted, and the question of the adop-

Virginia, North Carolina or in Tennessee, or because they were familiar with the marital difficulties of their favorite American statesman.

³³⁶ 1 La. Ann. at 101-02. Civilian is here used in its literal meaning; civil act, on the other hand, stands for legal transaction affecting status.

³³⁷ *Id.* at 102-04.

³³⁸ Judge Rost assigns the date of Aug. 12, 1564, to the cedula. *Id.* at 103. This is, of course, exactly one month too late (see text accompanying note 178 *supra*). The source given for the reference in *Patton* is "Prompta Bibliotheca, verbo Concilium" ("under the heading of concilium")—apparently an encyclopedic reference. *Id.* at 103.

³³⁹ 1 La. Ann. at 103.

tion, throughout christendom, of this Council, though, no doubt, in the eyes of the Church, a question of right, was also a question of power. The Church conceived it necessary to its existence and usefulness, that its supremacy in all spiritual and some temporal matters should be acknowledged; but when submission was secured, that great institution was too wise to bring into disrepute the moral power it possessed over the masses, by requiring the enforcement of the provisions of the Council, when they might be productive of hardship and oppression, or shock the common sense, the habits and customs of nations.³⁴⁰

He then mentioned the Netherlands as an example of areas where considerations such as these had led to a relaxation of the reign of *Tametsi*. This led to the conclusion that "after the adoption of the Council of Trent, the kings of Spain retained the power to suspend the operation of that portion of it which relates to the celebration of marriages in the remote settlements of new colonies, yet unprovided with either churches or priests."³⁴¹

The final step in this line of reasoning, not unexpectedly, was the determination that the marriage practices engaged in with official participation in the Ouachita district constituted just such an exercise of royal power. This ultimate holding was buttressed by three further considerations. First, it was pointed out, "one of the Spanish governors was married thus."³⁴² Second, reliance was placed on a holding of the Supreme Court, in quite a different context, that "when the commandant says he had authority and exercised it, his authority will be presumed, and that no one can question it but his superiors."³⁴³ Third, it was pointed out, there had been other exercises of royal power in derogation of canon law with respect to Louisiana: neither the Inquisition nor ecclesiastical tribunals had ever been established there.³⁴⁴

The opinion of Judge Rost in *Patton* is probably the most erudite exposition of Spanish marriage law in North America in the past century. Nevertheless, it has several flaws. The court might have consulted the text of the cedula, which was then

³⁴⁰ *Id.*

³⁴¹ *Id.* at 104.

³⁴² *Id.*

³⁴³ *Id.* The Supreme Court of Louisiana cited as authority *United States v. Arredondo*, 31 U.S. (6 Pet.) 691, 729 (1832), which involved the validity of a Spanish land grant in Florida. The statement in the text appears in quotation marks in the Louisiana court's opinion, but it is a paraphrase rather than a literal quotation.

³⁴⁴ 1 La. Ann. at 104. The supposition that ecclesiastical tribunals had not been established in Louisiana under Spanish rule is erroneous, but this error is readily explained. See note 205 *supra*. As to the Inquisition, see Greenleaf, *The Inquisition in Spanish Louisiana, 1762-1800*, 50 N.M. HIST. REV. 45 (1975).

conveniently available; it might also have underlined its perceptive discussion of royal power to limit Trent by reference to the *Patronato Real*.³⁴⁵ Furthermore, there were ecclesiastical tribunals in Louisiana under Spanish rule. The major defect of *Patton*, however, is more fundamental: the Royal Order of 1792 had confirmed the unqualified applicability of the Tridentine marriage legislation in, among other places, Louisiana, and had directed the governors to enforce that legislation through the imposition of severe penalties for conduct of the kind here involved.³⁴⁶ That Order clearly excluded the possibility of dispensations from Trent in Louisiana through delegated legislation by colonial officials,³⁴⁷ and indeed, Filhiol was actually prosecuted for having acted in violation of that order and of the Tridentine marriage legislation.³⁴⁸

For the sake of completeness, it should also be added that the Spanish governor whose clandestine marriage was mentioned by Judge Rost as further proof of the legality of the custom discussed is readily identified as Manuel Gayoso de Lemos, who was Governor of the Natchez District from 1789 to 1798, and thereafter Governor-General of Louisiana and West Florida until his death in 1799.³⁴⁹ On January 14, 1796, Gayoso and Margaret Cyrilla Watts signed a marriage intention contract in Natchez. That contract stipulated that the parties promised "to celebrate their Nuptials according to the Rites of the Church as soon as the Royal license is obtained and by promise they now constitute the same as legitimate and true Matrimony" ³⁵⁰

The obstacle, of course, was not the absence of a priest but the lack of the permission to marry which Gayoso needed as a Royal officer—an impedient rather than a diriment impediment under canon law as it then stood.³⁵¹ That permission was not granted by the Council of War until March 11, 1797. Gayoso, understandably anxious because of an impending happy event, had requested an interim permission from his immediate superior, the Governor-General of Louisiana, but that permission was denied. As Gayoso's biographer reports the conclusion of this matter: "When the Gayosos went to New Orleans later that year, an interesting reli-

³⁴⁵ See text accompanying notes 201-04 *supra*.

³⁴⁶ See text accompanying notes 238-41 *supra*.

³⁴⁷ See text accompanying note 241 *supra*.

³⁴⁸ See text accompanying notes 248-53 *supra*.

³⁴⁹ See generally J. HOLMES, GAYOSO, THE LIFE OF A SPANISH GOVERNOR IN THE MISSISSIPPI VALLEY 1789-1799 (1965).

³⁵⁰ *Id.* at 123.

