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THE LEGAL BASIS FOR THE ESTABLISHMENT
OF SPANISH COLONIAL SOVEREIGNTY:
THE ACT OF POSSESSION

MANUEL P. SERVÍN

THE LEGAL BASIS for establishment of Spanish colonial sovereignty, the act of possession, addresses the question of Spain's right to New Mexico and her claim to the New World—as well as those of other European colonizing powers of the fifteenth, sixteenth, seventeenth, and even the eighteenth centuries—a claim based upon the right of discovery. This right of discovery, however, does not mean that simply because a representative of one of the great European imperialistic nations saw or gazed upon a land previously unknown to Europeans that his monarch acquired sovereignty or legal control over it. The acquisition of territory by right of discovery meant much more than just finding, seeing, and exploring the area formerly unknown to European navigators, explorers, or officials. It meant that the discoverer or his lieutenant was physically on the land, exercised complete control over a portion of the area, and had the intention (the *Animus*) of acquiring it for his sovereign. This intention of acquiring sovereignty or ownership for the monarchy, moreover, had to be proclaimed and demonstrated by the discoverer in a ceremony which is called the symbolic act of possession or the symbolic act of sovereignty. Failure to repeat the magic words and perform the correct acts, they believed, could have dire results.

EARLY SYMBOLIC ACTS IN THE AMERICAS

Although symbolic acts of sovereignty were essential in acquiring newly discovered lands and were performed almost universally by the navigators and explorers of Portugal, Spain, England

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and France, history students are either unaware of their existence, or, at least, of their nature and ceremony. The reason for this lack of knowledge can be attributed generally to authors of historical texts who for unknown reasons have found it suitable to omit mentioning such acts; or if they mentioned them, they neglected describing or explaining the ceremony. To my knowledge, no United States history textbook author has ventured to devote even one paragraph to the ceremony of possession-taking, when in fact there were numerous examples of these symbolic acts.

Although the Portuguese performed the first acts of sovereignty in the Age of Discovery, it was the Castilians who executed the first one in the Americas. The first known act made in the Western Hemisphere was carried out by the Admiral, Christopher Columbus, as he claimed his discovery at the Island of San Salvador for the Crown of Castile. In his *Historia de Las Indias*, Bartolomé de Las Casas, the Apostle of the Indies, describes the act as he tells us that:

The Admiral took the royal standard, and each of the captains took one of the Green-crossed banners. . . . Jumping upon the land, the Admiral and all the members knelt down, gave great thanks to the Almighty God and Lord who brought them to safety. . . . Then the Admiral—in front of the two captains, and of Rodrigo de Escobedo, the notary for all the fleet, and of Rodrigo Sanchez de Segovia, the overseer of it, and of all Christian people who were with him—jumped on the land and stated that they be his witnesses: how he before all of them was taking, and in fact did take possession of said island which he named San Salvador for the king and queen his lords, by making the protestations which are recorded in detail in the testimonies which were written there.¹

More impressive Spanish acts were performed by Vasco Nuñez de Balboa in 1513 and by Hernán Cortés in 1535. After illegally seizing command of the Isthmus of Panama Expedition and crossing to the Pacific coast, Nuñez de Balboa “immediately recognized the necessity of legally claiming his astounding discovery for the kingdom of Castile.” After a large cross was erected and a

Te Deum was recited, he formally took possession of the South Sea (the Pacific Ocean) as

he entered into the salt water of the ocean, until it reached his knees, and he began to go back and forth as he said: "Long live the Most High and Powerful Queen, Don Fernando and Dona Juana . . . in whose names and in behalf of the royal crown of Castile I take and seize possession of these seas and lands and coasts and ports and southern isles, with all their surroundings and kingdoms and provinces which belong to them or may belong in any manner whatsoever, or by any reason or title which exists or can exist, ancient or modern, of past times, present or future, without contradiction whatsoever. And if any other prince or captain, Christian and infidel, of whatever law or sect, or condition, aspires to a right on these lands and seas, I am ready and equipped to contradict it, and defend it in the name of Kings and Queens of Castile, present and future, to whom belong this empire and domain of these Indies, isles, and northern and southern Terra Firma with its seas, both in the Arctic as well as in the Antarctic and in both parts of the equinoctial within and without the Tropics of Cancer and Capricorn. . . ."2

It was a grandiose act.

