The Strength of the Deed: Notarial Credit Markets and Contract Enforcement Institutions in Early Modern Spain

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Notarial Credit Markets and Contract Enforcement Institutions in Early Modern Spain

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"Oyó con gran sosiego Loaysa la arenga de la señora Marialonso, y con grave reposo y autoridad respondió: por cierto, señoras hermanas y compañeras mías, que nunca mi intento fué, es, ni será otro que daros gusto y contento en cuanto mis fuerzas alcanzaren, y así no se me hará cuesta arriba este juramento que me píden; pero quisiera yo que se fiara algo de mi palabra, porque dada de tal persona como yo soy, era lo mismo que hacer una obligacion guarentigia"

Miguel de Cervantes Saavedra, *Novelas ejemplares: El zeloso extremeño*, 1821 [1613], p. 40.

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Abbreviations

AHMM	Archivo Histórico Municipal de Málaga
AHPM	Archivo Histórico Provincial de Málaga
CGPJ	Consejo General del Poder Judicial
IECA	Instituto de Cartografía y Estadística de Andalucía
INE	Instituto Nacional de Estadística
NR	*Novísima Recopilación de las Leyes de España*
PARES	Portal de Archivos Españoles

ha	hectare (area unit)
km	kilometers (length unit)
mrvds.	maravedís (monetary unit)
r.v.	reales de vellón (monetary unit)
r	recto
v	verso

Equivalences

1 arroba	11.5 kilograms approx. (mass unit)
1 obrada	1,000 vineyard strains approx. (area unit)
1 real de vellón	34 maravedís (monetary unit)

Chapter 1

Introduction

1. 1 Motivation

Institutionalist analyses of early modern Spain have generally privileged a negative view of its capacity to create an efficient economic organization that worked as a lever for the development of markets and the transition to modern economic growth, especially in the Crown of Castile. On the one hand, mercantile elites are portrayed as being unable to constrain the predatory nature of the reigning monarchs in introducing and raising taxes arbitrarily, exerting a monopoly over colonial trade and confiscating American silver remittances. On the other hand, the monarchy is assumed to have refrained from developing a legal framework capable of encouraging trade and enforcing contracts, while leaving the control of the most dynamic sectors, such as wool production, in the hands of rent-seeking organizations (North and Thomas, 1973; Kagan, 1981; North, 1981 and 1991; Acemoglu *et al.*, 2005).

Nevertheless, several works have strongly criticized this interpretation. Regarding the unrestricted absolutism of the monarchs, some authors have suggested that, far from being predatory, Spanish kings were severely constrained by the traditional liberties (*fueros*) of both (Castilian) cities and (peripheral) historic territories. Thus paradoxically, in this view it was the structural weakness of the monarchy and royal powers – which hindered market integration – the main obstacle to creating an institutional framework conductive to economic growth (Yun, 1998; Grafe, 2012).

Relatively few studies, however, have tried to evaluate the actual capacity of the institutions designed by the Spanish Leviathan to guarantee the enforcement of contracts during the early modern period, as well as the performance of the most relevant organizations in the markets in which they operated. Nonetheless, in recent years there has been a proliferation of works questioning their alleged ineffectiveness. On the adequacy of the judicial institutions, the works of Carvajal (2013) and Fernández

Castro (2015) on the role played by the *Chancillería* of Valladolid and the *Audiencia de la Casa de Contratación* of Seville respectively have suggested that the courts created a framework favorable to the protection of private property rights, thus contributing nuances to Kagan's negative assessments in his seminal work (Kagan, 1981). On the analysis of organizations, Grafe (2006) and Lamikiz (2016) for Bilbao and González Arce (2010) for Burgos showed that their respective *consulados* provided merchants with mechanisms that encouraged the expansion of trade in those areas. In his study of the *Mesta*, Drelichman (2009) suggested that this organization, despite the distortions it introduced, constituted the best possible institutional arrangement, given the absence of an efficient land market. More recently Milhaud (2017) has evaluated the role of Spanish ecclesiastical institutions as the main suppliers of long-term credit, showing that, for example, they took advantage of their networks of monasteries and convents to gather the large sums solicited by some of their clients, as well as to allocate financial resources surpassing the obstacles created by jurisdictional fragmentation.