³⁵¹ 2 VELARDE 92.

gious ceremony took place when the bishop, Luis Peñalver y Cárdenas, baptized young Fernando and married his parents on the same Sunday, December 10, 1797.³⁵²

As Governor of Natchez, Gayoso was a local vice patron of the Patronato Real, yet even he obviously lacked the power to validate his own marriage under the circumstances described. It seems reasonably clear that far from supporting Judge Rost's conclusion, the Gayoso episode is solid authority for the rigorous applicability of the decree *Tametsi* in Spanish Louisiana at the time.

This brings us to *Hallett*, which has been considered above in a related connection.³⁵³ The marriage at issue there had been contracted in 1805 in Pascagoula, a Mississippi Gulf city then in Spanish West Florida. The relevant facts are summarized by Justice Grier in the following terms:

A contract of marriage was entered into by Joseph Collins and Elizabeth Wilson before Dr. White, who performed the marriage ceremony. The parties continued to live together as man and wife, and were so reputed, till the death of Collins. It is true that some persons did not consider their marriage as valid, because it was not celebrated in presence of a priest, while others entertained a contrary opinion. It is in proof also, that Collins himself, when he made his will, entertained doubts on the subject.³⁵⁴

Dr. White was a "syndic" of Pascagoula. In urbanized portions of New Spain, this would be about the equivalent of city attorney,³⁵⁵ but under the special conditions prevailing in sparsely settled Spanish West Florida, he was apparently, in the Court's words, the "chief public officer" *in loco*.³⁵⁶ (He was also apparently the founder of Pascagoula, and its leading citizen, a staunch Roman Catholic, and the grandfather of Edward Douglass White, who was to become the Chief Justice of the United States in 1910.)³⁵⁷

³⁵² J. HOLMES, *supra* note 349, at 124.

³⁵³ See text accompanying notes 192-214 *supra*.

³⁵⁴ 51 U.S. (10 How.) at 180.

³⁵⁵ M. SIMMONS, SPANISH GOVERNMENT IN NEW MEXICO 200-01 n.30 (1968).

³⁵⁶ 51 U.S. (10 How.) at 180. A regulation by the Spanish Governor of Louisiana, dated June 1, 1795, ordered the appointment of syndics, to be chosen from among "the most notable & respectable Inhabitants of the District" in all localities three leagues apart. These syndics were subordinate to the commandants; their main function was the investigation and reporting of crimes in their respective localities. They had no powers over civil status and seemingly no judicial powers other than those of inspection and reporting. The text is reproduced in English translation in Padgett, *A Decree for Louisiana Issued by the Baron of Carondelet, June 1, 1795*, 20 LA. HIST. Q. 590, 593-605 (1937). It is likely that this regulation, or one like it, applied in Spanish West Florida as well.

³⁵⁷ J. HIGGINBOTHAM, PASCAGOULA; SINGING RIVER CITY 11 (1967).

Justice Grier stated the question before the Court to be "whether an actual contract of marriage, made before a civil magistrate, and followed by cohabitation and acknowledgment, but without the presence of a priest, was valid, and the offspring thereof legitimate, according to the laws in force in the Spanish colonies previous to their cession."³⁵⁸ This question, he said, was of "some importance, as it might affect the titles and legitimacy of many of the descendants of the early settlers."³⁵⁹

Prior to the Council of Trent, it was an "established principle of the civil and canon law" that marriages could be validly contracted by mutual promises alone.³⁶⁰ Whether a marriage could be validly contracted under English common law prior to Lord Hardwicke's Act had been "disputed of late years, in that country, though never doubted here."³⁶¹

The Council of Trent had changed that rule *pro futuro*, by invalidating marriages not celebrated *in facie ecclesiae* in the presence of two or three witnesses, but, said Justice Grier, it was "not within the power of an ecclesiastical decree, *proprio vigore* [by its own force], to affect the *status* or civil relations of persons." That could only be done by the "supreme civil power."³⁶² Philipp II had received and promulgated the decree *Tametsi* "in his European dominions," but at the time this was done, the *Partidas* were already in effect in the Indies. The marriage law of the *Partidas* was identical with pre-Tridentine civil and canon law,³⁶³ and there was "no evidence, historical or traditional, that any portion of this code was ever authoritatively changed in any of the American colonies."³⁶⁴

This last statement seems surprising, coming as it does from Justice Grier. When presiding over the district court of Allegheny County, Pennsylvania, he stated expressly that the "ignorant and fanatical rabble of Mexico" reprobated rather than sanctioned marriages not celebrated *in facie ecclesiae*.³⁶⁵ Why should the rule have been any different in Spanish West Florida in 1805?

The author of the *Hallett* opinion had evidently not forgotten his presumably learned and dispassionate observations on Mexican

³⁵⁸ 51 U.S. (10 How.) at 181.

³⁵⁹ *Id.* at 180-81.

³⁶⁰ *Id.* at 181.

³⁶¹ *Id.*, citing *The Queen v. Millis*, 10 Clark & Fin. 534, 8 Eng. Rep. 844 (H.L. 1843).

³⁶² 51 U.S. (10 How.) at 181.

³⁶³ See notes 96-99 and accompanying text *supra*.

³⁶⁴ 51 U.S. (10 How.) at 182.

³⁶⁵ *Phillips v. Gregg*, 10 Watts (Pa.) 158, 161-62 (Grier, J.). See text accompanying notes 302-09 *supra*.

law and society. At least in part to escape the criticism of inconsistency, he now stated that "mere conformity" with the "usages" of the Church would be no evidence of the adoption of the Tridentine decrees by secular authority, since such conformity might show that as "a matter of conscience and subjection to ecclesiastical superiors, a Catholic population would in general conform to the usages of the Church."³⁶⁶ Quite to the contrary, he concluded, the *Patton* case has established "the fact that the civil magistrates of Louisiana had always been accustomed to perform marriage ceremonies, where the parties were Protestants, or where no priest was within reach," and this was "conclusive evidence that the law of the Partidas had never been changed, nor the decree of the Council of Trent promulgated, so as to have the effect of law on this subject in the colony."³⁶⁷

Justice Grier's handiwork was to meet its deserved fate some considerable time later, in what was surely the appropriate manner. A law professor wrote a memorandum stating that despite the opinion of the Supreme Court in *Hallett*, he could find "no doubt whatever in the Spanish books as to the immediate and absolute effect of the provisions of [the Council of Trent] in all the Spanish dominions,"³⁶⁸ and a state supreme court elected to follow the professor rather than the Supreme Court of the United States. Substantive criticism of *Hallett* is best deferred until the discussion of that case.³⁶⁹ Nevertheless, despite the unattractiveness of the subject, a few observations *ad personam* seem unavoidable at this point.