Not as pageantful as Nuñez de Balboa's ceremony, but more realistic, was Cortés's act in Baja California in 1535. The act of sovereignty, as recorded by the official notary and only partially quoted herein, reads as follows:

On the third day of May in the year 1535 of Our Lord, which is this day and at about noon the Very Illustrious Señor, Don Fernando Cortés, Marques del Valle de Oaxaca, Captain General of New Spain and of the South Sea for His Majesty, etc., arrived at a port and bay of a land newly discovered on the aforesaid South Sea by means of a ship and an armada of the aforementioned Señor Marques. His Lordship arrived at the aforesaid port with ships and an armada; and having arrived, he jumped on land, accompanied by his men and horses. Standing on it at the beach, in the presence of me, Martín de Castro, notary of His Majesty and of the aforementioned Señor Marques's government, he explained that on behalf of His Majesty and by virtue of the latter's royal provision

and in fulfillment of what had been contracted with His Majesty concerning the discovery of the aforesaid South Sea, he had discovered the aforesaid land by means of his ship and armada, that in order to conquer and colonize and pursue the aforesaid discovery, he had come with his armada and men; that therefore he wished to take possession of the aforesaid land and of all the other lands which from it may continue, be found, and discovered; and that therefore he was asking, did ask, and ordered me, the aforementioned notary, to give testimony of what he had said and of what would take place.³

Somewhat more subdued, and seemingly very appropriately English, was the act performed in Newfoundland by Sir Humphrey Gilbert in 1583—some eighty-seven years after John Cabot had claimed the area of Cape Breton for England. The chronicler of the expedition wrote the following description of the ceremony:

Monday following, the General had his tent set up, who being accompanied with his own followers, summoned merchants masters, both English and strangers to be present at his taking possession of those countries. Before whom openly was read and interpreted unto strangers his commission: By virtue whereof he tooke possession in the same harbour of S. John and 200 leagues every way. Invested the Queenes Majestie with the title and dignitie thereof, had delivered unto him (after the custome of England) a rod and a turffe of the same soile, entring possession also for him his heires and assignes for ever; and signified unto all men that from that time forward, they should take the same land as territorie appertaining to the Queene of England, and himself authorised under her Majestie to possesse and enjoy it. And to ordaine lawes for government thereof, agreeable (so neere as conveniently might be) unto the lawes of England: under which all people coming thither hereafter eight to inhabite, or by way of trafficque, should be subjected and governed. . . .⁴

While the English acts, as exemplified by that of Humphrey Gilbert, followed traditional British practices and excluded religious practices and symbols, the French explorers generally celebrated a ceremony very similar to that of some Spaniards. Perhaps the most colorful French act performed was that of the former Jesuit scholastic, René Robert Cavalier, Sieur de La Salle when he

took possession of the entire Mississippi Valley in 1682. According to the notary's *proces verbal*,

The whole party under arms chanted the *Te Deum*, the *Exaudiat*, the *Domine Salvum Fac Regem*, and then, after a salute of firearms and cries of 'Vive le Roi,' the column was erected by M. de La Salle, who standing near it, said, with a loud voice, in French: . . . "In the name of the most high, mighty, invincible, and victorious Prince Louis the Great, by the grace of God, King of France and Navarre, Fourteenth of that name, this ninth day of April, 1682, I, in virtue of the commission of his Majesty . . . have taken, do now take in the name of his Majesty and of his successors to the crown, possession of this country of Louisiana, the seas, harbors, ports, bays, adjacent straits; and all nations, people, provinces, cities, towns, villages, mines, minerals, fisheries, streams, and rivers comprised in the extent of Louisiana, from the mouth of the great River St. Louis on the eastern side, otherwise called Ohio, . . . as also along the River Colbert of Mississippi, and rivers which discharge therein from its sources; . . . as far as the mouth at the sea or Gulf of Mexico, . . . upon the assurance we have received from all these nations that we are the first Europeans who have descended or ascended the River Colbert, hereby protesting all those who may in the future undertake to invade any or all of these countries, people, or lands above described . . . I hereby take to witness those who hear me, and demand an act of the notary as required by law."

