JUDGES FOR BRITISH SUBJECTS IN SPANISH EAST FLORIDA

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"In the situation of our Affairs, it gives me the most sincere pleasure, that the protection of the Persons and Property of His Britannic Majesty's Subjects, is entrusted to your Excellency."

British Governor Patrick Tonyn to
Spanish Governor Vicente Manuel Zéspedes
St. Augustine, Spanish East Florida, July 5, 1784 [1]

INTRODUCTION

With these words, Governor Tonyn recognized the transfer of sovereignty of St. Augustine and the province of East Florida to Spain. British subjects and their property were now uncomfortably under the protection of Spanish Governor Zéspedes and Spain's Catholic Majesty Charles III. For Zéspedes, the British governor and his subjects could not get out of the city and the province fast enough. The process took a little

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1. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 5, 1784), EF: b40, *in* JOSEPH BYRNE LOCKEY, EAST FLORIDA 1783-1785: A FILE OF DOCUMENTS ASSEMBLED, AND MANY OF THEM TRANSLATED 214 (1949) (hereinafter LOCKEY). For manuscripts translated and transcribed in this work, I have maintained the references provided for each document in that collection. Items with references to the Public Record Office (PRO) are now found in The National Archives (Kew). I have consulted other documents in the East Florida Papers (EFP) Manuscript Div., Library of Cong., through "Records of East Florida" found in Slavery and Anti-slavery, A Transnational Archive. These are: Correspondence between the Governor and Subordinates on the St. John's and St. Mary's Rivers, 1784-1786 (corresponding to EFP, Box 192, Reel 45, Bundle 118A10 in the Library of Congress microfilm edition); Memorials, 1784-1788 (corresponding to EFP, Box 237, Reel 76, Bundle 179J14); Miscellaneous Legal Instruments and Proceedings, 1784-1786 (corresponding to EFP, Box 294, Reel 110, Bundle 261N5); Records of Criminal Proceedings, 1785-1787 (corresponding to EFP, Box 315, Reel 121, Bundle 283), Records of Civil Proceedings, 1785-1790 Mar. (corresponding to EFP, Box 368, Reel 150, Bundle 329R7), and Miscellaneous Records, 1784-1858 (corresponding to EFP, Box 439, Reel 173, Bundle 385). I have selected the method best suited to identify the page or folio within these collections.

less than three years, from the first official agreement on the transfer on January 20, 1783, until the departure of Governor Tonyn from East Florida on November 13, 1785.[2]

In these years when power, sovereignty, jurisdictions, religions, and cultures overlapped and conflicted, Zéspedes managed his British population with law and legal innovation. This episode exposes jurisdictional battles tied to sovereignty in a legally plural, imperially liminal place and moment. It reveals gaps in legal understanding between imperial actors and established prejudices between the British common law and Spanish civil law in criminal, civil, and procedural matters. These distances were exacerbated by a lack of informed legal experts. The British leadership and population yearned for stability in place and law during their long departure from East Florida. The Spanish leadership responded with assertions of absolute sovereignty and not a little ingenuity.

Zéspedes's most novel creation to govern this large British population was the establishment of "Judges over his Britannic Majesty's Subjects" and his attempts to provide transitional civil and criminal law in this legally plural society.[3] The creation of judges for British subjects stemmed from centuries of Spanish practice adapting law, institutions, and structures to its colonial enterprise. Spanish judges for British subjects were a continuation of legal and institutional adaptations commonly employed throughout the Spanish empire; they were a practical solution to a unique problem Zéspedes encountered when he assumed the Spanish governorship of a British province filled with British subjects.

The British population was not able to depart the province quickly and had to dispose of its property and settle its debts. These activities were carried out during a period of overlapping jurisdictions and authorities each pressing for recognition and control. Despite Spanish rule, the British governor exercised a kind of *de facto* jurisdiction of British subjects that challenged the universality of Spanish sovereignty on the ground. This British jurisdiction was asserted under contested interpretations of treaty rights and obligations.

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2. HELEN HORNBECK TANNER, ZÉSPEDES IN EAST FLORIDA, 1784-1790, at 66 (1989) (hereinafter TANNER); CHARLES LOCH MOWAT, EAST FLORIDA AS A BRITISH PROVINCE 1763-1784, at 141 (1943).

3. Letter from Patrick Tonyn to Lord Sydney, St. Augustine (Dec. 6, 1784), PRO:CO, 5/561, p. 28, *in* LOCKEY, *supra* note 1, at 322.

On January 20, 1783, Britain and Spain signed preliminary articles of peace in Paris, and both parties ratified the treaty by the end of the month.[4] Under this preliminary treaty, British subjects had eighteen months "to sell their estates, recover their debts, and to transport their effects, as well as their persons, without being restrained on account of their religion, or under any other preten[s]e whatsoever, except that of debts and criminal prosecutions."[5] These eighteen months were measured from the ratification of the final treaty on September 19, 1783.[6] Another provision of the treaty required Great Britain to evacuate East Florida within three months after the treaty's ratification[7]. Thus, the parties to the treaty contemplated that the British population of East Florida would swiftly exit from the province, leaving Spain to establish its sovereignty over Spanish subjects who would arrive shortly after the transfer of power.

This represented the best-case scenario for Spain. Nonetheless, Spain could extend the deadline if British subjects were unable to sell their property for sufficient value.[8] The quick and orderly evacuation expected under the treaty provisions did not materialize on the ground.[9] The original eighteen-month period under the treaty expired on March 19, 1785, but was later extended by governor Zéspedes to July 19, 1785.[10] Even this extension proved to be insuffient for the task. British subjects were delayed in their departure by lingering, false hopes that the transfer to Spain would be undone, by a lack of sufficient ships to transport people and property, and by a desire to collect outstanding debts.[11]

Under the preliminary treaty, British residents of East Florida had advance notice of its provisions for at least eight months before its implementation.[12] British subjects began their departure in February 1783, and continued relocation to other British provinces such as the Bahamas and

4. LOCKEY, *supra* note 1; Preliminary Articles of Peace between Spain and England, Spain-England, Versailles (Jan. 20, 1783), *in* LOCKEY, *supra* note 1, at 54-57.

5. LOCKEY, *supra* note 1, at 4.

6. *Id.* at 5; Definitive Treaty of Peace between England and Spain, Versailles (Sept. 3, 1783), *reprinted in* LOCKEY, *supra* note 1, at 142-47.

7. *Id.* Art. X at 147; LOCKEY, *supra* note 1, at 7.

8. *Id.* at 5.

9. Carole Watterson Troxler, *Loyalist Refugees and the British Evacuation of East Florida, 1783-1785*, 60 FLA. HIST. Q. 1, 2 (1981).

10. Letter Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (July 13, 1785) PRO:CO, 5/561, pp. 665-67, *in* LOCKEY, *supra* note 1, at 666-67.

11. Troxler, *supra* note 9, at 15-25.

12. LOCKEY, *supra* note 1, at 7

Nova Scotia for the next two years.[13] In June 1783, two shiploads departed East Florida, one for Jamaica and the other to New Providence.[14] This hardly put a dent in the British population.

On July 12, 1784, Governor Zéspedes took possession of the province for the Spanish crown and reestablished Spanish institutions, tribunals, and political structures under Spanish colonial law, *derecho indiano.*[15] This study will address several aspects of Zéspedes's reestablisment of Spanish sovereignty in East Florida. First, it presents the general structure of his government with a particular focus on legal institutions and *derecho indiano*. Second, it discusses Zéspedes's legal solutions to Spanish rule in the context of a persistent British population in East Florida during the transition. These solutions included judges for British subjects and ad hoc proclamations from the governor in the absence of comprehensive instructions from the king.

13. LOCKEY, *supra* note 1, at 7; 1 WILBUR HENRY SIEBERT, LOYALISTS IN EAST FLORIDA 1774 TO 1785: THE MOST IMPORTANT DOCUMENTS PERTAINING THERETO EDITED WITH AN ACCOMPANYING NARRATIVE 137-79 (1929).

14. LOCKEY, *supra* note 1, at 7.

15. *Derecho indiano*, or Spanish colonial law, is the body of law applied to the Americas, or Indies, by Spanish authorities. Although some aspects of *derecho indiano* applied to Indigenous communities, subjects, and legal actors, this body of law covered many more topics than merely Indigenous concerns, thus a frequent mistranslation of *derecho indiano* as "Indian law" is underinclusive and misleading. For the sources of *derecho indiano* and a sense of its scope, see M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 45-53 (2004). For the range of modern scholarship in the field, see NEW HORIZONS IN SPANISH COLONIAL LAW: CONTRIBUTIONS TO TRANSNATIONAL EARLY MODERN LEGAL HISTORY (Thomas Duve & Heikki Pihlajamäki, eds., 2015).

I. RE-ESTABLISHING SPANISH STRUCTURES

Florida was a Spanish province from the sixteenth to the nineteenth centuries, except for a twenty-year period from 1763 to 1783, when Great Britain held the region as two provinces divided by the Apalachicola River.[16] East Florida, with the capital St. Augustine, covered the peninsula; West Florida, with the capital Pensacola, contained a large swath running west to the Mississippi River including the panhandle, much of present-day Alabama, Mississippi, and a portion of Louisiana.[17]

Charles III appointed Zéspedes Governor and Captain General of East Florida on October 31, 1783. The order arrived in Havana, where Zéspedes was serving in the military, at the end of February 1784.[18] Zéspedes was a Castilian noble with a distinguished career in the military and in government; at sixty-four years old, this appointment was the capstone of his service to the crown.[19] Before his departure from Havana and arrival in St. Augustine, Zéspedes faced the tasks of organizing the new government, planning the proper use of the fort and hospital, arranging transportation for Spanish troops and settlers, developing a policy for Indigenous people, obtaining finances, and everything else related to reestablishing the province.[20]

This work was done with little imperial instruction and with woefully inadequate financial and material resources in the new province.[21] A letter from the Minister of the Indies informed Zéspedes that despite his position as Captain General, he was under the supervision of Bernardo de Gálvez as chief officer of both East and West Florida, as well as Louisiana.[22] This

16. Michael Gannon, *First European Contacts*, *in* THE HISTORY OF FLORIDA 18-40 (Michael Gannon ed., 2013); Susan Richbourg Parker & William S. Coker, *The Second Spanish Period in the Two Floridas*, *in* THE HISTORY OF FLORIDA 162-78 (Michael Gannon ed., 2013).

17. Robin F.A. Fabel & Daniel L. Schafer, *British Rule in the Floridas*, *in* THE HISTORY OF FLORIDA 144-61 (Michael Gannon ed., 2013).

18. Letter from José de Gálvez to Vicente Manuel de Zéspedes, San Lorenzo (Oct. 31, 1783), ANC:F, leg. 10, *in* LOCKEY, *supra* note 1, at 174; TANNER, *supra* note 2, at 16-18.

19. Patricia C. Griffin, *Introduction*, *in* TANNER, *supra* note 2, at xxii.

20. LOCKEY, *supra* note 1, at 8. For example, a list of employees for the hospital contains thirty-three people including administrators, a physician, a surgeon, a pharmacist, and ten servants. Juan Ignacio de Urriza, Employees for the Hospital at St. Augustine, Havana (June 1, 1784), EF:b54, B5, *in* LOCKEY, *supra* note 1, at 198-99.