First, Justice Grier simply misstated *Patton* when he cited it as authority for the proposition "that the civil magistrates of Louisiana had always been accustomed to perform marriage ceremonies, where the parties were Protestants, or where no priest was within reach."³⁷⁰ As is borne out by Judge Rost's reference in *Patton* to the precedent set by the Spanish governor,³⁷¹ he did not have Protestants in mind; and even as summarized in the opinion, the Morehouse-Hook contract contemplated that the marriage was to be "solemnized before the church on the first opportunity."³⁷² Even those who had no access to the text of the contract³⁷³ could

³⁶⁶ 51 U.S. (10 How.) at 182.

³⁶⁷ *Id.*

³⁶⁸ *In re Gabaldon's Estate*, 38 N.M. 392, 412-13, 34 P.2d 672, 685 (1934).

³⁶⁹ See notes 390-413 and accompanying text *infra*.

³⁷⁰ 51 U.S. (10 How.) at 182.

³⁷¹ 1 La. Ann. at 103-04.

³⁷² *Id.* at 101.

³⁷³ See text accompanying notes 326-27 *supra*.

hardly have been in doubt as to the church whereof a Louisiana judge named Pierre Adolphe Rost was speaking. In any event, Judge Rost made matters abundantly clear when he focused his remarks on the possible royal suspension of Tridentine legislation to "the remote settlements of new colonies, yet unprovided with either churches or priests."³⁷⁴ This might be a minor point, but it reinforces the unfortunate impression that Justice Grier, the son and grandson of Presbyterian ministers,³⁷⁵ might have seen the world in terms of Papists and Protestants pitted against each other, much as the forces of darkness and light, with Spaniards and Mexicans in the former role, and all "Americans" in the latter.³⁷⁶

Second, Justice Grier did not follow the suggestion of his former judicial superiors in *Phillips* that American citizens might contract marriage in Spanish North American territory under their own personal law, the latter being assumed to be the common law as then understood by the Supreme Court of Pennsylvania.³⁷⁷ Nor did he resort to the seemingly sensible solution to be adopted a few years later by the Supreme Court of Texas which simply held, when faced once again with conditions virtually identical with those described as prevailing in West Florida in 1805, that it was "the duty of the courts, upon the highest considerations of public policy, to hold that the marriages contracted in those times should be regarded as mere civil contracts, and should be sustained as valid, whenever the consent of the parties and the intention to enter into the state of matrimony, and to assume its duties and obligations, is clearly shown."³⁷⁸ The Collins-Wilson marriage was not upheld on any extraterritorial or retroactive application of the common law but on the theory that the *Partidas*, incorporating the pre-Tridentine civil or canon law notion of marriage by consent alone, still prevailed in Spanish West Florida at the critical time.³⁷⁹

³⁷⁴ 1 La. Ann. at 104. See also the quotation in note 334 *supra*. As to Judge Rost, see the bibliographical note in 133 La. lxxxvi (1913), and Dart, *The History of the Supreme Court of Louisiana*, 133 La. xxx, xlii (1913).

³⁷⁵ See Goble, *supra* note 108.

³⁷⁶ Bigotry judges itself, but in the present context, it must be remembered additionally that family names were no sure guide to national origin or religious affiliation in Louisiana (including Natchez) and in the Floridas. Some settlers were Loyalists; many with English, Scottish, or Anglo-Irish names were Roman Catholics. See text accompanying note 357 *supra*.

³⁷⁷ *Phillips v. Gregg*, 10 Watts (Pa.) 158, 168 (1840); see text accompanying notes 316-23 *supra*.

³⁷⁸ *Sapp v. Newsom*, 27 Tex. 537, 540 (1864).

³⁷⁹ *Hallett v. Collins*, 51 U.S. (10 How.) 174, 181-82 (1850). The Court did not question the "lawfulness" of Spanish rule in Pascagoula, which the United States asserted to have been included in the Louisiana Purchase of 1803. In *Foster v. Neilson*, 27 U.S. (2 Pet.) 253, 305-09 (1829), Chief Justice Marshall discussed these territorial claims of the United States

This matter could offer an alternative explanation to the origins of the concept of so-called common law marriages in the United States, which gained wide acceptance here almost exactly when it was rejected in England.³⁸⁰ "Common law marriage," the argument would run, is really pre-Tridentine civil and canon law marriage; it gained a foothold in the United States through Spanish law rather than English law. Even cursory further research indicates, however, that this theory is untenable. The doctrine was firmly established (though not universally accepted) in the United States in the first three decades of the last century, before the impact of Spanish marriage law was judicially registered.³⁸¹ All that can be said in this connection is that the uncertainties of Spanish and Mexican marriage law combined with other frontier conditions (including the polygamous proclivities of many male pioneers) to make the common law marriage doctrine highly attractive to the American judiciary in the mid-nineteenth century.