To which the whole assembly responded with shouts of 'Vive le Roi' and salutes of firearms. Moreover, the said Sieur de La Salle caused to be buried at the foot of the tree to which the cross was attached a leaden plate, and on one side of which were engraved the arms of France and the following inscription:

LUDOVICVS MAGNVS REGNAT NONO APRILIS CIG IGC
LXXXII ROBERTVS CAVILIER, CVM COMINO DE TONTY,
LEGATO, R.P. ZENOBIO MEMBRE, RECOLLECTO, ET
VIGINTI GALLIS, PRIMVS HOC FLVMEN INDE AB ILLNE-
ORVM, ENAVIGAVIT, EJVSQVE ESTIVM FECIT PERVIUM
NONO PARILIS ANNI CIG IGC LXXXII.⁵

Although there were countless acts similar to La Salle's and others previously mentioned, these should be sufficient to present

an excellent picture of the ceremony of possession-taking and the importance with which it was regarded by the officials and monarchs of the colonizing countries of Europe.

VALIDITY OF ACTS OF SOVEREIGNTY

One question that arises is whether the acts of sovereignty possessed legal validity. Were they recognized by the various European colonizing nations of the Age of Discovery as means of obtaining ownership of the region where they were performed, or were they merely "empty ceremonials" that were ignored by all the imperial powers of Europe except Spain?

Thorough historical research in the archives of Spain, England, Mexico, and the United States has proved that in the fifteenth, sixteenth, seventeenth, and eighteenth centuries, the symbolic acts of sovereignty obtained ownership of newly discovered territory for the nation on whose behalf it was performed. Furthermore this new ownership—with few exceptions—was respected and recognized by the other colonizing nations of Europe except the Netherlands. Although the question of the validity of possession-taking is a thesis in itself, the presentation of essential historical data will serve to show the acceptance of the rights arising from symbolic acts.

The Portuguese ownership of the Atlantic Islands where the act of sovereignty was performed first was never challenged. Furthermore, Portugal's claim to the territories of Madeira and the Cape Verde Islands and even to the African and Brazilian areas was never challenged by any nation. The only Atlantic areas which Portugal lost were the Canaries, where Spain and the Papacy joined hands in chiseling the Portuguese out of these islands. It should be pointed out, however, that the Canaries apparently were never claimed by a Portuguese solemn act of possession and also that the Papacy's grant of them to Spain was invalid because it was not based on international law but on false theological assumptions.⁶

Actually, European nations other than Spain paid little attention to Papal grants and donations. From the beginning they based the acquisition of sovereignty over *Terra Nullius* (land unknown to Europeans) simply on their discovery and symbolic

possession-taking. Thus Spain established her claim to San Salvador and a portion of the New World when Columbus made his discovery and took possession of the area which had been granted previously to Portugal by the encompassing and illicit papal bulls of 1454, 1456, and 1481. Moreover, Spain did not rely upon Alexander Borgia's Papal Donation for her claim in the Indies. This is evident from the words of Fernando Colon, Columbus's illegitimate son, who wrote: "Soon afterwards, acting on the advice of the admiral, the Catholic Sovereigns decided to strengthen their title to those lands by securing the Supreme Pontiff's approval and grant of their conquest of the Indies." Furthermore, even after the Papal Donation to the Catholic Monarchs, the rulers of Spain themselves ignored the Papal Demarcation Line and managed to retain the Philippines which they claimed by right of discovery and symbolic possession-taking, despite the location of the islands in the Portuguese sphere granted by the Pope in the Demarcation Edict of 1493.⁷

Spain was not the only country which ignored Papal presumptions. Catholic England and France acted likewise. As early as 1496 Henry VII of England allowed Giovanni Caboto (John Cabot) to sail to the New World. It was on the basis of his discovery and symbolic act in 1497 that England claimed and established her colonies in New England and Virginia.⁸ Later, the British conquered New Netherlands, alleging that the territory had been symbolically claimed previously by them. France, which entered the colonizing arena later than England when the monarch François Valois sent Giovanni Verrazzano to America, also relied upon acts of sovereignty and not upon Papal pronouncements. Stating that he had not seen the clause in Adam's will giving Spain one-half of the world, François Valois and his successors established their right to colonize Canada on the basis of Verrazzano's alleged act.⁹