My research aims to contribute to this field by evaluating the functioning of the notarial credit market in early modern Spain. More specifically, by relying mainly on data from the second half of the eighteenth century for the city of Malaga, I examine whether the formal contract enforcement institutions linked to this market were able to create a legal environment that protected creditors' rights, thus encouraging the use of such contracts and favoring a better allocation of credit resources.

In order to do this, the thesis analyzes the performance of three contracting institutions. First, it assesses the role of Castilian notaries in credit markets, focusing on the legal virtues that notarized contracts offered, as well as on those segments that benefited from them the most. Analyzing the role of notaries in credit markets has been a recurrent topic since the seminal work of Hoffman *et al*. (2000) on the Parisian case. These authors showed that between the seventeenth and nineteenth centuries Parisians made great use of notarized credit contracts, something encouraged not only by their legal advantages, but also by the financial intermediation developed by notaries. Because notaries certified documents containing valuable information about their customers, such as wills or sales, they could use this information to act as brokers, matching creditors with potential debtors. If a potential debtor needed a loan, a notary could help him find a creditor from among his wealthier clients. If a creditor needed information about a potential debtor's solvency or credit history, a notary could

examine his archive and collect information about him. Hence, thanks to their privileged position, these agents could mitigate the negative effects of information asymmetries.

Since then, a number of scholars have carried out analyses of notarial credit markets in both European and Latin American countries.[1] These works have demonstrated the existence of common elements across territories, but also important differences between them. Thus, for example, in the Low Countries the relevance of this market was much less than it was in Paris. This is explained, on the one hand, by the impossibility of notaries in the Low Countries becoming financial intermediaries. In Paris, conversely, notaries capitalized on certain regulatory advantages allowing them to consolidate that role: the application of a *numerus clausus*, the lack of any other group with similar functions, the absence of lien registries, and the fact that a high percentage of the sales of public debt passed through their hands. However, in the Low Countries the regulation of notaries was quite different: notarial activity was an open profession, aldermen were also authorized to certify documents, and the registration of real state transactions was compulsory. Along with the practical absence of informational advantages, in the Low Countries the law did not offer substantial legal advantages for notarized credit contracts in comparison with the non-notarized ones. Consequently, the combination of these two factors relegated notarized contracts to a secondary position, mainly being used in exceptional circumstances – unusual transactions or deals between unknown counterparts – while non-notarized contracts acquired a clearly predominant role (Van Bochove and Kole, 2014; Gelderblom *et al.*, 2016 and 2018). The example of the Low Countries shows the importance of conducting more case studies like the present one to help us make comparisons and identify the specific role of notaries in different countries or even cities.

Secondly, this work measures the degree of flexibility enjoyed by the notarial credit market in introducing legal adaptations in the absence of changes to Castilian statutory law. Thus, it is inserted in the discussion about the impact of legal traditions over the development of financial markets. This debate was initiated a few decades ago, when a

[1] On Europe, see Sola (2000), Peña-Mir (2016 and 2020), Carvajal (2018) and Cebreiro Ares (2018) for Spain; De Luca (2013) and Lorenzini (2015 and 2018) for Italy; Costa *et al.* (2014a and 2014b) for Portugal; Gelderblom *et al.* (2018) for the Low Countries; Dermineur (2018 and 2019) and Hoffman *et al.* (2019) for France. On Latin America, see Mata de López (1996), Wasserman (2014a, 2014b and 2018) and Anachuri (2019) for Argentina; Suárez (2001), Burns (2010) and Zegarra (2016, 2017a, 2017b and 2018) for Peru; and Levy (2012) for Mexico.