21. LOCKEY, *supra* note 1, at 35-38.

22. Letter from José de Gálvez to Vicente Manuel de Zéspedes, El Pardo (Jan. 23, 1784), EF:b39, M3, *in* LOCKEY, *supra* note 1, at 182.

letter also indicated that Zéspedes would function as prior governors did and under the general public law established for the Spanish empire as set forth in Book 5, Title 2 of the *Recopilación de Leyes de las Indias*.[23] Thus, Zéspedes was on par in status and in obligations with other governors under *derecho indiano*. Other than such general provisions, it is not clear what additional documents or directions Zéspedes had to guide him. In March 1784, he wrote his superiors awaiting the commissions.[24] In February 1785, he wrote awaiting instructions.[25] Furthermore, a trunk from Havana containing correspondence from the first Spanish period was dispatched to him for his assistance.[26] Zéspedes studied these documents.[27] Until new orders were received, Zéspedes was bound by the extant *derecho indiano*.[28] In correspondence with the Governor of Georgia in which Zéspedes refused to return enslaved humans escaping to East Florida, he expressed his constraints under extant law:

> I am under orders to conform in all ways to the old regulations of this government until I receive new instructions. One of the provisions of the old rule is that no fugitive Negro from Georgia be returned, as the London court refused to reciprocate. I explained at the same time to His Majesty the circumstances that Georgia is not now, as it was then, a British colony, and I am anxiously awaiting the reply to my letter in sincere hope that His Majesty will authorize me, as I should be pleased to do, to comply fully with Your Excellency's demands.[29]

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23. *Id.*; 2 RECOPILACIÓN DE LEYES DE LOS REYNOS DE LAS INDIAS 144-53 (Madrid: A. Ortega, 1774). For a description of this fundamental source of *derecho indiano* see M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 47-49 (2004).

24. Letter from Vicente Manuel de Zéspedes to José de Gávez, Havana (Mar. 3, 1784), EF:b40, *in* LOCKEY, *supra* note 1, at 185.

25. Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (Feb. 28, 1785), EF:b40, *in* LOCKEY, *supra* note 1, at 462.

26. Letter from Luis de Unzaga to Vicente Manuel de Zéspedes, Havana (Mar. 8, 1784), AGI: PC, leg. 1336, pp. 404-05, *in* LOCKEY, *supra* note 1, at 186.

27. Letter from Vicente Manuel de Zéspedes to José de Gálvez, Havana (Mar. 22, 1784), AHN: Est, leg. 3901, pp. 1-6, *in* LOCKEY, *supra* note 1, at 189.

28. *See generally* Duvon Clough Corbitt, *The Administrative System in the Floridas, 1781-1821*, 1 TEQUESTA 41-62 (1942).

29. Letter from Vicente Manuel de Zéspedes to John Houstoun, St. Augustine (Nov. 28, 1784), EF:b108, D9, *in* LOCKEY, *supra* note 1, at 316. Although comprehensive regulations for East

Zéspedes was not provided with a legal adviser (*Asesor y Auditor de Guerra*).[30] This impeded his ability to address fully the legal needs of the province.[31] Other officials formed a functioning group of individuals carrying out a working, if not specifically defined, provincial government. Carlos Howard, a Spanish soldier of Irish descent who spoke fluent English, served as Zéspedes's Secretary of Government.[32] Provisions and pay were made for treasury officials and a notary who tended to routine financial and legal matters.[33]

Departing Havana on June 19, 1784, Zéspedes arrived ashore in St. Augustine on June 27, 1784.[34] His arrival party included about 15 ships carrying supplies, 500 soldiers, and another several hundred people who served in government with their families.[35] These Spaniards were vastly outnumbered by the massive British population uncomfortably stranded in East Florida. At the time of Zéspedes's arrival, St. Augustine contained approximately 16,000 British inhabitants,[36] many of whom had arrived in recently past years as loyal British subjects forced to flee Georgia and South Carolina with the hopes and assurances that East Florida would continue as a loyal British province. Approximately 460 Minorcans, Greeks, and Italians chose to stay and requested to become Spaniards.[37] At least 200 Blacks of enslaved or free status chose or were forced to remain.[38] Although not present in St. Augustine and the smaller urban settlements, Native Americans were an important part of the regional population. Having joined British troops, supported British settlements, and engaged in extensive

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Florida were contemplated, they were not drafted or completed during Zéspedes's governorship. Corbitt, *supra* note 28, at 57-59. Zéspedes left East Florida on July 15, 1790, and permanent regulations were completed in 1791. See *infra* notes 234 and 235 and accompanying text.

30. TANNER, *supra* note 2, at 27.

31. Griffin, *supra* note 19, at xxiii.

32. Letter from Vicente Manuel de Zéspedes to José de Gálvez, Havana (Mar. 3, 1784), EF:b40, *in* LOCKEY, *supra* note 1, at 183-84; TANNER, *supra* note 2, at 26-27.

33. Juan Ignacio de Urriza, Government Employees Destined for St. Augustine, Havana (June 7, 1984), EF:b54, B5, *in* LOCKEY, *supra* note 1, at 202-03.

34. Letter from Raymundo de Onís to José de Gálvez, Havana, June 19, 1784, AGI: SD, leg. 2660, *in* LOCKEY, *supra* note 1, at 213; Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (July 16, 1784), AGI: SD, leg. 2660, pp. 1-11, *in* LOCKEY, *supra* note 1, at 223; TANNER, *supra* note 2, at 28.

35. Letter from Luis de Unzaga to Vicente Manuel de Zéspedes, Havana (June 7, 1784), AGI: PC, leg. 1336, pp. 340-55, *in* LOCKEY, *supra* note 1, at 205-06; TANNER, *supra* note 2, at 24.

36. LOCKEY, *supra* note 1, at 10.

37. TANNER, *supra* note 2, at 34.

38. LOCKEY, *supra* note 1, at 11.

trade, Native Americans felt betrayed by Great Britain's secession of East Florida to Spain.[39] Nonetheless, with the exception of a provision on murders crossing Spanish and Native communities, Indigenous peoples were ancillary *legal* actors in British or Spanish imperial policy in East Florida.[40] Furthermore, some prominent individuals from the British period also chose to remain, including Francis Philip Fatio, John Leslie, and Jesse Fish—all noted individuals in the history of East Florida.[41] Touring the province in 1787, Zéspedes noted 123 loyalists with twenty-two slaves in the northern areas bordering Georgia.[42]

The total population, including soldiers in the fort, settled in at approximately 3,000 people after all the British subjects who wanted to leave had departed over a period of nearly two years.[43] On April 5, 1786, the Spanish king normalized the status of remaining British Protestants who were granted permission to live under Spanish protection, and he sought an additional English-speaking priest from Ireland to encourage their conversion to Catholicism.[44] By 1789, Father Hasset reported that 98 of 295 British Protestants had converted to Catholicism.[45]

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39. Substance of Indian Talks Delivered to Governor Tonyn, St. Augustine (May 15, 1783), PRO: CO 5/110, pp. 71-74, *in* LOCKEY, *supra* note 1, at 109-10; Bernardo del Campo to Conde de Floridablanca, London (Aug. 9, 1783), Extract from the Gazette of July 26, 1783, *in* LOCKEY, *supra* note 1, at 139-40.

40. Nancy O. Gallman & Alan Taylor, *Covering Blood and Graves: Murder and Law on Imperial Margins*, *in* JUSTICE IN A NEW WORLD: NEGOTIATING LEGAL INTELLIGIBILITY IN BRITISH, IBERIAN, AND INDIGENOUS AMERICA 228-30 (Brian P. Owensby & Richard J. Ross eds., 2018).

41. LOCKEY, *supra* note 1, at 12-13.

42. TANNER, *supra* note 2, at 129.

43. *Id.* at 136.

44. *Id.* at 146-47.

45. *Id.* at 175.

On Zéspedes's arrival in St. Augustine, British Governor Patrick Tonyn consulted his legal officers about the survival of British law during the transition.[46] On the receipt of this advice, Tonyn informed the Spanish governor on July 5, 1784 that British law no longer operated in its full sense and that all persons and property were now under the legal protection of Zéspedes and the Spanish crown.[47] He wrote:

> I have consulted with the law Officers, and it is their opinion, that the British Laws, could no[] longer operate with strict legal propriety, in their usual Channel, after the period your Excellency landed in this Province, and produced the royal Mandates of our respective Courts, to deliver up, and to receive, the Sovereignty of this Country.[48]

British tribunals could no longer hold session, and there are no records of British courts in East Florida after this date. Nonetheless, in this twilight zone of imperial transition, British law continued until Spanish law was imposed by proclamation. On July 10, 1784, Tonyn wrote Zéspedes:

> I beg leave to mention to your Excellency, as my opinion, that no British Subject, can possibly be amenable to your Government, for any crimes committed previous to your taking possession of the Country, where the English Laws will remain in force 'till altered by a Proclamation from the new Sovereign.[49]

Similarly, the governors agreed that anyone not protected by the British government would not be protected by the Spanish government.[50] A British outlaw was a Spanish outlaw.

Despite these understandings, it was not clear whose law governed in the twilight between July 5, 1784, and July 14, 1784, the date Spain assumed complete sovereignty. And, as luck would have it, there was a substantial

46. LOCKEY, *supra* note 1, at 8-9.
47. *Id*.
48. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 5, 1784), EF:b40, *in* LOCKEY, *supra* note 1, at 214.
49. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 10, 1784), EF; b40, *in* LOCKEY, *supra* note 1, at 219.
50. *Id.* at 220.

crime committed, or perhaps committed, in this window: the theft of eight enslaved humans from Samuel Farley.[51] Other aspects of the case are discussed later, but it seems important to consider the exact day the crime was committed because it sheds light on the transition of sovereignty and jurisdiction. Farley alleged that the slaves were stolen on July 13 and in another document on July 15, either one day before or one day after Spanish assumption of sovereignty.[52] Zéspedes noted this difference and mentioned its important effects.

> It was without doubt an error in the British Governor to have delayed the delivery of the place from the 27th of June when the [Spanish] Governor disembarked to the 12th of July in the afternoon – If the English Laws could not operate neither was it regular that the Spanish should, of course the delay of the delivery was to suspend in effect all operation of Justice, Spanish or British and to concur directly that there should reign as in fact there did reign in the intermediate space from the disembarking of the Governor to the delivery of the place a species of Anarchy during which especially in the Country various excesses were committed, which have remained without punishment, and it is to be noted that the British Governor in his official Letters from the beginning established it as a rule and maxim that the Spanish Governor had no authority to make any retrospection into any thing that had happened prior to his receiving the place.[53]

In accordance with the British governor's assertions, the Spanish governor agreed not to take cognizance of anything that occurred before July 14, 1784.[54] Thus, the Spanish governor argued for the possibility of a gap in sovereignty in which neither British nor Spanish institutions and law were in effect. This period, in which Farley's enslaved humans were stolen, was an anarchy in which criminal acts went unpunished. British authorities

51. Paper by way of reply to Samuel Farley, St. Augustine (Oct. 23, 1784), PRO:CO, 5/561, pp. 521-23, *in* LOCKEY, *supra* note 1, at 593-94.
52. *Id.* at 593.
53. *Id.* at 593-94.
54. *Id.* at 594.

later argued that this potential gap in sovereign power was contemplated and properly addressed.[55] This document, apparently written by former Chief Justice James Hume but without a stated author, concluded on this point, "one thing appears very clear, that if any interregnum happened it was not with the will or concurrence of Governor Tonyn."[56] Hume served as Tonyn's legal adviser throughout the evacuation; he was the most legally educated person in St. Augustine.[57]

This interregnum was short and affected only Farley and a few others. On July 14, 1784, Zéspedes announced by proclamation the beginning of Spanish rule in East Florida.[58] British subjects, and more importantly, British Governor Tonyn, lagged on in the province creating administrative and legal challenges for the Spanish governor. Tonyn was instructed to remain in East Florida to supervise the orderly departure of British subjects.[59] Two days after the transfer of power, Zéspedes wrote his superior Bernardo de Gálvez that he was awaiting royal orders of how to proceed.[60]

The governors coordinated activities closely, and although living just a few houses apart during this period, they left a substantial amount of official written communications that detailed every major event, issue, and conflict.[61] Despite heated disputes over the proper resolution of matters related to the security of the province, the status of enslaved humans, property claims, and commercial affairs, and despite mutual prejudices engrained for centuries, British officials recognized Zéspedes's justice and humanity.[62] Jurisdictional encroachments, however, were frequent.