Throughout the fifteenth and sixteenth centuries the European colonizing nations adhered to and recognized the rights of ownership derived from symbolic acts. By the seventeenth century, however, the Netherlands, which had missed out in the early scramble for claiming *Terra Nullius*, rejected the validity of symbolic acts of sovereignty for acquiring territory and proclaimed

the doctrine that unoccupied territory (meaning unoccupied by Europeans) could only be acquired by permanent settlement. Relying upon this doctrine, the Dutch occupied New Netherlands. They, however, were displaced in 1664 by the English, who defended their action on the basis of having taken symbolic possession of the area before the Dutch established their settlement. Yet, the Dutch had already more than compensated for this loss by forcibly taking the colonized Portuguese East Indies. The French, unlike the Dutch, did not reject the validity of symbolic acts consistently. Although they continued to claim territory by performing many acts, they nevertheless rejected England's Elizabethan possession-taking ceremonies in the Hudson Bay area because these gave the English first claim. Despite the French action, England, as in the case of New Netherlands, successfully defended her claims to the area. Thus, it is evident that Spain and England throughout the first three centuries of the Age of Discovery were avowed supporters of the validity of possession-taking acts for obtaining ownership of newly discovered territories which in reality belonged to the aborigines who may have inhabited them.¹⁰

In the eighteenth century, at least up to the Nootka Sound dispute in the 1790's between Spain and England, the attitude of the European nations concerning the validity of symbolic acts of sovereignty remained almost exactly the same as in previous centuries. After the Nootka Sound dispute over claims to the Pacific Northwest, England followed an ambivalent course in accepting the validity of symbolic acts. When it suited her, as in the case of the Malvinas (Falkland Isles), she upheld their validity; when it was detrimental to her imperialistic ambitions, as occurred at Nootka, she rejected their validity. France, on the other hand, returned to her original position and accepted the validity of the ceremonies. The Netherlands continued to maintain its doctrine that such acts were invalid and that permanent occupation was the sole basis for acquiring sovereignty over discovered area unoccupied by Europeans. Only Spain, despite the forced loss of her sovereign rights in the Pacific Northwest, remained steadfast in her adherence to the original doctrine that possession-taking granted ownership of *Terra Nullius*. Spain's legal basis for acquiring colonial possessions was and remained the symbolic act of

possession which was the accepted legal practice of the period. Thus Spain's claims and rights—viewed from the European and not the aboriginal viewpoint—were just and well founded.¹¹

Finally, regarding New Mexico, Spain's legal basis for sovereignty likewise was based upon early and repeated ceremonies such as the various acts of Francisco Sánchez Chamuscado, Antonio de Espejo, and Constaño de Sosa. These acts of possession, followed by occupation in 1598, were the basis for Spanish sovereignty which passed first to Mexico and subsequently to the United States of America.

The act of possession-taking is not solely a relic of ancient times. The twentieth century also has its examples, the most recent symbolic act being enacted on man's first moon walk. No one country can claim such possession in these days, however. The United States flag was planted, but possession was taken in the name of mankind.

NOTES

1. Bartolome de las Casas, *Historia de Las Indias*, 3 vols. (Mexico, 1951), I:201-02.

2. Gonzalo Fernandez de Oviedo y Valdés, *Historia General y Natural de las Indias, Islas y Tierra-Firma del Mar Océano* (Madrid, 1853), Lib. XXIX, Cap. III.

3. Bernal Diaz del Castillo, *Historia Verdadera de La Conquista de la Nueva España* (Mexico, 1950), p. 61.

4. "A Report of the Voyage and Success thereof, Attempted in the Yeere of Our Lord 1583 by Sir Humfrey Gilbert Knight" in Richard Hakluyt, *The Principle Navigations, Voyages, Traffiques and Discoveries of the English Nation*, 12 vols. (Glasgow, 1903-5), 8:53-55.

5. "La Salle's *Proces-Verbal*, March 14, 1682," *Collections of the State Historical Society of Wisconsin (CSHSW)*, 11 (1886):29-32; "La Salle's *Proces-Verbal*, April 2, 1682," *CSHSW*, 11 (1886):33-35.

6. Manuel P. Servín, "The Act of Sovereignty in the Age of Discovery" (Ph.D. diss., University of Southern California, 1959), pp. 29-31.

7. Servín, "Act of Sovereignty," pp. 32-35.

8. Servín, "Act of Sovereignty," p. 105.

9. Servín, "Act of Sovereignty," pp. 96-98.

10. Servín, "Act of Sovereignty," pp. 101-03.

11. Servín, "Act of Sovereignty," pp. 140-44.