This interrelationship is well illustrated by *Graham v. Bennet*,³⁸² an early decision of the Supreme Court of California that is almost contemporaneous with *Hallett*. The defendant, who then had a wife living in Tennessee, had held himself out to be single, and had induced the plaintiff to enter into a marriage contract with him in California. That contract was witnessed by an instrument reading as follows:

Marriage in the year 1845. Isaac Graham, of Santa Cruz, and Catharine Bennet, of San Francisco, were married at Lyant, by banns, this 26th day of September, in the year 1845, by one who was requested to read the ceremony, Henry Ford. This marriage was solemnized between us, Isaac Graham, Catharine Bennet. In presence of William Wern, Henry Ford.³⁸³

with little if any approval, but concluded by remarking: "If those departments which are intrusted with the foreign intercourse of the nation, which assert and maintain its interests against foreign powers, have unequivocally asserted its rights of dominion over a country of which it is in possession, and which it claims under a treaty; if the legislature has acted on the construction thus asserted, it is not in its own Courts that this construction is to be denied." *Id.* at 308. The relevance of this conclusion in the present context was, however, undercut by the following remark: "No practical application of the laws of the United States to this part of the territory was attempted, nor could be made, while the country remained in the actual possession of a foreign power." *Id.* at 303. It seems difficult to square this statement with the approach of the same learned Chief Justice to the validity of British and Spanish land grants in the Natchez district. See note 304 *supra*.

³⁸⁰ *The Queen v. Millis*, 10 Clark & Fin. 534, 8 Eng. Rep. 844 (H.L. 1843); O. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 79-104 (1922).

³⁸¹ *Id.* at 79-91. The *locus classicus* is 2 J. KENT, COMMENTARIES ON AMERICAN LAW 75-78 (1st ed. 1827).

³⁸² 2 Cal. 503 (1852).

³⁸³ *Id.* at 503.

The parties had cohabited for some time, and two children were born of the union. Upon discovering that the defendant had a wife living, however, the plaintiff left him, taking the children with her. This was in essence an action in tort for the subsequent forceful removal of the children by their father from their mother.

Under the law as it then stood, the defendant had a good defense if he was the legitimate father of the children. His "marriage" to Catharine Bennet was of course bigamous and invalid, but California had a statute legitimating the children of marriages "deemed null in law."³⁸⁴ Was the marital union contracted by the writing just quoted a marriage for this limited purpose?

The plaintiff argued to the contrary, contending that Mexican law which was in force in 1845 "required (in common with all Catholic countries, since the Council of Trent,) that a marriage to be valid, must be solemnized in presence of the parish priest."³⁸⁵ This statement seemed to raise the issue here discussed in the sharpest possible manner. The Supreme Court of California, however, simply sidestepped this question by issuing the following lapidary ipse dixit:

Marriage is regarded as a civil contract, and no form is necessary for its solemnization. If it takes place between parties able to contract, an open avowal of the intention, and an assumption of the relative duties which it imposes on each other, is sufficient to render it valid and binding.³⁸⁶

Simply by applying that rule to the 1845 marriage contract, the court held that the children were issue of a marriage "deemed null in law" within the meaning of the California legitimation statute, so that their father had acted lawfully when claiming them by force.³⁸⁷

It seems difficult to determine now whether Clio was thus raped or merely spurned by the Supreme Court of California; surely, unlike poor Catharine Bennet, she was not artfully seduced by cunning arguments and impressive legal prose. In any event, the muse of history retired from the scene for almost a century, and the concept of "common law marriage" spread apace through the formerly Spanish and Mexican territories of the United States.³⁸⁸

³⁸⁴ Descents and Distribution Act, § 2, Cal. Stat. 1850, ch. 96, p. 220, § 2 (repealed 1869).

³⁸⁵ 2 Cal. at 505-06.

³⁸⁶ *Id.* at 506.

³⁸⁷ *Id.*

³⁸⁸ *Campbell's Adm'r v. Gullatt*, 43 Ala. 57 (1869) (Alabama); *Daniel v. Sams*, 17 Fla.

But at long last, the issue so rudely avoided in *Graham*³⁸⁹ was squarely faced by a court of last resort. *In re Gabaldon's Estate*,³⁹⁰ a 1934 decision of the Supreme Court of New Mexico, dealt with the matter so incisively that it may serve here conveniently as a summary of the current section, perhaps even of the major part, of the present study.

The question before the court was simply put: Could marriages be validly contracted in New Mexico simply by mutual consent followed by cohabitation? The territorial marriage act, adopted in 1860 but still in effect at the date critical here, provided that marriages might be solemnized by "any ordained clergyman whatsoever, without regard to the sect to which he may belong, or by means of any civil magistrate."³⁹¹

New Mexico had not been a previously uninhabited territory, nor was it a territory colonized by English-speaking people who carried the common law with them. At the time of its conquest by the United States, it was inhabited by a civilized people living under the Spanish civil law as it then prevailed in Mexico, and this legal system was still in effect in 1860 when the marriage act was adopted.³⁹² Furthermore, at that time, the non-Catholic population was inconsiderable, the edicts of the church were regarded as "highly binding upon conscience,"³⁹³ and marriage was generally regarded as a sacrament.

In the light of these historical facts, the court concluded that the statute quoted above could not be read without gaining the impression that "in the belief of those who . . . passed it, the only valid marriage theretofore was one celebrated by a Roman Catholic priest."³⁹⁴ Since the field was thus occupied by statute before the reception of the common law in New Mexico in 1876,³⁹⁵ there was no room for the operation of the common law marriage rule.³⁹⁶

The court conceded that there was some disagreement as to "whether the Council of Trent (1563) had been proclaimed by the

487 (1880) (Florida); *Hargroves v. Thompson*, 31 Miss. 211 (1856) (Mississippi); see *Pacific, Common Law Marriage in Mississippi*, 16 Miss. L.J. 40 (1943).

³⁸⁹ See text accompanying notes 382-87 *supra*.

³⁹⁰ 38 N.M. 392, 34 P.2d 672 (1934).

³⁹¹ N.M. Laws 1859-60, p. 120, now codified in N.M. STAT. ANN. § 57-1-2 (1953).

³⁹² 38 N.M. at 393, 34 P.2d at 673, citing *Beals v. Ares*, 25 N.M. 459, 185 P. 780 (1919)—an exceptionally informative decision on the reception of the common law in New Mexico.