55. Tonyn's legal advisers suggested that "the Epocha of the change of Governments ought to be fixed betwixt the two Governors to commence from the time of the landing of His Catholic Majesty's representative; one of the reasons that operated with them was, that there might be no Interregnum." The Case of Samuel Farley, no date, PRO:CO, 5/561, pp. 577-81, *in* LOCKEY, *supra* note 1, at 621.

56. *Id.* at 623.

57. M.C. Mirow, *The Thistle, the Rose, and the Palm: Scottish and English Judges in British East Florida*, *in* NETWORKS AND CONNECTIONS IN LEGAL HISTORY 111-13 (Michael Lobban & Ian Williams eds., 2020).

58. TANNER, *supra* note 2, at 36.

59. Letter from Lord North to Patrick Tonyn, Whitehall (Dec. 4, 1783), PRO: CO 5/560, p. 732, *in* LOCKEY, *supra* note 1, at 180.

60. Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (July 16, 1784), AGI:SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 230.

61. LOCKEY, *supra* note 1, at 13-14.

62. TANNER, *supra* note 2, at 52.

Zéspedes summarized his view of the former governor and former Chief Justice James Hume, this way: "He rarely leaves his house where, usually shut in with the quarrelsome chief justice, the two are busily engaged in prying into my actions and misinterpreting my decisions."[63] Even after a full year of joint presence in St. Augustine, on July 19, 1785, Zéspedes felt compelled to remind Tonyn that Britain had no authority in East Florida and should expect nothing but Spanish hospitality.[64]

Conflict between these two soldiers-turned-men-of-state was inevitable, and political and jurisdictional battles were ignited by several of Zéspedes's proclamations dealing with important matters requiring immediate resolution. Three main areas of dispute haunted Zéspedes's first years. First was the question of how to deal with a massive British population. Second was the question of criminal law and maintaining public order. Third were questions related to the status and ownership of enslaved humans. Zéspedes's effective provision of justice to a heterogeneous, and mostly foreign, population exhibited his creativity in establishing Spanish rule. Because both criminal law and the status and legal position of enslaved humans overlap with the British population, it seems best to begin here.

63. Letter from Vicente Manuel de Zéspedes to José de Gálvez, St. Augustine (June 6, 1785), AGI:SD, leg. 2660, *in* LOCKEY, *supra* note 1, at 553.

64. TANNER, *supra* note 2, at 64.

II. JUDGES FOR BRITISH SUBJECTS

Zéspedes had to provide justice. For Spaniards, Zéspedes effectively resolved legal disputes.[65] What, however, should be done to provide justice for his British guests? On July 14, 1784, Zéspedes announced by proclamation the beginning of his rule in Florida.[66] One provision of the proclamation of July 14 referred disputes between British subjects to British judges.[67] It states, "Likewise, I publish and declare that in case any quarrel, litigation, or difference arises between purely British subjects, it is my desire that the decision be made by arbiters of their own nation, which decision will receive the full backing of my authority."[68] Zéspedes appointed Francis Fatio and John Leslie to serve in these positions. The work of these men mostly revolved around title to enslaved humans, the collection of debts, and criminal causes.[69] Although their function was to provide justice to British subjects, they were not welcomed by this community. Their lives indicate that they were not well-trained or well-suited for the assigned task under the Spanish governor.

Fatio was born in Switzerland on Lake Geneva in 1724.[70] After living in England since 1759, he and his family moved to East Florida in 1771 during the British period and established a substantial plantation called New Switzerland along the St. John's River to the northwest of St. Augustine.[71] Fatio remained in Florida after the British departure; as a supplier of

65. In sparsely populated Spanish provinces, governors often served as the chief judicial official. M.C. MIROW, LATIN AMERICAN LAW: A HISTORY OF PRIVATE LAW AND INSTITUTIONS IN SPANISH AMERICA 25 (2004). For Zéspedes's judicial activities in East Florida during this period, see M.C. Mirow, *Causas Civiles en la Florida Oriental*, 1785-1821, *in* HISTORIA DEL DERECHO: DÉCADAS DE INVESTIGACIÓN Y DE DOCENCIA HOMENAJE A ABELARDO LEVAGGI 308 gráfico 1 (Ricardo Rabinovich-Berkman & Agustín Parise eds., 2016); M.C. Mirow, *Testamentary Proceedings in Spanish East Florida, 1783-1821*, *in* STUDIES IN CANON LAW AND COMMON LAW IN HONOR OF R. H. HELMHOLZ 289 fig. 1 (Troy L. Harris ed., 2015).

66. TANNER, *supra* note 2, at 36.

67. *Id.* at 39.

68. Proclamation of Governor Zéspedes (July 14, 1784), AGI: SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 235.

69. TANNER, *supra* note 2, at 49. Francis Fatio's son, Lewis or Luis Fatio, also served in this position but the extant documents indicate that he was much less active than his father. Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (Feb. 28, 1785), EF:b40, *in* LOCKEY, *supra* note 1, at 462.

70. Susan R. Parker, *I Am Neither Your Subject nor Your Subordinate*, *in* CLASH BETWEEN CULTURES: SPANISH EAST FLORIDA 1784-1821, 46 (Jacqueline K. Fretwell & Susan R. Parker, eds., 1988).

71. Parker, *supra* note 70, at 45, 46, 54.

provisions to Spanish troops, he became a key figure in East Florida trade and civic life.[72] On Zéspedes's arrival in Florida, Fatio applied to become a Spanish subject.[73] By serving as a trusted agent who continued in Spanish territory after the departure of the British, Fatio also benefitted from the sale of British property. Fatio purchased property with the agreement that he would hold it for the British owner and would dispose of it for a fair price later. This ensured that the British property was not subject to seizure by Spanish authorities, and Fatio held such property in a type of secret trust.[74] He died in St. Augustine in 1811.[75]

The other judge of British subjects, John Leslie was a principal of the major trading firm, Panton, Leslie & Co. He was baptized in Rothes, Scotland, near the Moray Firth north of the Grampian Mountains in October 1749.[76] Records indicate that he was in St. Augustine by 1777 and that in 1779, he established a trading partnership with William Alexander with its main office in Charleston, South Carolina.[77] This trading partnership became inactive in 1783 with the creation of Panton, Leslie & Co. in which both Leslie and Alexander were partners.[78] On June 6, 1783, Leslie joined an address to Governor Tonyn restating his allegiance to the British crown.[79] After serving as a judge, Leslie traded and represented Panton, Leslie & Co. in East Florida until his departure from St. Augustine in 1789.[80] In 1803, he died in London, survived by his wife, Elisabeth Cain of East Florida, who died two years later.[81]

Leslie was a respected member of the province's economic elite. Because Panton, Leslie & Co. had an extremely favored trading status under the Spanish crown, his leadership of the firm meant that Zéspedes might

72. Parker, *supra* note 70, at 47-51.

73. Memorial of Francis Philip Fatio, St. Augustine (Feb. 23, 1785), EF:b40, *in* LOCKEY, *supra* note 1, at 464.

74. Troxler, *supra* note 9, at 14.

75. Parker, *supra* note 70, at 60.

76. WILLIAM S. COKER & THOMAS D. WATSON, INDIAN TRADERS OF THE SOUTHEASTERN SPANISH BORDERLANDS: PANTON, LESLIE & COMPANY AND JOHN FORBES & COMPANY, 1783-1847, 19 (1986).

77. *Id.* at 23, 39.

78. *Id.* at 40, 43, 86. The five original partners were William Panton, Thomas Forbes, John Leslie, William Alexander, and Charles McLatchy. *Id.* at 363.

79. Address of the Principal Inhabitants to Governor Tonyn, St. Augustine (June 6, 1783), PRO: CO 5/560 p. 628, *in* LOCKEY, *supra* note 1, at 112-15.

80. COKER & WATSON, *supra* note 76, at 47, 215-16.

81. *Id.* at 46-47.

turn to him for advice and favors. Indeed, by the beginning of 1785, Zéspedes owed Panton, Leslie & Co. $3,000, and Leslie continued to advance Zéspedes goods for Indian trade in the following years.[82] These economic, social, and political ties to Spain meant that Zéspedes trusted Leslie to carry out British justice in the name of the Spanish governor and king.

In practice, these judges wielded tremendous power under their Spanish authority. Fatio's power went to his head on more than one occasion. In one dispute he urged a party to accept arbitration because otherwise he, Fatio, would decide the case under the present principles of government that he described as "Arbitrary Despotic Chancery Equity Law"— a nonsensical collection of words related to English law echoing longstanding common law fears of equity.[83] Others argued that Fatio augmented his own wealth in cases dealing with slavery. When an enslaved human was declared property of the crown, Fatio as judge received one-third the value of the slave.[84] And in other contexts, pending the determination of the slaveholder, Fatio might petition the Governor for temporary ownership.[85] Fatio's profit in the course of dispensing justice was a point of a heated exchange between Zéspedes and the former Chief Justice Hume.[86] Fatio also was ordered to investigate an act of piracy committed on Jesse Fish's plantation on Anastasia Island and noted the expansion of his jurisdiction in the statement submitted to Zéspedes.[87]

Tonyn found fault with judges for British subjects appointed by the Spanish governor. In December 1784, he complained that these "Justices of the Peace" assumed an extensive jurisdiction and that they styled themselves "Judge over His Britannic Majesty's Subjects."[88] They considered cases and facts that had occurred in British territory before the

82. *Id.* at 63.

83. Affidavit of David Zubly, St. Augustine (Oct. 4, 1784), *in* LOCKEY, *supra* note 1, at 385.

84. Roger C. Smith, The Fourteenth Colony: Florida and the American Revolution in the South 295-96 (2011) (Ph.D. dissertation, University of Florida) (on file with author).

85. EFP, Memorials, 1784-1821, No. 29, Aug. 27, 1785, pp. 217-18.

86. Smith, *supra* note 84, at 292-96.

87. In documents related to this case, Fatio states, "I Francis Philip Fatio Esquire, one of the Judges appointed by His Excillency Don Vincent Emanuel De Zespedes Bigadier General, Governor & Comandant General in the Province aforesaid to administer in first Instance Justice &. *And now Commanded by a Special order to Examine and Inquire into an Act of Piracy*." Deposition of Thomas Bell, St. Augustine (Jan. 24, 1785), EF:b108, D9, *in* LOCKEY, *supra* note 1, at 439-40 (emphasis added).