group of scholars developed the "law and finance hypothesis", which maintains the superiority of common-law countries (like Britain and its former colonies) over civil-law countries (like countries in continental Europe and their respective former colonies) in developing of financial markets. This would be explained by the greater degree of judicial discretion in the first group of countries, which allows them to introduce legal innovations without passing new laws. Civil-law countries, conversely, are much more dependent on the decisions of a central legislative power, which severely limits their ability to introduce legal innovations rapidly (La Porta *et al.*, 1997, 1998 and 2008). However, the supposedly greater rigidity of the civil-law countries has been questioned by other works, many of which draw on evidence from the economic history of the nineteenth and twentieth centuries (Rajan and Zingales, 2003; Lamoreaux and Rosenthal, 2005; Sgard, 2006; Musacchio, 2008 and 2010; Lamoreaux, 2016; Martínez-Rodríguez, 2016; Hoffman *et al.*, 2019, pp. 122-148). Analysis of the degree of legal flexibility in early modern Spain provides us with evidence for an earlier period, thus contributing to identifying more precisely the legal basis of financial development.

Finally, the thesis assesses whether the public mortgage registries, a sort of pre-land registry created in 1768, contributed to the better functioning of the notarial credit market in early modern Spain. There is a consensus among economists on the need to develop transparent property rights as a prerequisite for encouraging impersonal exchanges and guaranteeing wider access to credit. One of the ways to achieve this is through the diffusion of sophisticated registries that mitigate information asymmetries on the collateral and accelerate judicial processes in the event of a default (De Soto, 2000; Arruñada, 2012). Recently, economic historians have paid attention to this topic, by analyzing the emergence of these institutions during the medieval and the early modern periods, their performance, and the factors that conditioned their trajectories (Van Zanden *et al.*, 2012; Van Bochove *et al.*, 2015; Hoffman *et. al*, 2019, p. 76). Studying the registries thus help us measure the real capacity of pre-industrial states to introduce this type of institution and to identify the obstacles they found in the process.

1. 2 The spatial and temporal contexts: Malaga's economy in the second half of the eighteenth century

This thesis analyzes the performance of the aforementioned contract enforcement institutions in the notarial credit market of the city of Malaga in the second half of the eighteenth century. Although relying on data from a single locality forces us to be cautious about extending our conclusions to the whole Spain – especially in a context of high jurisdictional fragmentation – an in-depth case study gives us a better knowledge of the interaction between the financial and the real economy. Additionally, it provides a more thorough identification of the specific problems derived from market relationships and the capacity of different institutions to deal with them.