³⁹³ 38 N.M. at 396, 34 P.2d at 675.

³⁹⁴ *Id.* at 394, 34 P.2d at 673.

³⁹⁵ See *Beals v. Ares*, 25 N.M. 459, 185 P. 780 (1919).

³⁹⁶ 38 N.M. at 394, 34 P.2d at 673-74.

Spanish sovereign as effective in Mexico,"³⁹⁷ but it refused to be precluded on this point by the decision of the United States Supreme Court in *Hallett*.³⁹⁸ The reasons there given by Justice Grier for concluding that the Council had nothing but ecclesiastical authority behind it were politely termed "not entirely convincing" by the *Gabaldon* majority.³⁹⁹ But this question was regarded as not ultimately crucial, the decisive issue being the intent of the territorial legislature in 1860, which controlled the construction of the act. On this point, the majority said, speaking through Judge Hudspeth:

These early legislators may have been mistaken on a fine point of law, living as they did, remote from the centers of learning. But they must have thought that some law, if not the Council of Trent duly proclaimed, made a mere consent marriage invalid. If they understood the law to be, as now contended, that no solemnization was then necessary, it was pure supererogation to give validity to the act of an ordained clergyman or a civil magistrate.⁴⁰⁰

Why did the Supreme Court of New Mexico fail to be convinced by *Hallett*? The majority opinion assigns three major reasons for this remarkable show of independence. First, the doubt as to the effect of the cedula was "not based upon any deficiency of the language of the royal decree to give it effect in the colonies."⁴⁰¹ (Although formally addressed to *Patton*, this point challenges a major holding in *Hallett*.)⁴⁰² Second, Louisiana and West Florida had not been settled in 1564, but at that time Mexico had been settled and New Mexico had been explored and claimed. Third, even conceding the power of the King of Spain to modify *Tametsi* for Mexico, Judge Hudspeth said that "we have not the evidence of his having done so that the Louisiana Supreme Court accepted."⁴⁰³

Some of these remarks become considerably more precise when read in conjunction with the dissenting opinion of Judge Sadler. Professor James B. Thayer, who then taught Roman and Civil Law at Harvard University, had submitted a memorandum⁴⁰⁴

³⁹⁷ *Id.* at 394, 34 P.2d at 673.

³⁹⁸ See text accompanying notes 353-79 *supra*.

³⁹⁹ 38 N.M. at 396, 34 P.2d at 674.

⁴⁰⁰ *Id.* at 394, 34 P.2d at 673.

⁴⁰¹ *Id.* at 395, 34 P.2d at 674.

⁴⁰² See text accompanying notes 362-64 *supra*.

⁴⁰³ 38 N.M. at 395, 34 P.2d at 674.

⁴⁰⁴ Professor Thayer's memorandum is mentioned by Judge Sadler, specially concurring in the dissent in *In re Gabaldon's Estate*, 38 N.M. 392, 412-13, 34 P.2d 672, 685 (1934). Unfortunately, this memorandum does not appear to have been published elsewhere, and no references to it could be located.

to the court on the subject, at long last citing the cedula of 1564 to the *Novísima*⁴⁰⁵ and setting forth its text in so far as material. He had also made the obvious point that "Spain was then the 'most Catholic country' engaged in upholding the Papacy everywhere, and the forms of marriage were then universally a question subject to the exclusive jurisdiction of the church."⁴⁰⁶ Professor Thayer had further cited several relevant Spanish and other authorities, and had concluded (as already noted) that despite the *Hallett* case, he could "find no doubt whatever in the Spanish books as to the immediate and absolute effect of the provisions of this council in all the Spanish dominions."⁴⁰⁷

Judge Sadler, who dissented on the narrow ground that *Hallett* was binding in New Mexico before statehood, expressly stated that nevertheless the authorities and sources cited and quoted by Professor Thayer "quite satisfy my mind of the correctness of his conclusion."⁴⁰⁸

Judge Buckley's lengthy dissent was based, in the main, on the view that the territorial legislature had received common law marriage along with the common law. He also made the point that the territorial legislators "must be presumed to have had knowledge of the decision of the United States Supreme Court in the *Hallett* Case in 1850 to the effect that the Council of Trent was not in force in Spanish dominions, and [that] they manifested no inclination to incorporate its provisions relating to marriage into their enactments."⁴⁰⁹

This is a curious argument, for surely even at that time, the enactment of *Tametsi* into secular law would have violated the territorial Organic Act and perhaps the Constitution of the United States.⁴¹⁰ Nevertheless, Judge Buckley seems to have focused in-

⁴⁰⁵ *Novísima* 1, 1, 13. See text accompanying notes 178-79 *supra*.

⁴⁰⁶ 38 N.M. at 413, 34 P.2d at 685.

⁴⁰⁷ *Id.*

⁴⁰⁸ *Id.*

⁴⁰⁹ *Id.* at 408, 34 P.2d at 682.

⁴¹⁰ Apparently the Supreme Court has never expressly held that the first eight amendments of the Constitution were directly applicable to what later came to be known as "incorporated" territories, *i.e.*, territories in the continental United States destined for statehood. *American Publishing Company v. Fisher*, 166 U.S. 464, 466-67 (1897) and cases there cited; *cf. Benner v. Porter*, 50 U.S. (9 How.) 235, 242 (1850). Nevertheless, it is of course hornbook law that the "fundamental" guarantees of the Bill of Rights extend to the territories, and that these include the first amendment. *Hawaii v. Mankichi*, 190 U.S. 197, 217-18 (1903); *Montalvo v. Colon*, 377 F. Supp. 1332, 1336-43 (D.P.R. 1974). Embarrassingly, the only express authority for the proposition that these radiations of fundamental constitutional principles include the establishment of religion and its free exercise (U.S. CONST. amend. 1, § V) is *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 450 (1857). As

stinctively on the essential point. He expressed strong disagreement with the majority's thesis that the social and legal history of New Mexico was different from that of neighboring states,⁴¹¹ and it seems unlikely that he would have been swayed by the peculiarities in the transition of ecclesiastical jurisdiction described above.⁴¹² The quintessence of his thinking on the issue before the New Mexico Court may be summed up in the following sentence: "Instead of striving to sustain a suggestion that the law of Mexico was contrary to the 'common law of Christendom,' we ought to assume that it was conformable thereto unless it is clearly shown to have been to the contrary."⁴¹³

