LEGITIMATION AND ADOPTION ON THE ANGLO-HISPANIC FRONTIER OF THE UNITED STATES

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During the latter years of the eighteenth century Spain's North American empire stretched from the Floridas to the Californias and nominally included all the lands west of the Mississippi River. But that had not long been so. Although France had ceded the vast territory of Louisiana to Spain in 1762, effective possession of lower Louisiana was not achieved until 1769, and most of the rest of the area was neither colonized nor reduced to control. Spain had lost the Floridas to Britain in 1763 but had regained them twenty years later. Thus toward the end of the eighteenth century, the Spanish crown asserted sovereignty over the western half of the North American continent and all the northern shores of the Gulf of Mexico. It is ironical that just on the brink of the collapse of her American empire, Spain's territorial claims stood at their peak.

With the turn of the century, France coerced retrocession of Louisiana and within two decades Spain had lost the entire region. In 1795 the United States negotiated the cession of a portion of West Florida and then seized the rest of the Floridas between 1810 and 1819. The western territories were lost when Mexico achieved her independence in 1821. Thereafter, Texas became an independent republic in 1836 and in 1845 joined the United States. The American conquest and annexation of New Mexico and California followed almost immediately. Under American rule, Spanish law continued to retain much of its prior vigor in the lower Mississippi region, and under Mexican sovereignty it also prevailed to the west. Even after the coming of Anglo-American government to the whole region, Hispanic law continued to maintain a significant influence over men's doings and institutions.

As English-speaking Americans poured into the formerly Spanish provinces, they brought with them their attachment to Anglo-American rules of law. Many of these principles had developed on the western shores of the Atlantic during a century and a half of indulgent English rule prior to the formation of the United States, and further innovations were thereafter introduced, as migrant North Americans extended those concepts to new states and territories. In areas where the Spanish law was well established, however, the two legal traditions tended to interact in a way that gives the law of the region a distinctive Hispanic tone. Family law and succession have been particularly affected by the meeting of the two traditions. Although the emergence of the principle of adoption in the United States has already attracted considerable scholarly attention, neither the in-

stitution of adoption nor the concept of legitimation has been related to the Hispanic traditions of the southern and southwestern regions.

Old English law had developed an early antipathy to the institution of legitimation and there is scant evidence that there was any marked post-medieval English inclination to the concept of adoption prior to the twentieth century. But English America had shown itself receptive to both ideas by the early nineteenth century. Anglo-America was clearly familiar with the continental ideas of legitimation and adoption through classical and Biblical sources, and familiarity with Hispanic sources and Spanish legal traditions in the formerly Spanish provinces contributed to the maintenance of Hispanic legal ideas in the South and Southwest.

1. – Legitimation

In old Castilian law there were two steps in the process of legitimation by fathers. The first was that of establishing the biological relationship between father and child. The fact seems normally to have been established through acknowledgement by the father. Once that was achieved, legitimation might follow by compliance with one of several legal formalities. The established fact of paternity had its most important consequence as the basis for legitimation, but under Castilian law rights to support and succession also resulted from the fact of paternity without legitimation.


3. See J. Cowel, *Institutes*, 27-28: 'I have also heard of that kind of Adoption amongst us which the Romans used. But this sounds rather to be by private will and agreement of the persons adopting and adopted, than by any law... whence it is apparent, that the custom which the Romans had of Adoption was either never received amongst us or else that it is long since, as with the French, wholly extinct'.

4. Just how the fact of paternity was established in Castilian law when the parents did not marry seems open to some doubt. Whether an acknowledgement of paternity might have been merely tacit or presumed from surrounding circumstances, as opposed to a requirement of an express acknowledgement by the father, and whether even an express acknowledgement alone would have sufficed, were points at issue among the commentators. See E. Gacto Fernández, *La filiación no legítima en el derecho histórico español* (1969), 89-93 (hereafter cited as *Filiación*). I. Asso and M. Manuel, *Instituciones del derecho civil de Castilla* (6th ed. 1805), 63 (hereafter cited as *Instituciones*), mentioned that there might be a judicial proceeding to declare legitimacy when a child's status was in doubt. See E. Gacto Fernández, *Filiación*, 78-80, 84-93.

5. The tenth Law of Toro, *Recop.* V.8.8, *Nov. Recop.* 1.20.6, allowed a father with acknowledged illegitimate descendants (but no legitimate ones) to put aside the expectations of ascendant-forced-heirs, even to the full extent of the testator's estate in favor of his illegitimates. The ninth Law of Toro, *Recop.* V.8.7, *Nov. Recop.* X.20.5, was to the same effect as to a mother's testamentary powers in favor of her illegitimates. Although the acknowledged illegitimate was entitled to support, the unlegitimated bastard had no right of intestate succession from his father. Old Spanish law nonetheless allowed intestate