88. Letter from Patrick Tonyn to Lord Sydney, St. Augustine (Dec. 6, 1784), PRO:CO, 5/561, p. 28, *in* LOCKEY, *supra* note 1, at 322.

arrival of the Spanish and even challenged cases decided by British courts.[89] Furthermore, Englishmen who contracted under British law had the expectation that any dispute would be heard by British courts. Tonyn warned, "Great inconveniences my Lord, would ensue in agitating, and making liable, to the Jurisdiction of a Spanish Court of Judicature matters, when at the time of contracting, the Parties expected in case of controversy, it would be tried by a British Jury, and Court of Law."[90] Governor Tonyn continued "Mr. Fatio, being a Foreigner, has a very imperfect knowledge of the laws, language, and constitution of Great Britain, and is an obnoxious Character in the community. In his present function, he prejudges causes, and decides by whim and caprice."[91] In Tonyn's eyes, this was a Spanish scheme to deprive British subjects of their rights as Englishmen. It was unlike anything the regular royal courts of East Florida provided under English law.[92] East Florida courts during the British period were staffed with professional judges who had an adequate legal formation for their work.[93]

These judges for British subjects handled a number of significant and complicated legal disputes. I have selected a few cases to illustrate their function.

89. *Id.*
90. *Id.*
91. *Id.*
92. M.C. Mirow, *The Court of Common Pleas of East Florida 1763-1783*, 85 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 540-76 (2017).
93. Mirow, *supra* note 57, at 88-123.

A. Samuel Farley's Oath

In August 1784, Stephen White, a British subject, sold four enslaved humans to Stephen Egan, a British subject.[94] White established his title to the slaves through a forged bill of sale.[95] Egan claimed that White knew the document was forged when White sold the slaves to Egan.[96] Egan and White both responded to Fatio's summons, and White responded that he thought the document was genuine.[97] Before Fatio, as Judge in the province of East Florida for British subjects under the protection of His Catholic Majesty, White and Egan agreed to have the case submitted to four arbitrators who would decide the case.[98] Their decision and the report of Judge Fatio would then be forwarded to Zéspedes for his determination.

Egan selected two local merchants.[99] White named two individuals to whom Egan objected because of their low status in the community: one was a "seafaring man and a transient person not sufficiently known" and the other was only a "clerk of merchants."[100] White named two new arbiters, Samuel Farley and John Ross, two individuals of high status and with some legal training. Farley had served as a British Justice of the Peace in 1783 and 1984.[101] Ross had been a member of the first Commons House of Assembly of East Florida in 1781.[102] These two new arbiters refused to take the required oath, and the arbitration could not proceed.[103] White departed St. Augustine.[104] Egan was left without title to the enslaved humans.[105] Judge Fatio referred this case to the governor to provide proper relief to Egan.[106]

Samuel Farley's refusal to take the required oath as an arbitrator had

94. Francis Philip Fatio to Vicente Manuel de Zéspedes, St. Augustine (Aug. 30, 1784), EF:b195, M15, *in* LOCKEY, *supra* note 1, at 265.
95. *Id.*
96. *Id.* at 266.
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.* at 267.
101. Mirow, *supra* note 57, at 118.
102. CHARLES LOCH MOWAT, EAST FLORIDA AS A BRITISH PROVINCE 1763-1784, 164 (1943).
103. LOCKEY, *supra* note 1, at 267.
104. *Id.*
105. *Id.*
106. Letter from Francis Philip Fatio to Vicente Manuel de Zéspedes, St. Augustine (Aug. 30, 1784), EF:b195, M15, *in* LOCKEY, *supra* note 1, at 267.

unexpected consequences for him. As mentioned earlier, shortly after Zéspedes's arrival, the notorious outlaw Daniel McGirtt stole eight enslaved humans from Farley.[107] On August 16, 1784, Farley, as a British subject, petitioned Zéspedes, stating that slaves formerly belonging to Daniel McGirtt and sold to Farley by the Provost Marshall (evidently in the British period) were stolen by McGirtt sometime between July 13 and July 15, 1784.[108] There was inconsistency on the exact date in Farley's statements; July 14, 1784 seems most likely, and the exact date became a matter of dispute and of extreme legal importance.[109] The petition was referred to John Leslie and Francis Fatio who looked into the matter.[110] Zéspedes responded with a decree outlawing Farley for his refusal to take the oath as arbitrator.[111] Because Samuel Farley and John Ross refused the oath, the decree provided:

> They shall be reprimanded for so doing and excluded from the Spanish protection, and of being heard by me upon any demand whatsoever, and principally Mr. Samuel Farley in the cause now depending against Daniel McGirtt for having refused to take the Oath as arbitrator (as it has been reported).[112]

Although Farley attempted to recover the enslaved humans under procedures established by Zéspedes, the governor did not permit the petition to move forward because Farley refused to be sworn as an arbitrator in the earlier dispute. Fatio, who had also considered Farley's petition, reported Farley's refusal to the Spanish governor.[113] Farley objected to Zéspedes

107. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Sept. 24, 1784), PRO:CO, 5/561, p. 153, *in* LOCKEY, *supra* note 1, at 360.

108. Petition of Samuel Farley, St. Augustine (Aug. 16, 1784), PRO:CO, 5/561, pp. 159-62, *in* LOCKEY, *supra* note 1, at 363.

109. Paper by way of reply to Samuel Farley, St. Augustine (Oct. 23, 1784), PRO:CO, 5/561, pp. 521-23, *in* LOCKEY, *supra* note 1, at 593-94; The Case of Samuel Farley, no date, PRO:CO, 5/561, pp. 582-94, *in* LOCKEY, *supra* note 1, at 624-31. Certificate of Governor Tonyn, no date, PRO:CO, 5/561, pp. 627-28, *in* LOCKEY, *supra* note 1, at 650; Certificate of James Hume, no date, PRO:CO, pp. 631-32, *in* LOCKEY, *supra* note 1, at 651.

110. Memorial of Samuel Farley, St. Augustine (Sept. 24, 1784), PRO:CO, 5/561, p. 172, *in* LOCKEY, *supra* note 1, at 367.

111. Decree of Vicente Manuel de Zéspedes against Samuel Farley, St. Augustine (Sept. 4, 1784), PRO:CO, 5/561, pp. 163-64, *in* LOCKEY, *supra* note 1, at 364-65.

112. *Id.* at 365.

113. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Sept. 24, 1784),

that he was denied his rights as a British subject under the treaty.[114]

Tonyn argued that even if Zéspedes denied Farley civil claim, the facts warranted McGirtt's criminal prosecution.[115] Asserting that there were four witnesses to Farley's acceptance as arbitrator, Tonyn also requested that Farley have an opportunity to defend himself from the allegation of refusing to swear the oath and that his property be restored.[116] Zéspedes responded at length and mentioned several types of arbitration under English and Spanish law.[117] For arbitration under Spanish judicial supervision, the oath was required, and Farley had refused to take it.[118] Zéspedes concluded:

> By the Spanish Tribunal erected for the protection of the British Subjects in Florida, and their priviledges Mr. Farley was named an Arbitrator, he refused to take his Oath in this case, was despising not only the Spanish authority and Justice, the only one that exists in this Country, but renounced likewise those priviledges which . . . ought to guard the said British subjects . . . consequently excluding this Mr. advocate [Farley] from the Spanish protection was nothing more than to prohibit him with just motives all appeal to this Tribunal.[119]

Seeing that his claim would not be heard and that he was now an outlaw,

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PRO:CO, 5/561, p. 153-54, *in* LOCKEY, *supra* note 1, at 360.

114. Memorial of Samuel Farley, St. Augustine (Sept. 24, 1784), PRO:CO, 5/561, p. 172, *in* LOCKEY, *supra* note 1, at 367.

115. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Sept. 24, 1784), PRO:CO, 5/561, p. 155, *in* LOCKEY, *supra* note 1, at 361.

116. *Id.* at 361-62; Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Oct. 11, 1784), PRO:CO, 5/561, pp. 188-89, *in* LOCKEY, *supra* note 1, at 373.

117. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Oct. 11, 1784), PRO:CO, 5/561, pp. 238-40, *in* LOCKEY, *supra* note 1, at 392. Differing notions of arbitration under Spanish and English colonial law in Florida must be left for another study. Spanish colonial law, *derecho indiano*, contained well-developed provisions and practices for different forms of arbitration. *See generally* José María Díaz Couselo, *La Jurisdicción Arbitral Indiana: Su Continuidad en Buenos Aires Después de la Revolución (1810-1880)*, 35 REVISTA DE HISTORIA DEL DERECHO 173-93 (2007); ANTONIO MERCHÁN ALVAREZ, EL ARBITRAJE: ESTUDIO HISTÓRICO-JURÍDICO 17-26 (1981). Arbitration under *derecho indiano* was conducted in Spanish East Florida during the second Spanish Period (1783-1821). M.C. Mirow, *Law in East Florida 1783-1821*, 55 AM. J. LEGAL HIST. 89, 99, 103 (2015). Arbitration in British East Florida was much more limited; colonial British East Floridians preferred the common law and its courts. Mirow, *supra* note 92, at 540-76.

118. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Oct. 11, 1784), PRO:CO, 5/561, p. 239, *in* LOCKEY, *supra* note 1, at 392.

119. *Id.*

Farley wisely departed East Florida within a few weeks. Defending his position to the end and explaining that he was forced to leave East Florida, Farley wrote a lengthy letter to Tonyn.[120] Farley returned to the question of oaths and arbitration and expanded his treatment to a critique of Spanish law under Zéspedes:

> I am told I ought to have known that arbitrators according to the English Laws, are persons chosen indifferently by the parties contending; they have very ample powers, – their award is to be conclusive, and cannot be altered by the Judges: They are men of honour and integrity to whom an oath is not administered: their award according to certain well digested and settled, wise and fixed rules may be set aside by the Judges but it requires professional knowledge to understand those rules, and in my humble opinion, a Lawyer might with equal propriety be set to perform a difficult operation in surgery, amputation or the like, as Mr. Fatio to explain or determine according to those rules; but since Mr. advocate is attacked on the score of his profession, and his knowledge in it, I must take the liberty in my turn of making one or two observations on the mode of proceeding in East Florida, I do not view it as an arbitration at all – the award is not conclusive, it is to be commented on by Mr. Fatio, who may differ from the arbitrators in part or in the whole – He again reports to the Governor, who differs, if he thinks proper, in part or in the whole, both from the Arbitrators and Mr. Fatio; and thus the award or Sentence of those sworn arbitrators undergoes as it were, the operation of the refiners furnace twice; for my own part after all, I should be for adhering strictly and religiously to the old rules laid down in Westminster-Hall, where British Subjects are concern'd, I prefer them even to the wisdom of Governor De Zespedes or the Justice of Mr. Fatio; I like also that a Judge should give the reasons upon which he founds the Judgment, in public, men can then

120. Letter from Samuel Farley to Patrick Tonyn, St. Augustine (Oct. 23, 1784), PRO:CO, 5/561, pp. 281-91, *in* LOCKEY, *supra* note 1, at 405-11.