The answer is, of course, that there were two "common laws of Christendom" after the Council of Trent, and that the Tridentine variant had been in effect in New Mexico under Spanish and Mexican rule. But even thus rebuffed, Judge Buckley would have prevailed in the end. The Tridentine form of marriage as incorporated into the Spanish and Mexican law, he would have pointed out, was incompatible with the constitutional and social order of the secular and pluralistic republic that became the territorial sovereign of New Mexico in 1848.

CONCLUSION

Three major conclusions emerge from the present study. They concern the contents of the rule governing the formal validity of marriage in Spanish North America; the reasons of the insignificant or possible negative impact of that rule on marriage law in the United States even in those regions that were once parts of

regards New Mexico, § 17 of the Organic Act of 1850 extended the Constitution and "all laws of the United States which are not locally inapplicable" to the Territory. Act of Sept. 9, 1850, ch. 49, 9 Stat. 446, 452. It seems to have been generally assumed in New Mexico that this clause incorporated the first eight amendments of the Constitution. See *Torrez v. Board of Comm'rs*, 10 N.M. 670, 65 P. 181 (1901); *Garcia v. Territory*, 1 N.M. 415, 417-18 (1869). Note, incidentally, that pursuant to § 7 of the Organic Act, Congress had power to veto Territory legislation. That power was used in the Act of Feb. 3, 1879, ch. 41, 20 Stat. 280, to veto the incorporation of the "Society of the Jesuit Fathers of New Mexico" by special act of the New Mexico territorial legislature. *Tametsi* would hardly have fared better.

⁴¹¹ It is interesting to note that our neighboring jurisdictions of Texas, Louisiana, Arizona, and California early held common law marriages valid, and that in these localities the legal and social history was to a degree like ours. I take it that we are chiefly concerned with the legal history because social history is usually reflected therein.

38 N.M. at 401-02, 34 P.2d at 678. This statement appears to be in error as to Louisiana—an error, incidentally, which might be of some consequence to students of judicial psychology.

⁴¹² See text accompanying notes 163-65 *supra*.

⁴¹³ 38 N.M. at 403, 34 P.2d at 679.

Spain, Mexico, or both; and the impact of Spanish marriage validity law on the curiously intractable American phenomenon of "common law marriage."

As regards the form of marriage under Spanish and Mexican law until the middle of the last century, the conclusion is clear and, in the opinion of the author, beyond doubt. Spanish and Mexican law incorporated, and gave civil effect to, the provisions of the Tridentine decree commonly known as *Tametsi*.⁴¹⁴ Pursuant to that decree, marriages between baptized persons, including heretics or schismatics, were valid only if celebrated with the assistance of a Roman Catholic cleric of the requisite rank and authority in the presence of at least two witnesses. This rule was applicable throughout the Spanish realms, irrespective of parochial organization or local publication, by virtue of the cedula of July 12, 1564.⁴¹⁵ Its applicability was neither relaxed in Spanish North America nor in the northern portions of Mexico even when the private practice of the Protestant faith was permitted for certain approved settlers.⁴¹⁶

Second, the Spanish and Mexican law as to the formal validity of marriages failed to make any significant and lasting positive contribution to secular American marriage law. This was so because *Tametsi* was, in essence, a tool of the Counter Reformation which discriminated against those who were not in communion with Rome. As such, it was simply incompatible with the constitutional order of a secular republic and with the political aspirations of a pluralist society in which non-Roman Catholics, although divided into many creeds, nevertheless constituted a solid majority. As a general rule, therefore, the Spanish or Mexican law governing the formal validity of marriages was quickly replaced by the typically "American" system of alternative civil or ecclesiastical form, the latter including all faiths equally.⁴¹⁷

The incompatibility of the Tridentine marriage legislation with constitutional and political reality in the United States is even reflected in Roman Catholic canon law as an ecclesiastical discipline after this secularization of marriage law. The original territorial scope of the applicability of *Tametsi* in the United States is a mirror image of past Spanish or Mexican rule.⁴¹⁸ In the nineteenth century, however, it was a clearly discernible policy of the American

⁴¹⁴ C. Trident., Sess. XXIV, *de reformatione matrimonii* c. I, MANSI col. 152.

⁴¹⁵ NOVISIMA I, 1, 13; text accompanying notes 178-214 *supra*.

⁴¹⁶ See text accompanying notes 232-57 *supra*.

⁴¹⁷ See text accompanying notes 39, 52 *supra*.

⁴¹⁸ See notes 172-73 and accompanying text *supra*.

hierarchy to seek the extension to these areas of the Benedictine Declaration, which renders *Tametsi* inapplicable to marriages of, or with, baptized non-Roman Catholics. That goal was achieved in a general manner in 1885.⁴¹⁹

Third, the Spanish and Mexican law as to the formal validity of marriages had some impact on the so-called common law marriage as that term is generally understood in American law, *i.e.*, marriage without any ceremony, religious or civil, by the mere consent of the parties (or perhaps by consent and cohabitation, or all of these plus repute).⁴²⁰ At one extreme, some courts held or merely assumed that *Tametsi* had not been in effect in Spanish North America or in México, so that nonceremonial marriages were held valid under pre-Tridentine civil or canon law.⁴²¹ At the other extreme, at least one court correctly held that *Tametsi* had been locally in effect, with the result that the reception of the common law after the enactment of a secular marriage act requiring a civil or a religious marriage ceremony could no longer carry with it the common law marriage doctrine.⁴²² Somewhere in between these two extremes, at least one state court simply validated marriages contracted in excusable noncompliance with *Tametsi* by recourse to public policy.⁴²³