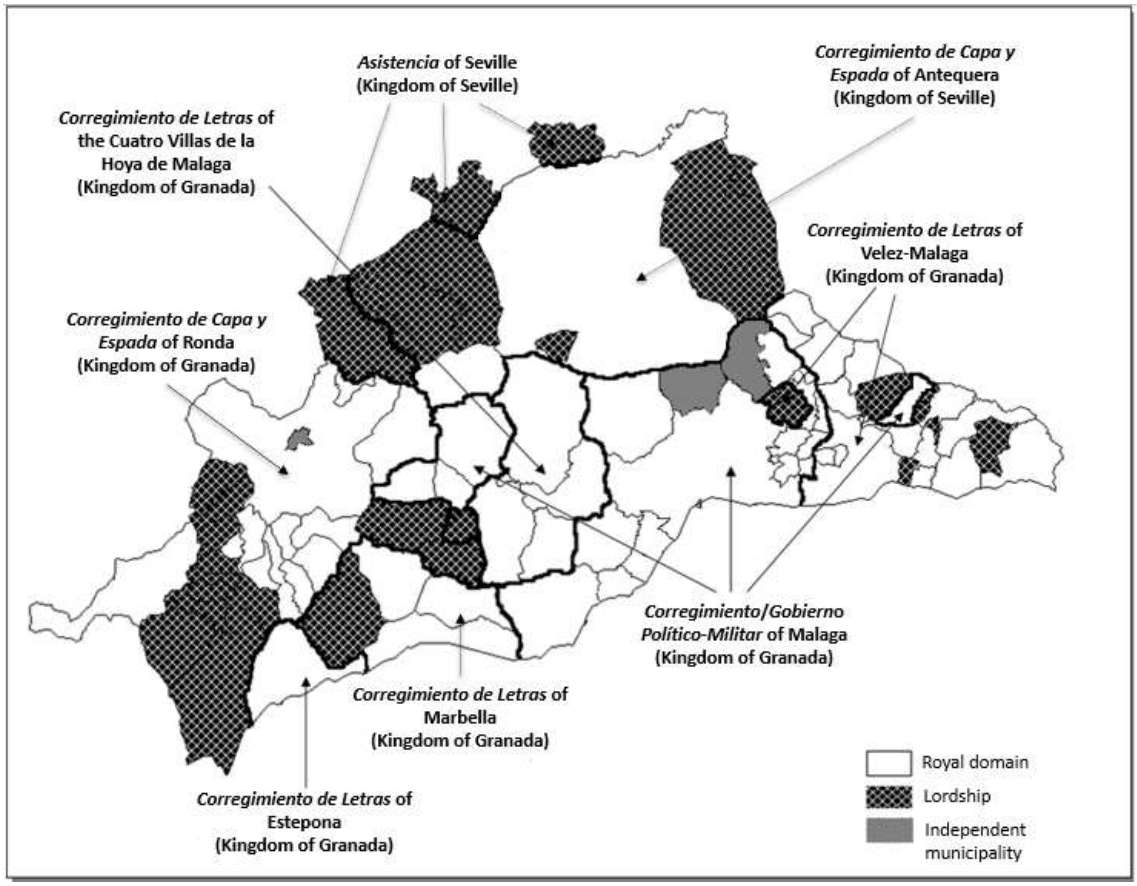
Located in the Kingdom of Granada, the city of Malaga and its surrounding municipalities were tightly integrated into international commercial circuits (Figures 1.1 and 1.2).[2] From the thirteenth century this territory specialized in the production and exportation of raisins, almonds and figs, something encouraged by the signature of several commercial treaties between the Kingdom of Granada – at this time a Muslim state – and the Republic of Genoa (Fábregas García, 2006). After its conquest by the Crown of Castile at the end of the fifteenth century, this agro-export pattern was maintained and even reinforced by the possibilities of producing and exporting wine on a large scale (Ponce, 1995; Martínez Ruíz, 2011).

[2] The Kingdom of Granada corresponded approximately to the modern provinces of Granada, Malaga and Almería.

FIGURE 1.1: Early modern Spain divided into crowns and kingdoms (the circle indicates the geographical area of study)*

*Note: the thick lines indicate a higher level of "regional" legal autonomy (Grafe, 2012, pp. 116-164).
Source: author's elaboration.

FIGURE 1.2: Late eighteenth-century administrative and jurisdictional division of the territory composing the current province of Malaga