> discover upon what principles it is given. Judgments drawn up in private, do not suit the constitution of Englishmen, – We do not know what passes in private, – the closet is not so well calculated as the Bench for the administration of Justice, experience evinces this even in East Florida.[121]

Four months later, as part of his encouragement to the British subject to leave the province, Zéspedes ordered the return of the enslaved humans to Farley.[122] Zéspedes continued to insist that, although the slaves would be returned, they would still be subject to whatever legal claims another claimant, Francis Sánchez, might have to them.[123] Likewise, Tonyn continued to contest such claims, asserting that McGirtt's slaves were properly forfeit for his outlawry and validly sold to others such as Farley. Sánchez had no claim.[124] At one point in the dispute, Zéspedes obtained his own legal opinion from a British lawyer named Johnston.[125]

Even from his ship departing the province, Tonyn protested, "I consider your Excellency's taking upon yourself to decree upon property vested in His Britannic Majesty by the Laws during the British government, or appealing to any Spanish tribunal in such business without my knowledge, is not warranted by the Treaty of Peace."[126]

In addition, and in response to a letter sent by Farley after his departure, Zéspedes sent a lengthy memorandum denying that McGirtt should be tried for the theft. First, as related earlier, he argued that the theft occurred during a gap in sovereignty when criminal law was unenforceable.[127] Second, McGirtt had requested and been granted clemency.[128] Third, Farley refused

121. *Id.* at 409.

122. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Feb. 20, 1785), PRO:CO, 5/561, p. 443, *in* LOCKEY, *supra* note 1, at 524.

123. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Apr. 11, 1785), PRO:CO, 5/561, p. 513, *in* LOCKEY, *supra* note 1, at 590.

124. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (July 29, 1785), PRO:CO, 5/561, pp. 563-64, *in* LOCKEY, *supra* note 1, at 613; Reply in the Case of Francis Sánchez, no date, PRO:CO, 5/561, pp. 633-48, *in* LOCKEY, *supra* note 1, at 651-60.

125. Reply in the Case of Francis Sánchez, no date, PRO:CO, 5/561, p. 644, *in* LOCKEY, *supra* note 1, at 659. This was perhaps Lewis Johnston. Mirow, *supra* note 57, at 117.

126. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (July 29, 1785), PRO:CO, 5/561, pp. 564, *in* LOCKEY, *supra* note 1, at 613-14.

127. Paper by way of reply to Samuel Farley, St. Augustine (Oct. 23, 1784), PRO:CO, 5/561, pp. 521-23, *in* LOCKEY, *supra* note 1, at 593-94.

128. *Id.* at 594-95.

to take the arbitrator's oath and was outside Spain's protection.[129] Fourth, Farley had made other false accusations.[130] Fifth and finally, Fatio and Leslie had found insufficient evidence to proceed against McGirtt.[131] Even if Farley was to receive the slaves, they were subject to the legal claims of others and the perpetrators of the theft would not be punished.[132] There was then an even more extensive rebuttal from the British and Farley's point of view apparently the anonymous work of Hume.[133]

B. The Case of "slave Lucy"

The case of the "slave Lucy" illustrates well the jurisdictional battles related to British subjects, Spanish subjects, and enslaved humans.[134] Lucy had previously run away from her British owner and was sold to Lorenzo Rodríguez, a Spanish sea captain in St. Augustine.[135] Searching for the slave, Spanish soldiers observed by two British subjects searched the home of Luisa Waldron (also called Mrs. Proctor).[136] The sailors brought their discovery to Francis Fatio.[137] On September 14, 1784, Fatio then called on Spanish authorities, Manuel Solano and a companion, to bring Waldron for questioning.[138] Fatio ordered Waldron placed in the custody of John Thomas who had been the jail keeper during British rule.[139] During her imprisonment, Waldron was questioned by Fatio and Francisco Sánchez.[140] Waldron attempted suicide, and the community became increasingly interested in the case and Waldron's treatment.[141] During her imprisonment,

129. *Id.* at 595.
130. *Id.* at 596.
131. *Id.* at 597.
132. Memorial of Francis Sánchez and Decree of Governor Zéspedes, St. Augustine (Dec. 13,1784), PRO:CO, 5/561, pp. 533-37, *in* LOCKEY, *supra* note 1, at 598-600.
133 The Case of Samuel Farley, no date, PRO:CO, 5/561, pp. 573-624, *in* LOCKEY, *supra* note 1, at 617-50.
134. Letter from Samuel Farley to Patrick Tonyn, St. Augustine (Oct. 23, 1784), PRO:CO, 5/561, pp. 288-90, *in* LOCKEY, *supra* note 1, at 410.
135. TANNER, *supra* note 2, at 51.
136. *Id.*
137. *Id.*; *see* Affidavit of William Carr and Solomon Glass, St. Augustine (Oct. 12, 1784), PRO:CO 5/561, pp. 309-10, *in* LOCKEY, *supra* note 1, at 417-18.
138. TANNER, *supra* note 2, at 51.
139. *Id.*; The Case of Louisa Waldron, St. Augustine (Oct. 12, 1784), PRO:CO, 5/561, pp. 300-03, *in* LOCKEY, *supra* note 1, at 414-16.
140. TANNER, *supra* note 2, at 51.
141. *Id.*

her horse was sold by one of her Spanish captors and her house was robbed.[142] After nearly a month, Waldron was released when Lucy was found at another plantation about fifteen miles away.[143]

Tonyn objected to Zéspedes for Waldron's poor treatment and loss of property; Zéspedes's promised investigation was never undertaken.[144] Waldron also petitioned Zéspedes directly for release from prison, and Fatio provided a lengthy explanation justifying his actions.[145] The only restitution she received was her horse's bridle and the price paid for the horse.[146] The case became a well-known example of Spanish arbitrariness and improper treatment of British subjects.[147]

C. Petitions to "Governor" Tonyn

Other cases were referred to these judges.[148] For example, Fatio was requested to adjudicate questions of estate administration. The estate was opened during the British period and the petitioner requested that Fatio "refer the matters in litigation to the British Judicature when the parties retire to that Government" or to provide redress in the case.[149] The day after petitioning Fatio and apparently wary of hybrid British and Spanish justice, the same petitioner sought resolution of the case from former British governor Tonyn:

> Wherefore Your Excellencys Petitioner humbly begs leave to look up to you as a British subject for some mode of redress and humbly conceives that his case and situation with respect to the said Negro, is at this day and place not to be adjudged or invested by Francis Philip Fatio Esquire

142. *Id.*
143. *Id.*
144. *Id.* at 51-52.
145. Memorial of Louisa Waldron and Decree of Governor Zéspedes, St. Augustine (Feb. 2, 1785), PRO:CO 5/561, pp. 541-47, *in* LOCKEY, *supra* note 1, at 601-04.
146. TANNER, *supra* note 2, at 51-52.
147. Case of Louisa Waldron and Affidavit of John Tomas, St. Augustine (May 3, 1785), PRO:CO, pp, 649-664, *in* LOCKEY, *supra* note 1, at 660-66.
148. The Case of a Negro Named Frank (Sept. 11, 1784), EF:b195, M15, *in* LOCKEY, *supra* note 1, at 270-71; Letter from Francis Philip Fatio and John Leslie to Governor Zéspedes, St. Augustine (Oct. 20, 1784), EF: b195, M15, *in* LOCKEY, *supra* note 1, at 284-85.
149. Petition of Gerald Byrnes, St. Augustine (Sept. 27, 1784), PRO:CO, 5/561, pp. 209-10, *in* LOCKEY, *supra* note 1, at 382.

> or any other Judge under Spanish authority, But your Petitioner stands ready to have his case adjudged in and by the Laws of his own County – And in hope Your Excellency will be pleased to consider his case.[150]

Simultaneously petitioning both Spanish and British authorities, the petitioner sought relief in whatever forum he might obtain it.

Thus, despite Spanish structures for resolving disputes in East Florida, some British plaintiffs continued to petition Tonyn as the former British governor. In November 1784, another British subject, William Mangum complained directly to the former British governor that "George Philips, Michael Melton and a Negro Man named Brutus, with force and arms did attack the House of Your Petitioner," attempted to murder him, and stole various items from his house.[151] And even when on board the ship to take the former governor from East Florida to England, Tonyn wrote the captain of another ship demanding the release of two British subjects, William Powell and a slave, from Spanish captivity.[152]

Similarly, in November 1784, Nicolas Turnbull, an agent of a partnership in which Francis Fatio held a one-third interest, petitioned Tonyn to assist him in resolving his affairs so that he might leave the province.[153] It was not clear what portion was due Fatio and what portion was due another partner, Mr. Dunnage. Things became much more complicated when Fatio was a party rather than a judge in a legal action. Turnbull expressed concern about subjecting himself to Spanish jurisdiction in the matter this way:

> And that your Petitioner being a British subject, and thinking Himself not liable to any Decision of a Spanish Court, with respect to any Transactions prior to the Spanish Government having taken Place in this Province and that any Decision of the Spanish Court, would neither be considered of any Effect in a British Court or secure your

150. *Id.* at 383.

151. Petition of William Mangum, St. Augustine (Nov. 6, 1784), PRO:CO, 5/561, pp. 265-68, *in* LOCKEY, *supra* note 1, at 399-400.

152. Letter from Patrick Tonyn to Pedro Vásquez, St. Marys (June 12, 1785), EF:b208, *in* LOCKEY, *supra* note 1, at 555-56.

153. Petition of Nichol Turnbull, St. Augustine (Nov. 19, 1784), PRO:CO, 5/561, pp. 293-96, *in* LOCKEY, *supra* note 1, at 411-14.

> Petition from Action which might be commenced by His Constituent hereafter, has Consequently refused and still refuses to proceed any farther in the Business.[154]

Turnbull was still detained in East Florida several months later when Tonyn interceded with Zéspedes to permit Turnbull to depart the province.[155] To assist, and perhaps to pressure Zéspedes in the process, Tonyn attached an opinion drafted by James Hume expounding British law on the topic.[156] Hume opined that Turnbull, as a British subject, should not be delayed in his departure from the province. To the extent questions remained concerning the partnership proceeds to be distributed to Fatio and his partner, Mr. Dunnage, the normal course of action would be for Fatio to bring a claim against Turnbull who would then file a bill in Chancery to determine the amounts owned to Fatio and Dunnage.[157] Hume concluded that in Spanish East Florida, "there is no Court in this Country of competent Jurisdiction to entertain and determine the Matter."[158] Zéspedes responded that Turnbull was not a British subject; he had moved to Georgia and only declared that he was a British subject when Fatio raised his claim to the funds. The treaty did not cover Turnbull.[159]

Hume prepared a more extensive opinion now with the blessing of the parties and Zéspedes.[160] First, as a British inhabitant of East Florida before the Spanish period, Turnbull was a British subject and his moving to another country did not destroy that link between subject and sovereign.[161] Second was the jurisdictional question, framed by Hume this way, "whether Mr. Turnbull agreeing to have a Dispute (the foundation of which arose under a British Government, and in which a British Subject now in England is

154. *Id.* at 413.

155. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Jan. 21, 1785), PRO:CO, pp. 395-402, *in* LOCKEY, *supra* note 1, at 509-11.

156. The Opinion of James Hume on the Case of Nicholas Turnbull, St. Augustine (Dec. 17, 1784), PRO:CO, 5/561, pp. 399-401, *in* LOCKEY, *supra* note 1, at 510-11.

157. *Id.*

158. *Id.* at 511.

159. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Jan. 26, 1785), PRO:CO, 5/561, pp. 407-09, *in* LOCKEY, *supra* note 1, at 512-13; The Opinion of James Hume on the Case of Nicholas Turnbull, St. Augustine (Dec. 17, 1784), PRO:CO, 5/561, pp. 399-401, *in* LOCKEY, *supra* note 1, at 510-11.