In more general terms, it can be argued that since common law marriage prospered especially in territories that had previously been under Spanish or Mexican rule,⁴²⁴ so-called common law marriage in the United States is really pre-Tridentine nonceremonial civil or canon law marriage. This argument is historically inaccurate in this simplistic form. The recognition of common law marriage in America antedates the adjudication of marriages contracted in those territories by at least two decades, and common law marriages were recognized as valid in areas that had never been subject to Spanish or Mexican rule.⁴²⁵ Nevertheless, it seems plain that judicial confrontation with Spanish and Mexican marriage law—an obscure law in a foreign language—reinforced a natural tendency to validate marital

⁴¹⁹ See text accompanying notes 174-76 *supra*.

⁴²⁰ See generally O. KOEGEL, COMMON LAW MARRIAGE AND ITS DEVELOPMENT IN THE UNITED STATES 105-60 (1922).

⁴²¹ *Hallett v. Collins*, 51 U.S. (10 How.) 174 (1851); *Phillips v. Gregg*, 10 Watts (Pa.) 158 (1840).

⁴²² *In re Gabaldon's Estate*, 38 N.M. 392, 34 P.2d 672 (1934).

⁴²³ *Sapp v. Newsom*, 27 Tex. 537, 540 (1864).

⁴²⁴ See cases cited in notes 388-89 *supra*.

⁴²⁵ New York, Michigan, and Pennsylvania were three such areas. See *Fenton v. Reed*, 4 Johns. (N.Y.) 52 (1809); *Hutchins v. Kimmell*, 31 Mich. 126 (1875); *Hantz v. Sealy*, 6 Binn. (Penn.) 405 (1814) (dictum).

unions contracted without strict compliance with form requirements. Additionally, the judicial consideration of the "general law of Christendom" for the ostensible purpose of determining the contents of Spanish and Mexican marriage law called to attention authorities, especially pertaining to Scotland, that proved more acceptable for the determination of English-derived common law rules than the more recent English authorities.⁴²⁶

On a more parochial level, it would seem that some new insights have been gained into the origins of, and reasons for, the custom of marriage by bond in Texas. In its specifically Texas manifestation, that custom has been traced to the Bastrop settlement in what is now Monroe, Louisiana.⁴²⁷ Although documented extensively only for Texas,⁴²⁸ marriage by bond was previously practiced in other Spanish North American possessions as well.⁴²⁹ One might even call the custom a Trojan horse of "manifest destiny" or of its precursors, for all of the territories where marriage by bond was shown to have been practiced were soon thereafter to be incorporated into the United States. But that argument is rather like attributing the mortality rate in a "sunset city" to its environment. Marriage by bond was a symptom, not a cause. It demonstrated, for all to see, the inability or the unwillingness of Spain and Mexico to enforce the law of the land with respect to land-hungry settlers who had even more land-hungry relatives and friends in a neighboring and powerful country.

There is, however, another point involved here. Marriage by bond was conceived as a device to cope with the physical impossibility of compliance with *Tametsi* due to the unavailability of priests, but it was also, in distressingly many cases, abused as a means for creating the semblance of a marital relationship where there was the more formidable obstacle of an undissolved prior marriage.⁴³⁰ It seems doubtful at this point, however, that these abuses were of sufficient significance to threaten the transformation of a device designed for securing marriage stability into its exact opposite. (The same ambivalence is of course apparent in the use of the term "common law marriage" in its diametrically opposed legal and popular connotations.)

⁴²⁶ The decision most frequently relied on is *Dalrymple v. Dalrymple*, 161 Eng. Rep. 665 (P. 1811). This is an English decision applying Scottish law as the *lex loci celebrationis*. In *Hallett v. Collins*, 51 U.S. (10 How.) 174 (1851), Justice Grier remarked that "all the learning on this subject is collected" in that decision. *Id.* at 181.

⁴²⁷ See text accompanying notes 329-35 *supra*.

⁴²⁸ B. SMITH, *MARRIAGE BY BOND IN COLONIAL TEXAS* (1972); see generally Part I, *supra*.

⁴²⁹ See text accompanying notes 244-46 *supra*.

⁴³⁰ This is pointed out in *Lewis v. Ames*, 44 Tex. 319, 338-39 (1875).

In conclusion, an attempt will be made to place the present study and its findings into the more general contexts of United States legal history, comparative law, and jurisprudence. As to legal history, in a country as large as the United States, it is submitted that the regional approach is very promising, that the formerly Spanish and Mexican territories provide a fruitful area for further research, and that any work in this area must necessarily rely in good measure on the Spanish colonial archives. This source is now conveniently accessible.⁴³¹ An obvious area for detailed future study is Spanish and Mexican land grant law and policy, and especially its impact on general American public contract and public land law. On a different but related level, *Hallett*⁴³² has severely shaken the present author's previously held assumption that at least the federal courts applied Spanish or Mexican law in a straightforward manner. It stands to reason that wherever else doubts on this score should prove justified, new insights may be gained into some of the causes of the development of American law in the last century.