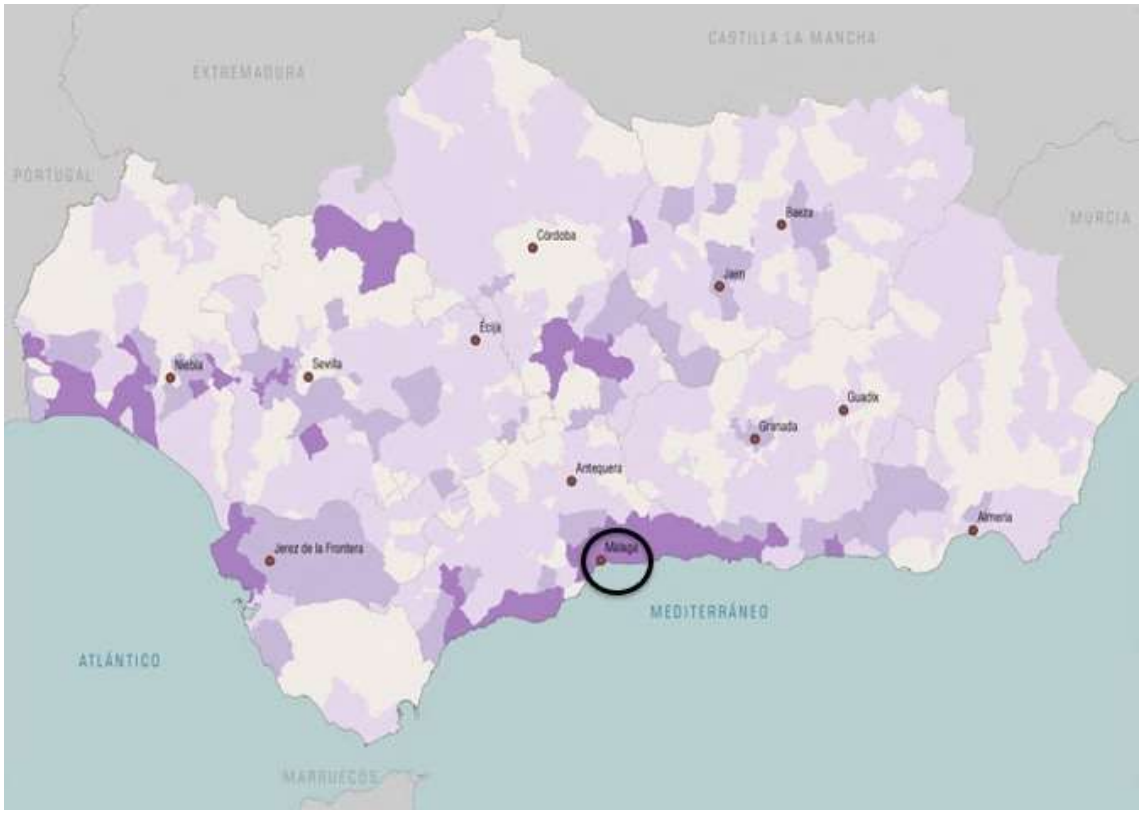
Source: author's elaboration. For the administrative division of this area and the boundaries of both *corregimientos* (thick lines) and municipalities (thin lines), see *España dividida en provincias e intendencias, Tomo I* (1789, pp. 314-316 and 467-468), Heras Santos (1996, pp. 127 and 136-139), and Álvarez y Cañas (2012, pp. 35-38, 58-59, 69-71, 76-77, 84 and 86). For the jurisdiction of the municipalities, see *España dividida en provincias e intendencias, Tomo I* (1789, pp. 314-316 and 467-468), Villalobos y Martínez-Pontrémuli (1986, p. 1312), and Soria Mesa (1995, p. 103).

Malaga's economy experienced significant growth during the eighteenth century. The end of the War of the Spanish Succession (1701-1714) was followed by a constant increase in export of wine and raisins after a long period of decline initiated in the thirties of the previous century (Ringrose, 1983, pp. 235-236 and 244-245; Quintana Toret, 1995).[3] This favored Malaga in making it one of the main Spanish exporters of both commodities (Nadal, 2003, p. 34; García Fernández, 2006, pp. 167-170, 332-335, 365-367). There were also exports of other agricultural commodities, such as almonds, figs, lemons, oranges, olive oil and *aguardiente* (Gámez Amián, 1983, pp. 129 and 137-

[3] "Exports of Málaga wine and raisins jumped more than 50% as soon as the War of Succession ended and increased another 60% by the early 1730s. This trend continued throughout the century, and in the 1780s exports were more than double those of the 1740s." (Ringrose, 1996, p. 198).

139). The increase in the demand of all these commodities stimulated the replacement of subsistence crops with cash crops. Thus, in the second half of the eighteenth century vineyards already occupied around 20% of the cultivated area of the current province of Malaga, especially along the coastal strip (Figure 1.3), while other cash crops like olive, almond and lemon trees occupied another 10% (Parejo Barranco, 2007, p. 37). At the same time, from the port a large number of foreign goods (textiles, grain, codfish, timber, etc.) were introduced for consumption within the city and other places in Andalusia or for re-export (Gámez Amián, 1983, pp. 117-122; 1986, pp. 160-163).