160. Letter from James Hume to Patrick Tonyn, St. Augustine (Feb. 11, 1785), PRO:CO, 5/561, pp. 415-20, *in* LOCKEY, *supra* note 1, at 515-19.

161. *Id.* at 516.

concerned) can alter the Case, can a Spanish Tribunal entertain such a Cause at present?"[162] Hume stated that under English law, even if a party consents to a court's jurisdiction but the court in fact had no jurisdiction, the decision of the court is of no effect on the party.[163] Third, Hume offered a solution that balanced the interests of Mr. Turnbull, Mr. Fatio, and Mr. Dunnage.[164] Even Zéspedes, who was certainly not a fan of Hume, praised him for this solution while making it very clear he continued to disagree strenuously with him on other matters.[165]

Spanish authorities objected to appeals to the former British governor. In a dispute over slaves, Thomas Waters mentioned to Carlos Howard, the secretary of the government, that Waters suggested that as a British subject he should petition Tonyn.[166] Already enraged, Howard responded, "Governor Tonyn! We know of no such man – We know of General Tonyn, and as such we respect him as a Gentleman by the respect to matters of this kind, this is a Spanish Government and he has nothing to say."[167]

D. Complaints to Leslie about Fatio

John Leslie heard several complaints by British subjects against his fellow judge Francis Fatio. In one document, Samuel Iverson listed several excessive abuses committed by Fatio threatening the affiant with imprisonment when he expressed concerns about an arbitration award. The complaints were lodged with John Leslie.[168]

Similarly, David Zubly had settled his dispute with Sinclair Waters under English law in Georgia.[169] Zubly was surprised when he received a summons from Fatio for him to answer in the same cause.[170] Raising his objection that the matter had already been resolved in an English court,

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162. *Id.* at 516-17.
163. *Id.*
164. *Id.* at 518-19.
165. Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Apr. 11, 1785), PRO:CO, 5/561, pp. 497-500, *in* LOCKEY, *supra* note 1, at 583-85.
166. Declaration of Thomas Waters, St. Augustine (July 29, 1785), PRO:CO, 5/561, pp. 569-72, *in* LOCKEY, *supra* note 1, at 615-17.
167. *Id.* at 616.
168. Affidavit of Samuel Iverson, St. Augustine (Oct. 8, 1784), PRO:CO, 5/561, pp. 217-18, *in* LOCKEY, *supra* note 1, at 384.
169. Affidavit of David Zubly, St. Augustine (Oct. 4, 1784), PRO:CO, 5/561, pp. 221-23, *in* LOCKEY, *supra* note 1, at 385-86.
170. *Id.* at 385.

Fatio threatened Zubly at length stating:

> Do you know what kind of Government this is? to which (replying in the negative) He the said Francis Philip Fatio answered that it was Arbitrary Despotic Chancery Equity Law or what it pleased, at the same time advising this deponent to leave the matter to arbitration, and . . . confiding in the Justice of his cause he agreed to the proposal of said Francis Philip Fatio. The deponent further says that a few days after in conversation, he told this deponent that some people were foolish, Idle or weak enough . . . to say the Spanish Governor had no right to do certain things, but should He the Governor take it into his head to put a person into the Fort, before a representation could be made to Great Britain from thence to Madrid, to the Havan[]a[] and return to this place the persons might suffer much or perhaps be dead, and then where would be his redress? That the Governor Don De Z[é]spedes having no Instructions from his Court, could do no wrong or words to that effect.[171]

Zubly submitted to arbitration, lost, suffered threats of imprisonment, and paid the amount.[172]

These cases illustrate the activities of the judges of British subjects who served as cultural, linguistic, and legal bridges from British claimants and disputes to Spanish sovereign authority. The judges often served in procedural capacities to facilitate an often-ad hoc path to some kind of judicial resolution. Although the creation of these judges circumvented the direct legal intervention of Zéspedes into disputes of his British residents, there was still a question about governing law.

171. *Id.* at 385-86.
172. *Id.* at 385.

E. Zéspedes and Legal Advice

Zéspedes was uncertain of legal affairs related to his administration of justice. Despite his repeated requests for an Asesor, he would not receive one during his entire governorship. For example, Zéspedes felt stymied by a lack of a trained legal consultant in November 1785 during the extensive murder trial for the killing of Lieutenant William Delaney of the Spanish Hibernia Regiment outside the dwelling of Catalina Morain.[173] The investigation produced 176 pages of testimony from fifty-seven witnesses.[174] Zéspedes even recommended his friend, Josef Mariano de Cépedes Clavijo, a native of Havana and abogado of the Royal Audiencia in Cuba, to serve as Asesor but his requests were not heeded.[175] Without a trained legal official to advise the governor, Zéspedes was legally outgunned by Tonyn who could rely on Hume as contentious legal affairs for the British were handled by the judges appointed for British subjects. Broader legal concerns were governed by proclamation, and these proclamations could only address the most pressing problems, such as civil order and enslaved humans. Although one source indicates Zéspedes had drafted ordinances for East Florida, the draft ordinances have not been found.[176]

III. PROCLAMATION ON ORDER

As British control waned during preparations for and evacuation of British subjects from East Florida, bands of thieves and raiders with little allegiance to East Florida, Georgia, Spain, Britain, or the United States served their own ends of acquiring whatever riches were available for the taking. This usually involved stealing cattle and enslaved humans.

Before Zéspedes's arrival, British authorities struggled with one particularly powerful group of outlaws and raiders, "banditti," led by Daniel McGirtt. Although Tonyn had recently captured the main individuals in the group before Zéspedes's arrival, they had escaped. Tonyn now urged

173. TANNER, *supra* note 2, at 72.
174. *Id.* at 73.
175. *Id.* at 72.
176. Letter from Vicente Manuel de Zéspedes to Juan Ignacio de Urriza, St. Augustine (Nov. 30, 1785) (draft), EF: b55, C5, *in* LOCKEY, *supra* note 1, at 740.

Zéspedes to pursue them with British troops provided by Tonyn.[177] Zéspedes, however, sought to begin his rule with an act of clemency, and, on July 14, issued a proclamation that those who had been accused of criminal acts would receive leave to depart East Florida to a place of refuge beyond its jurisdiction.[178] The leaders petitioned for leave to depart to Louisiana just a few days later.[179] In the field, Tonyn's soldiers did not hear of the new arrangement and believed that McGirtt and his band were positioning themselves to raid several plantations near the St. Johns River, including plantations owned by Tonyn himself.[180] British soldiers fired on McGirtt and his group, killing one and taking a prisoner. The others escaped, but after this attack, members of McGirtt's band were wary of continued British authority and action. One of the banditti was reported as rejecting the proclamation of clemency this way, "God damn the Proclamation they may wipe their backsides with them, in a very vulgar manner."[181] McGirtt's band availed themselves of Spanish protection and were granted permission to depart the province.[182] Before their departure, they continued to raid farms and plantations to the north of St. Augustine, and John Leslie took several affidavits of witnesses concerning their activities.[183]

This episode was the first of many jurisdictional frictions and confusions. Zéspedes, the Spanish governor, had permitted the use of

177. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 5, 1783), EF: b40, *in* LOCKEY, *supra* note 1, at 214-15; Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 10, 1784), EF: b40, *in* LOCKEY, *supra* note 1, at 220-21.

178. Proclamation of Governor Zéspedes (July 14, 1784), AGI: SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 235.

179. Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (July 16, 1784), AGI: SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 231; Statement of William Cunningham and Other Americans, St. Augustine (July 15, 1784), AGI: SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 235-36.

180. Letter from William Young to Patrick Tonyn (July 30, 1784), PRO:CO, 5/561, pp. 131-32, *in* LOCKEY, *supra* note 1, at 353-54; Letter from William Young to Patrick Tonyn (Aug. 5, 1784), PRO:CO, 5/561, pp. 139-41, *in* LOCKEY, *supra* note 1, at 356-57; Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (Feb. 9, 1785), AGI: SD:, leg. 2530, *in* LOCKEY, *supra* note 1, at 456; Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (July 29, 1785), PRO:CO, 5/561, p. 556, *in* LOCKEY, *supra* note 1, at 609.

181. Letter from William Young to Patrick Tonyn (Aug. 5, 1784), PRO:CO, 5/561, p. 140, *in* LOCKEY, *supra* note 1, at 357.

182. Letter from Vicente Manuel de Zéspdes to Bernardo de Gálvez, St. Augustine (Aug. 9, 1784), EF:b40, *in* LOCKEY, *supra* note 1, at 248-49.

183. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Jan. 7, 1785) PRO:CO, 5/561, pp. 379-94, *in* LOCKEY, *supra* note 1, at 503-08.

British soldiers in a territory under Spanish sovereignty. Similarly, British Governor Tonyn and his British soldiers lacked any authority to act. Some claimed that Tonyn's only motivation was to protect his own plantation. McGirtt and his group were later arrested in 1785 under Spanish authority and were sent to Havana in April of that year.[184] Even then, Tonyn unsuccessfully objected that McGirtt and his band should be sent for trial in British territory for violations of British law.[185] McGirtt was eventually sent to the Bahamas.[186]

Despite the well-meaning provision of clemency in Zéspedes's first proclamation on July 14, 1784, the effective exercise of Spanish largesse was foiled by the overlapping de facto authorities on the ground and the various populations with differing recognition of assertions of sovereignty. Tonyn raised his frustration with Zéspedes that Spanish authorities conducted themselves inconsistently with British determinations on McGirtt and his band. At one point in this lengthy dispute Tonyn wrote Zéspedes:

> [B]y virtue of legal proceedings had in due form according to the British Constitution the above mentioned Daniel McGirtt setting himself in open defiance against the Laws and Government of this Country was declared an Outlaw, and his Estate forfeited to His Majesty. I did not however call officially on Your Excellency for a compliance with the usual practice of Nations concerning the offender either as to the delivery of his person or property.[187]

In light of Tonyn's unsanctioned attacks against McGirtt and his group and despite the convenience of Spanish protection, McGirtt and his band did not fully recognize Spanish schemes to establish sovereignty in East Florida.[188]

The judges of the British subjects were not excluded from this affair. In an unusual affidavit sworn before John Leslie, a Spanish judge of British

184. LOCKEY, *supra* note 1, at 16-18; TANNER, *supra* note 2, at 39-46.
185. TANNER, *supra* note 2, at 45.
186. Troxler, *supra* note 9, at 16.
187. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Aug. 7, 1784), PRO:CO, 5/561, p. 97, *in* LOCKEY, *supra* note 1, at 344.
188. Letter from Patrick Tonyn to Lord Sydney, St. Augustine (Dec. 6, 1784), PRO:CO, 5/561, p. 27, *in* LOCKEY, *supra* note 1, at 321.