Regarding comparative law, there are several points. Why, for instance, were Spanish or Mexican printed sources not judicially used when they were readily available? How solid was the knowledge of Spanish and Mexican law of American nineteenth century jurists and authors who acquired reputations as experts in this area? The present study does not lead one to assume that the answers to questions such as these will always be reassuring. They are, however, relatively minor points. As Professor Schlesinger has shown, much in this area depends on the means available for proof of foreign law, and these have been made rational (again largely due to his efforts) only quite recently.⁴³³

A more serious matter, and one that concerns comparative lawyers directly, is the neglect of canon law and ecclesiastical history. Little will be gained here by dwelling upon the sins of the past. For the future, however, it seems inconceivable that compara-

⁴³¹ The invaluable Seville Archives are indexed in J. DE LA PEÑA, E. BURRUS, C. O'NEILL & M. GARCIA, CATÁLOGO DE DOCUMENTOS DEL ARCHIVO GENERAL DE INDIAS (SECCIÓN V, GOBIERNO. AUDIENCIA DE SANTO DOMINGO) SOBRE LA ÉPOGA ESPAÑOLA DE LUISIANA (1969) (2 vols.). Copies of the originals may be obtained from Seville, Spain; microfilms may be viewed at Loyola University of New Orleans. See O'Neill, *The State of Studies on Spanish Louisiana*, THE SPANISH IN THE MISSISSIPPI VALLEY 1792-1804 16, 25 (J. McDermott ed. 1974).

⁴³² See text accompanying notes 192-214, 353-81.

⁴³³ R. SCHLESINGER, *supra* note 1, at 38-187, 618-36 (3d ed. 1970); FED. R. CIV. P. 44.1 (effective July 1, 1966). Professor Schlesinger made substantial contributions to the drafting of this rule. Interest in law reform in this area is largely due to his efforts.

tive lawyers and legal historians in the United States, especially in the Southwest, will continue to neglect printed canon law treatises, monographs, and other related sources; the invaluable Vatican archival materials pertaining to the United States are now available,⁴³⁴ in addition to the treasures of American diocesan archives.⁴³⁵ The present study has illustrated the usefulness of the consultation of these materials for obtaining new insights into issues of legal history that are otherwise clouded by the lack of reliable documentation.

Finally, those with more philosophical interests might wish to pursue the jurisprudential implications of the interaction of secular and ecclesiastical law as outlined in the present study, and more particularly, some of the interactions of legal values within canon law as a self-contained system. To cite one example, a noted ecclesiastical historian observed, with respect to the matter here studied: "In parts of the United States formerly under the Spanish flag Tridentine rigidity surrounded the law of marriage down to the twentieth century."⁴³⁶ He attributed the perseverance of this "severe legislation" to the "crippling use of the *pase regio*" and said that there was "no estimating the range of the restriction brought upon all [the] people" living in those areas.⁴³⁷ A quick answer would be that the statement of law is simply not true, for the Benedictine Declaration was extended to Louisiana and the Floridas in 1824 and to all other Tridentine parts of the Continental United States in 1885. Further, he should really have asked instead why the latter change was not made sooner.⁴³⁸ On a more elevated level of analysis, until the nineteenth century, Spanish law generally excluded non-Roman Catholics from the colonies and punished such local heretics as were convicted by the Inquisition;⁴³⁹ the local adoption of the Benedictine Declaration under such circumstances would have been an invitation to self-incrimination.

But there is a much more fundamental point. How could it ever

⁴³⁴ A most valuable guide is UNITED STATES DOCUMENTS IN THE PROPAGANDA FIDE ARCHIVES (F. Kinnealy ed. 1974) (1st series, 5 vols.).

⁴³⁵ E.g., Catholic Archives of Texas, *supra* notes 29, 280; Notre Dame Archives, *supra* note 244. See generally P. HORGAN, *supra* note 164.

⁴³⁶ E. SHIELS, KING AND CHURCH, THE RISE AND FALL OF THE PATRONATO REAL 190 (1961).

⁴³⁷ *Id.* at 190.

⁴³⁸ See text accompanying note 176 *supra*.

⁴³⁹ See text accompanying notes 206-12 *supra*. The Inquisition was introduced in Santa Fé on January 25, 1626. Scholes, *Problems in the Early Ecclesiastical History of New Mexico*, 7 N.M. HIST. R. 32, 71 (1932).

be, as a matter of canon law, that the formal validity of marriage depended upon historical and geographical factors so easily misstated, as this example shows, even by church historians? Is the mission of mercy and the care of souls compatible with the imposition of such technical legal constraints? A negative answer to this question was given almost a century ago by Rudolf Sohm in a famous dictum: "Das Kirchenrecht steht mit dem Wesen der Kirche in Widerspruch."⁴⁴⁰ More recently, the same argument has been made, with great passion and eloquence, by a dissident Roman Catholic clergyman in the United States.⁴⁴¹ The present study has also shown, however, that canon law is not insensitive to the appeals of equity. The Church accepted the maxim that no one is obligated to do the impossible as excusing failure to comply with *Tametsi*, and it interpreted that maxim rather broadly.⁴⁴² Furthermore, at least two bishops with jurisdiction in North America inclined towards extending the Benedictine Declaration without direct papal authority, and in complicated cases, the power of radical sanction or validation of formally defective marriages was employed.⁴⁴³ Thus, there is much to be said on the other side as well, and the debate started by Rudolf Sohm is still far from concluded.⁴⁴⁴ Is it not appropriate for legal philosophers in the United States to discuss such questions, or at least to acknowledge their existence?

These concluding remarks are to some extent critical. Their message can be summed up briefly. The historical materials available in the past were adequate, but on the whole, their treatment by lawyers was not. The materials available now are superb, and we must do much better.

⁴⁴⁰ "Ecclesiastical law is incompatible with the essence of the church." R. SOHM, *KIRCHENRECHT* 1 (1892) (trans. by author). See also, e.g., *id.* at 482-83 (1892).

⁴⁴¹ J. KAVANAUGH, *A MODERN PRIEST LOOKS AT HIS OUTDATED CHURCH*, 68-81 (1967).

⁴⁴² See text accompanying notes 125-28 *supra*.

⁴⁴³ See text accompanying notes 129, 235, 256 *supra*.

⁴⁴⁴ D. STODT, *WORT UND RECHT, RUDOLF SOHM UND DAS THEOLOGISCHE PROBLEM DES KIRCHENRECHTS* (1962), conveniently summarizes the pertinent literature through 1960.