FIGURE 1.3: Vineyards in eighteenth-and nineteenth-century Andalusia (the circle indicates the geographical area of study)*



*Note: the darker colours indicate the greater presence of vineyards.
Source: *Atlas de Historia Económica de Andalucía ss XIX-XX*, available on the IECA website at https://www.juntadeandalucia.es/institutodeestadisticaycartografia/atlashistoriaecon/atlas_cap_16.html (consulted October 4, 2020).

The destinations of most exports were concentrated in northern Europe, with England occupying a predominant position (Table 1.1).[4] In the second half of the eighteenth century the Bourbon monarchy passed several reforms, that of 1778 being the most important, that broke the monopoly of the port of Cadiz over the Indies trade and authorized several ports such as Malaga to trade with certain locations in the Americas. Both farmers and trading houses took advantage of this to export some of their surplus there, mainly of wine, which resulted in the consolidation of Malaga as the third largest Spanish exporter to America between 1778 and 1796 (Fisher, 1981; Gámez Amián, 1994).[5] However, the relevance of this market was never comparable to the importance of northern Europe (Parejo Barranco, 2007, pp. 45-46).

From very early on, control over exporting and importing was concentrated in the hands of foreign merchants. Initially they did not have a permanent presence in Malaga, making only brief visits to the city. However, over time their presence became more permanent, a tendency that was definitively consolidated in the eighteenth century (Villar García, 1997; Martínez Ruíz, 2011).[6] It seems that it was precisely then that a group of trading houses that had settled in the city of Malaga came together in a private organization known as the *Comercio Marítimo* or the *Alto Comercio Marítimo* to coordinate their actions and protect their interests (Villar García, 1981, pp. 254-255; Villas, 1982, p. 205).[7] Proofs of this more stable foreign presence include the gradual diversification of their investments (lands, factories, etc.) and their intervention in local policy-making as aldermen (Villar García, 1982; Gámez Amián, 1994, pp. 130-145; Carmona Portillo, 2017, pp. 67 and 73).

[4] In her analysis of the Anglo-Spanish trade through the ports of Bristol, Exeter, Hull, Plymouth and Southampton, García Fernández shows that between 1700 and 1765 Malaga, along with Bilbao, was the main Spanish exporter to these ports, as well as being the third largest importer after Bilbao and Cádiz (García Fernández, 2006, pp. 123-134).

[5] In trade with America, not only exports of local commodities but also re-exports of Catalan products (mainly *aguardiente*, paper and textiles) were relevant (Gámez Amián, 1994, pp. 65-69).

[6] This was favored, to a large extent, by the minor legal obstacles to their settlement (Gámez Amián, 1983, p. 163).

[7] It seems that it was 1744 that the members of this organization, through a private deed, fixed their obligations – which included paying membership fees – as well as the penalties for non-compliance with them (Villar García, 1981, pp. 254-255). Previously, in 1719, a group of mostly foreign merchants under the generic name of the *Comercio de Málaga* had notarized a document granting powers to several attorneys of Madrid for the protection of their interests (Villar García, 1997, p. 193). It should be noted that the *Alto Comercio Marítimo* did not include all foreign merchants but only the most important, those who were closely involved in import-export activities (Villar García, 1997, pp.). Likewise, members of some foreign communities such as the Maltese did not join this organization, but remained an independent group (Mairal Jiménez, 1999b, pp. 321-323). Equally, this organization did not exclude Spanish merchants, as the cases of Antonio Luis Martínez or Eugenio Agustín Bazo prove (Figure 2.2).