Subjects, and James Hume, the former Chief Justice of East Florida, Thomas Clarke recounted Daniel McGirtt's threats to him and:

> perfectly remembers his making use of these words, "damn you I'll have your Ears for it, and that he had taken nothing from him but what he ought" that []he said Daniel McGirt further added that he would be damned if he would not have July, meaning a Negro the property of this deponent – that he challenged this deponent to fight and made the use of very opprobrious language.[189]

McGirtt's theatre of operation was north of St. Augustine along the St. Johns River. Zéspedes commissioned Luis (or Lewis) Fatio, Francis Fatio's son, a judge for the British inhabitants in criminal cases in this wild region. Luis Fatio investigated these matters working with an interpreter, Luciano de Herrera, and produced much of the documentation for Zéspedes.[190] This included statements that made their way to Zéspedes from Tonyn.[191] In at least one instance, John Leslie determined if there was sufficient cause to proceed against the accused.[192] Although commissioned judge for the St. Johns region to hear cases between British inhabitants, Luis Fatio also took statements in St. Augustine on criminal matters.[193]

189. Affidavit of Thomas Clarke (Aug. 4, 1784), PRO:CO, 5/561, pp. 147-50, *in* LOCKEY, *supra* note 1, at 358-59.

190. EFP, Records of Criminal Proceedings 1785-1787, ff. 1-115, Images 61-182/662 (Mar. & Apr. 1785), see ff. 27v-28, Image 89/662 (for Herrera); EFP, Records of Criminal Proceedings 1785-1787, Images 257-73, 287-89, 296/662 (Feb. to Apr. 1785).

191. EFP, Records of Criminal Proceedings 1785-1787, ff. 21-38, Images 82-99/662.

192. EFP, Records of Criminal Proceedings, 1785-1787, ff. 24v-25, Image 86/662, Feb. 7, 1785.

193. EFP, Miscellaneous Legal Instruments and Proceedings, 1784-1821, 1784-1786, Images 131-139/356, Jan. to May, 1785.

IV. PROCLAMATION OF SLAVES

Zéspedes first month of rule also saw a proclamation on enslaved humans, a subject close to the pockets of wealthy British slaveholders in East Florida and a frequent source of litigation. By proclamation on July 26, 1784, the governor disrupted the established law relating to the ownership of slaves.[194] With the concern of slaveholders that enslaved humans were being stolen and removed from East Florida in this transitional period, Zéspedes ordered that all passengers, free or slave, required a license from the governor to depart the province.[195] Concealing a slave or providing passage without license was prohibited under Spanish law, and enslaved humans leaving without license were subject to forfeiture to the judge, treasury, and informer.[196] Furthermore, the proclamation required every Black person without an owner or document of manumission to present him or herself to Spanish authorities for a work permit. Failure to comply resulted in the individual being made a slave of the Spanish government.[197]

The proclamation led to official objections by Tonyn and his former Chief Justice James Hume.[198] Following Hume's arguments, Governor Tonyn objected that these new provisions were excessive, confiscatory, and violated the treaty.[199] Hume based his objections on the treaty that gave British subjects the right to leave and to remove their property, except where the subject was constrained by debt or criminal prosecution.[200] He asserted that under the treaty, "every individual, black as well as white, Slave as well as freeman that was under the protection of the British Government at the arrival of His Excellency Governor De Z[é]spedes have full right to withdraw."[201] This principle was directly contradicted by the proclamation's

194. Proclamation of Governor Zéspedes, St. Augustine (July 26, 1784), EF:b40, *in* LOCKEY, *supra* note 1, at 240-42.

195. *Id.* at 240.

196. *Id.* at 241.

197. *Id.*

198. Letter from Vicente Manuel Zéspedes to Bernardo de Gávez, St. Augustine (Aug. 9, 1784) (draft), EF:b40, *in* LOCKEY, *supra* note 1, at 249. For information on Hume, see Mirow, *supra* note 57, at 111-13.

199. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (July 29, 1784), PRO:CO 5/561, pp. 41-45, *in* LOCKEY, *supra* note 1, at 326-28; Letter from Patrick Tonyn to Lord Sydney, St. Augustine (Dec. 6, 1784), PRO:CO 5/561, pp. 26, *in* LOCKEY, *supra* note 1, at 321.

200. Letter from James Hume to Patrick Tonyn, St. Augustine (July 26, 1784), PRO:CO, 5/561, p. 47, *in* LOCKEY, *supra* note 1, at 328.

201. *Id.* at 329.

requirement that individuals not in compliance with its provisions might wind up slaves of the Spanish government.[202]

Many former slaves had been manumitted through service in the British army and did not have additional documentation simply because they did not seek it at the time of their manumission.[203] The vast majority of enslaved humans in East Florida were held without title deeds. Hume asserted, "five out of six of the Slaves in the Country, are held without any title deeds, and Bills of Sale were never given with New Negroes; parole Sales, and possession is all they can sh[o]w, which was a sufficient Title by the Laws of the Province."[204] To convert enslaved humans who failed to give their names or who lacked proper documentation into criminals, and thus subject to the restrictions of the treaty, was to make the "smallest omission criminal," something the Spanish governor could not uphold under his good exercise of "justice and equity."[205] According to Hume, such a challenge to British title to slaves was a confiscatory act unlike anything found in British law. Forfeiture was an extreme penalty and giving the judge a portion of the forfeiture was unheard of by Hume who wrote, "I cannot help remarking, that the Judge being made a party, by receiving a part of what is condemned, is altogether a system unknown in the British Constitution."[206]

Zéspedes responded directly to Hume's concerns. He provided a point-by-point refutation and interpretation of Hume's memorandum to defend his authority, the validity of the proclamation, and it implementation.[207] To Hume's aside concerning the ability of judges to profit in their condemnation of slaves, Zéspedes responded that "many Laws esteemed good and necessary in one Country may not be so in another, and that the laws of every civilized Country are respectable tho' differently expressed, they tend to the same object, which is that of Justice."[208]

Thus, Zéspedes asserted that the proclamation was only meant to cover one class of Blacks in East Florida, vagrant Blacks without known masters.[209] He stated that the three other classes of Blacks were not covered

202. *Id.*
203. *Id.*
204. *Id.* at 330.
205. *Id.* at 329-30.
206. *Id.* at 330.
207. Remarks on James Hume's Opinion, Vicente Manuel de Zéspedes, no date, PRO:CO, 5/561, pp. 79-90, *in* LOCKEY, *supra* note 1, at 338-42.
208. *Id.* at 341.
209. *Id.* at 339; Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine

by the proclamation. These were free Blacks, Blacks deserving freedom under British law, and enslaved humans belonging the British subjects who were recognized as owners.[210] He also expressed his concerns to Spanish authorities that his lack of an Asesor hindered his ability to respond properly to the technical legal arguments Hume propounded.[211] Hume responded.[212] The debate continued with each side restating its position even after Tonyn was aboard a ship departing the province.[213]

V. DECREES ON PROPERTY

British subjects wishing to protect their property under Spanish authority were subject to two main proclamations in addition to the Proclamation on Slaves. The first provision was in Zéspedes's initial proclamation on July 14, 1784. It required British subjects who wanted to avail themselves of the treaty's provisions to give their names and domiciles to the Secretary of the Government.[214] Each British subject asserting protection of the treaty had:

> at the office of the secretary of the government, Captain Carlos Howard, to register the name and domicile of himself and his dependents . . . [W]hosoever shall not have presented himself . . . will be considered as being deprived of the privileges, benefits, and immunities of the recent treaty of peace, and consequently excluded from enjoying Spanish protection.[215]

(Aug. 14, 1784), *in* LOCKEY, *supra* note 1, at 252; Letter from Vicente Manuel de Zéspedes to Patrick Tonyn, St. Augustine (Aug. 6, 1784), PRO:CO, 5/561, pp. 70-71, *in* LOCKEY, *supra* note 1, at 335-36.

210. LOCKEY, *supra* note 1, at 23.

211. Letter from Vicente Manuel de Zéspedes to Bernardo de Gálvez, St. Augustine (Aug. 9, 1784), Ef:b40, *in* LOCKEY, *supra* note 1, at 250.

212. Reply of James Hume to the Remarks on His Opinion, no date, PRO:CO, 5/561, pp. 193-208, *in* LOCKEY, *supra* note 1, at 374-81.

213. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Oct. 11, 1784), PRO:CO, 5/561, pp. 184-87, *in* LOCKEY, *supra* note 1, at 371-72; Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (July 29, 1785), PRO:CO, 5/561, pp. 550-53, *in* LOCKEY, *supra* note 1, at 605-06; The Case of Samuel Farley, no date, PRO:CO, 5/561, pp. 594-98, *in* LOCKEY, *supra* note 1, at 631-34.

214. Proclamation of Governor Zéspedes (July 14, 1784), AGI:SD, leg. 2660, pp. 1-10, *in* LOCKEY, *supra* note 1, at 234.

215. *Id.* at 234-35.

A second proclamation addressed the uncertainty accompanying many property transactions as British subjects sought to liquidate their holdings in the period provided by the treaty. Zéspedes established mechanisms to create a reliable public record of such transactions. On September 25, 1784, Zéspedes required that:

> all persons who have bought . . . real or personal property . . . from British subjects or others shall . . . have recorded the corresponding deeds which affirm and protect their direct ownership of the thing acquired. . . . To this end they will appear with the vendors before the present government notary, the vendors having previously made the legal ownership of the property which they are disposing of a matter of record in this tribunal, as is already directed and observed. These instruments must be set in order and recorded in the protocol or registry for the purpose by the customs and laws of this kingdom, with the understanding that all purchases or sales made before March 20 next shall be considered null and void, if it appears that they have not been executed in the manner and under the conditions required.[216]

The consequences of the failure to comply with these provisions are illustrated in the case of William Freeman's house and lot in St. Augustine. On departing St. Augustine, Freeman appointed James Taylor his attorney-in-fact to sell Freeman's house and lot for no less than 500 pounds.[217] Taylor did not register Freeman's house with the secretary of the government.[218] On December 10, 1784, Taylor got an offer for 100 pounds, and in February 1785, Taylor received a new power from Freeman to sell the house for this amount and accepted 200 dollars as partial payment of the purchase money.[219] Thus, under these facts, the sale was completed before the treaty's extended deadline of March 19, 1784.[220]

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216. Decree of Vicente Manuel de Zéspedes, St. Augustine, (Sept. 25, 1784), EF: b153, J2, *in* LOCKEY, *supra* note 1, at 280.

217. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Apr. 13, 1785), PRO:CO, 5/561, p. 481, *in* LOCKEY, *supra* note 1, at 577.

218. *Id.*

219. *Id.* at 578.

220. *Id.*

Taylor was informed that it was necessary to register the sale, and Carlos Howard refused because the house and lot had not been entered in the secretary's office before March 19, 1784.[221] Taylor "was then told he had been guilty, to his great surpri[s]e, of an omission, which was likely to be the forfeiture of his Constituents [Freeman's] property."[222] Title to the property vested in the Spanish king as of March 19, 1784.[223]

Pressing Taylor's claim, Tonyn wrote Zéspedes complaining that the proclamation did not give adequate warning of the danger of losing one's property.[224] Furthermore, this was all due to the actions of an attorney rather than the owner of the property himself.[225] Considering Zéspedes's zeal for justice, Tonyn could not imagine:

> that it can be the wish of His Catholic Majesty, that upon a slip, made by an Attorney – a Gentleman not present to transact his own business, and thereby more exposed to such circumstances to take away a hundred pounds from this Gentleman, who is compelled by the Peace to sell his property for that Sum, formerly worth five hundred.[226]

It appears that Tonyn's requests and Taylor's separate petition to Zéspedes did not change the governor's mind.[227]

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221. *Id.*

222. *Id.*

223. *Id.*; Decree of Vicente Manuel de Zéspedes, St. Augustine (Apr. 5, 1785), PRO:CO, 5/561, p. 491, *in* LOCKEY, *supra* note 1, at 581.

224. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Augustine (Apr. 13, 1785), PRO:CO, 5/561, p. 484-85, *in* LOCKEY, *supra* note 1, at 579.