TABLE 1.1: Foreign destinations of the wine and raisins exported from Malaga (1791-1793)

	Wine (%)			Raisins (%)		
Area	**1791**	**1792**	**1793**	**1791**	**1792**	**1793**
Austrian Netherlands	12.2	-	4.2	-	26.0	-
Bremen	3.6	-	1.3	3.1	-	1.3
Denmark	-	14.4	8.4	7.5	3.2	19.4
Dutch Republic	3.7	26.2	1.1	-	-	-
England	30.9	19.1	35.8	48.9	53.0	44.8
France	9.3	1.3	-	2.9	1.4	-
Hamburg	18.8	-	8.7	19.3	-	4.3
Italy	-	-	1.3	-	0.1	-
Portugal	-	2.1	9.4	2.0	-	2.3
Prussia	-	-	4.9	-	-	3.3
Russia	7.7	27.0	0.3	-	0.2	-
USA	3.0	6.1	17.0	3.6	6.8	10.8
Others	10.8	3.8	3.8	12.7	9.3	13.8
Total	**100.0**	**100.0**	**96.2***	**100.0**	**100.0**	**100.0**

*Note: the data in this column do not account for 100.0% of the exports.
Source: Gámez Amián (1986, p. 158).

In marketing agricultural commodities, a key role was played by the notarial credit market. Annually, via notarized contracts, a large number of farmers from the city and the nearby municipalities received loans to finance the work on their farms. In exchange, the lenders, who were mostly engaged in trade, were repaid some months later with the agricultural commodities produced by their own farmers (Gámez Amián, 1984; Peña-Mir, 2016).[8] The proliferation of these deeds was motivated in large degree by the structure of land ownership in this area. Unlike what happened in the rest of Andalusia, characterized by the hegemony of its large estates, in repopulating the Kingdom of Granada after its conquest, small plots predominated, resulting in a larger number of landowners (Table 1.2). Furthermore, within the Kingdom of Granada, it seems that small-scale owners were relatively more important in Malaga and its surrounding area than in the rest of the territory (Table 1.3). The small size of the farms, together with the high seasonality of agricultural incomes, made it difficult for farmers

[8] For the early modern period, this system of commercialization was not only used in Malaga, it has been also documented for other Spanish areas in connection with a wide range of commodities: wool in sixteenth and seventeenth-century Soria (Diago Hernando, 2002); hazelnuts in the eighteenth-century Asturias (Gómez Álvarez, 1993, p. 73); *aguardiente* in Reus in the second half of the eighteenth century (Rovira i Gómez, 1988; Grau Pujol and Valls-Junyent, 2015); or wool and cattle in late eighteenth-century Cáceres (Melón Jiménez, 1990, pp. 80-81). Bilbao's merchants also made great use of it in the eighteenth century to acquire Biscayan iron, Castilian wool and Riojan wine (Ruíz Martín, 1970, pp. 184-185).

to save enough money to finance their works without resorting to credit. Mercantile groups took advantage of this situation and massively used these instruments to ensure the supply of commodities. It should be noted that, although the trading houses of the *Alto Comercio Marítimo* sometimes used agricultural loans, it was the city's lesser merchants, mostly natives, who were the main creditors of this modality (Villar García, 1982, pp. 152-153; Gámez Amián, 1983, pp. 99 and 164; Peña-Mir, 2016, pp. 137 and 140-141). However, probably many of these merchants acted as intermediaries of the trading houses in this activity, as suggested by their indebtedness with them (Table 1.4).[9] Something similar applied to purchases of agricultural commodities in other municipalities, an activity in which the trading houses contracted local traders, instead of sending their own employees (Table 1.5).

TABLE 1.2: Distribution of agricultural population in Andalusian kingdoms (1797)

	Córdoba	**Granada**	**Jaén**	**Seville**	**Total**
Agricultural population	41,000	121,000	32,000	130,000	324,000
Landowners (%)	5.0	16.0	3.0	4.0	8.5
Sharecroppers (%)	14.0	16.0	17.0	10.0	13.4
Labourers (%)	81.0	68.0	80.0	86.0	78.0
Total (%)	**100.0**	**100.0**	**100.0**	**100.0**	**100.0**

Source: Bernal (1981, p. 283).