225. *Id.*

226. *Id.*

227. Memorial of James Taylor, St. Augustine (Apr. 6, 1785), PRO:CO, 5/561, pp. 493-95, *in* LOCKEY, *supra* note 1, at 582-83.

CONCLUSION

The last British ship from St. Augustine, the *Cyrus*, weighed anchor on September 4, 1785 with a few other ships carrying 114 British loyalists and 249 enslaved humans.[228] Bad weather and damage to the *Cyrus* forced delays at St. Mary's, north of St. Augustine, for several months. Tonyn continued to receive petitions from British subjects complaining of Spanish injustices and to correspond with Zéspedes about them until the very last days of his presence in East Florida and its waters.[229] Fatio continued his judicial functions past the final deadline for British evacuation on July 19, 1785. For example, in late July 1785, Governor Zéspedes referred a case to him dealing with the sale of property by a surgeon for 500 pesos. Fatio responded with a lengthy set of findings on the nature of the transaction on July 28, 1785.[230] Zépesdes continued to employ Fatio as a judicial officer after the official final departure of the British.[231] Tonyn finally parted the province on another ship, no doubt to Zéspedes's relief, on November 13, 1785.[232]

Government by proclamation was necessary but did not provide the kind of comprehensive plan of civil government Zéspedes desired.[233] José de Gálvez and Bernardo de Gálvez died before a coherent plan for civil government in East Florida was established. In the place of a plan, finances and the duties of particular paid officials created a working system of daily government without clear structures.[234] As governor, Zéspedes served as judge to hear causes between Spaniards. With the continued lack of a legal adviser, Zéspedes handled significant criminal cases by taking evidence and then sending the record, charging document, and prisoner to Havana for a

228. TANNER, *supra* note 2, at 65.

229. Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (July 25, 1785), PRO:CO, 5/561, pp. 669-80, *in* LOCKEY, *supra* note 1, at 667-71; Letter from Patrick Tonyn to Vicente Manuel de Zéspedes, St. Marys (Aug. 6, 1785), PRO:CO, pp. 685-704, *in* LOCKEY, *supra* note 1, at 673-79; Letter from Patrick Tonyn to Vicente Manuel de Zépedes, St. Marys, (Aug. 25, 1785), PRO:CO, 5/561, pp. 745-53, *in* LOCKEY, *supra* note 1, at 704-08.

230. EFP, Reel 150, Box 368, Bundle 329R7, Records of Civil Proceedings, 1785-1821, No. 4 (July 28, 1785), (Manuscript Div., Library of Cong.).

231. Declaration of David People (St. Augustine, Aug. 5, 1785), PRO:CO, 5/561, pp. 739-43, *in* LOCKEY, *supra* note 1, at 702-03. EFP, Memorials, 1784-1821, No. 133, Jan. 8, 1787, pp. 201-07.

232. TANNER, *supra* note 2, at 66.

233. *Id.* at 147.

234. *Id.*

decision by the Auditor de Guerra there.[235] For civil matters, Zéspedes had some assistance from the public notary, Domingo Rodríguez de León.[236] Nonetheless, by 1789, the province still waited for a permanent garrison from Havana, essential regulations on granting land, and general instructions establishing a civil government.[237] Governor Zéspedes departed East Florida on July 15, 1790.[238] Permanent regulations for East Florida were completed in 1791 and employed by Zéspedes's successor, Governor Juan Nepomuceno de Quesada.[239]

This study explores a short period of heightened legal pluralism in the Spanish Empire.[240] During the transition from British to Spanish sovereignty in East Florida, actors coexisted and even cooperated in multiple juridical spheres under imperial treaty provisions. This was not a transfer of power occasioned on the military conquest of East Florida by Spain. The episode was a peaceful transfer in which the actors were required to participate willingly by their sovereigns. It is a telling illustration of imperial legal pluralism as described by Jane Burbank and Frederick Cooper this way:

> Empires set themselves the tasks of bringing different peoples and places under their control and of exploiting these resources effectively and securely. . . . The option of one law for all, applied consistently and thoroughly to all subjects and to their relations with each other and the state, was sure to fail. Successful imperial law had to be variegated and adaptable to multiple and changing circumstances, while affirming the sovereign's ultimate authority.[241]

So it was for the Spanish in East Florida. Nonetheless, this uneasy

235. *Id.* at 167.
236. *Id.* at 168.
237. *Id.* at 197.
238. *Id.* at 222.
239. Corbitt, *supra* note 28, at 59.
240. *See generally* Lauren Benton & Richard J. Ross, *Empires and Legal Pluralism: Jurisdiction, Sovereignty, and Political Imagination in the Early Modern World*, *in* LEGAL PLURALISM AND EMPIRES, 1500-1850, 1-14 (Lauren Benton & Richard J. Ross eds., 2013); Paul D. Halliday, *Laws' Histories: Pluralism, Pluralities, Diversity*, *in* LEGAL PLURALISM AND EMPIRES, 1500-1850, 261-67.
241. Jane Burbank & Frederick Cooper, *Rules of Law, Politics of Empire*, *in* LEGAL PLURALISM, *supra* note 240, at 280.

coexistence of Spanish and British legal authority and law in East Florida led to several tensions or points of conflict and concession.

First, jurisdiction is the central aspect of imperial power, and legal authority is the prime expression of sovereign power.[242] As the cases explored in this study reveal, East Floridian British and Spanish legal actors lived in a legal order that "encompassed multiple zones with unstable and varied relationships to one another and to imperial centers."[243] The liminal position in imperial geography and moment of East Floridian British and Spanish legal mechanisms meant that the solutions would be local and specific.[244] Zéspedes crafted proclamations and judges to meet the perceived legal needs of his residents. Although with only vestigial power under the treaty, Tonyn continued to draw petitions and to assert jurisdiction. Tonyn, the obstinate former leader of these British subjects, persisted in helping them through a sense of duty while asserting their rights under the treaty between Great Britain and Spain. Tonyn's actions on their behalf created jurisdictional challenges to Zéspedes's attempted exercise of complete Spanish sovereignty. Tonyn's effectiveness was enhanced by the legal and adversarial acumen of the former Chief Justice of East Florida, James Hume, who brought his skill both to individual causes and to inter-imperial constitutional conflicts that implicated freedoms, rights, justice, and sovereignty under domestic law and international agreements in this jurisdictionally porous and legal plural province. Furthermore, the two governors were so tied to the concept of sovereignty that they struggled to fix a precise moment of its transfer and even raised the specter of an abeyance of sovereignty when outlaws were without law.

Second, the overlap of British and Spanish assertions of power exposes legal distances between the two imperial powers. Legal systems, procedures, institutions, and language were a field full of gaps, breaks, holes, and incommensurable concepts that legal actors navigated with great uncertainty. Ignorance of one system was ammunition for challenging its authority and its underlying ability to dispense justice in criminal actions and civil causes. British subjects clamored for English law, the common law courts, their procedures, and their protections. They wanted attorneys,

242. LAUREN BENTON, LAW AND COLONIAL CULTURES: LEGAL REGIMES IN WORLD HISTORY, 1400-1900, 12-15, 28-30 (2002).

243. Benton & Ross, *supra* note 240, at 1.

244. *Id.* at 5.

writs, bills of indictment, *habeas corpus*, and civil and criminal juries. They were used to trained attorneys, a clerk of court, and judges. British subjects feared, or feigned to fear, the secret and arbitrary nature of Spanish justice; they feared its ties to despotism and Catholicism even when administered by supposed members of their community. Spanish officials, in turn, asserted Spanish sovereignty and the justice of their legal system.

Third, Zéspedes's creation of judges for British subjects was an ingenious solution to a difficult colonial legal and administrative problem in the legal management of his British population. The creation of judges for British subjects followed from established practices employed by Spain to deal legally with the other. Stemming from its legal accommodation of Muslims and Jews on the peninsula to its elaborate attempts to create a separate *República de Indios* in the Americas, Spanish law and especially *derecho indiano* were replete with examples of separate institutions, rules, and officials to fulfill the legal needs of its ancillary communities.[245] In Zéspedes's mind, such methods were easily adapted to the British community of Spanish East Florida. In the context of empire, judges for British subjects in East Florida were not conceptually different from the *Juzgado General de Indios* in New Spain. Both institutions were pragmatic adaptations to provide legal recourse to a differentiated population within the empire.

Fourth, Spanish and British legalities in this transitional period functioned in isolation and craved adequate resources for the full expressions of *derecho indiano* or the common law. British legal actors lacked underlying sovereignty. Although the recognized representative of sovereign power, Zéspedes had no instructions from the sovereign, no legal adviser despite his pleas for one, and little control over the massive British population. Even Spain's judges for British subjects, Fatio and Leslie, lacked the legal training to act as judges, but for Zéspedes their loyalty to Spain was more important than legal knowledge. Zéspedes could not turn

245. WOODROW BORAH, JUSTICE BY INSURANCE: THE GENERAL INDIAN COURT OF COLONIAL MEXICO AND THE LEGAL AIDS OF THE HALF-REAL 1-6, 94-105 (1983) (separate court for Indigenous people); MAURICIO NOVOA, THE PROTECTOR OF INDIANS IN THE ROYAL AUDIENCE OF LIMA: HISTORY, CAREERS AND LEGAL CULTURE, 1575-1775, 1-15 (2016) (separate royal office to protect Indigenous people). For the *República de Indios*, see Amy Turner Bushnell, *Republic of Spaniards, Republic of Indians*, *in* THE HISTORY OF FLORIDA 76-90 (Michael Gannon ed., 2013); BRIAN P. OWENSBY, EMPIRE OF LAW AND INDIAN JUSTICE IN COLONIAL MEXICO 7-12 (2008); Brian P. Owensby, *Between Justice and Economics: "Indians" and Reformism in Eighteenth-Century Spanish Imperial Thought*, *in* Benton & Ross, *supra* note 240, at 143-69;

to the obvious choice, James Hume, to fill this function despite Hume's skill in English law; Hume was loyal to another sovereign.

Fifth, British and Spanish legal actors could agree on some things. Although the particulars and solutions might differ, they both sought regimes that protected slavery as a recognized and enforceable facet of private property law. British and Spanish authorities, however, vehemently disagreed on how slavery was to be handled and who was to exercise jurisdiction over enslaved humans. Furthermore, neither British authority nor Spanish sovereignty had the reach necessary to control lawlessness away from the confines of the small city. McGirtt's band and similar criminals operated beyond the effective check of policing activities.

The transfer of sovereignty of East Florida from Great Britain to Spain presented Zéspedes with numerous legal challenges. Without clear instructions from the crown and without a legally trained adviser to guide him, Zéspedes improvised within the strictures and structures of *derecho indiano*. As governor, he issued proclamations on pressing topics of private and criminal law that were applied to all inhabitants but fell disproportionately on his British guests who awaited transport from the province. Mirroring imperial institutions to manage legally disparate communities such as Indigenous peoples, Zéspedes created judges for British subjects. These judges applied rules, language, and procedures suited to this foreign resident population. Nonetheless, the judges lacked legitimacy with the British population because they were not adequately trained and, particularly in the case of Fatio, they were seen as too strongly aligned with Spanish power. British subjects wanted English law, courts, and juries. They wanted a British East Florida. Instead, until they left, they got a Spanish governor's proclamations and ad hoc judges for British subjects, a Swiss planter and a Scots merchant, to dispense justice in Spanish East Florida.