TABLE 1.3: Owner' structure of the territories composing the current provinces of Almería, Granada and Malaga (c. 1750)

Owners (in ha)	**Almería (%)**	**Granada (%)**	**Malaga (%)**
below 1	44.6	40.8	48.2
1-5	30.6	30.0	35.7
5-10	8.9	17.8	8.6
10-100	9.6	8.7	6.7
100-250	5.1	2.3	2.2
250 +	1.2	1.6	0.7
Total	**100.0**	**101.2***	**102.1***

*Note: the data in these columns account for more than 100.0% of the owners.
Source: Gámez Amián (1995, p. 152).

[9] Previous studies have identified the existence of merchants and trading houses from the city of Malaga and its surrounding area highly involved in these operations, such as Juan de Binsbach for the seventeenth century (Quintana Toret, 1995, p. 792); Catalina Lynch, Tomás Quilty Valois, Fernando Antonio Pérez and Juan Antonio Palomino y Vargas for the eighteenth century (Gámez Amián, 1984, pp. 207-213; Villar García and García Montoro, 1989, pp. 271 and 274; Chauca *et al.*, 1994, pp. 116-117; Gallardo Téllez and Pezzi Cristóbal, 2015); or Manuel Agustín Heredia, Jorge Loring and Felipe Rixon for the nineteenth century (García Montoro, 1978, pp. 37-38; Campos Rojas, 1987, pp. 88-109; Villar García, 2004, p. 73).

TABLE 1.4: Some creditors and their links with the trading houses of the *Alto Comercio Marítimo*

Creditor	**Number of agricultural loans subscribed in 1784 (as creditor)**	**Status**	**Links with trading houses**
Andrés del Pino	65	Andrés ran a business house in codfish, wine, raisins, figs and almonds in Malaga in 1807 Salvador del Pino, father of Andrés, worked as merchant of Malaga (*Tráfico Comercio Terrestre*) in 1771	On July 1, 1782, Salvador del Pino obliged himself to pay 14,550 r.v. and 28 mrvds. that he had received from the trading house "Menvielle, Westertrom".
			On February 19, 1783, Salvador del Pino obliged himself to pay 15,600 r.v. that he had received from the trading house "Menvielle, Westertrom".
			On February 19, 1784, Andrés del Pino and his father obliged themselves to pay textiles valued at 17,332 r.v. and three quarters that they had received from the trading house "Lambrecht, Schnackenburg and Co."
			On July 4, 1785, Andrés del Pino and his father obliged themselves to pay 20,442 r.v. and 24 mrvds. that they had received from the trading house "Flor, Neumann, Helmeke and Co." to cover emergencies.
			On March 29, 1787, Andrés del Pino and his father obliged themselves to pay 18,000 r.v. that they had received from the trading house "Jaime Setta and Co." to cover emergencies.
			On July 7, 1787, Andrés del Pino and his father obliged themselves to pay 25,196 r.v. that they had received from the trading house "Flor, Neumann, Helmeke and Co." to cover emergencies.
			At a meeting of creditors held between 1807 and 1808, Andrés del Pino recognized a debt of 290,759 r.v. and 5 mrvds. with the trading house "Grivegnée and Co."
Manuel Orozco Rodríguez	64	Mentioned as "a person famous for being a good payer" in 1784 José Orozco Coronado, father of Manuel, worked as merchant of Malaga (*Tráfico Comercio Terrestre*) in 1771	On March 10, 1785, Manuel Orozco obliged himself to pay 20,291 r.v. and 30 mrvds. that he had received from the trading house "Jaime Setta and Co." to cover emergencies.
			On February 24, 1787 Manuel Orozco and his brother José obliged themselves to pay 8,875 r.v. that they had received from the trading house "Flor, Neumann, Helmeke and Co." to cover emergencies.
			On June 15, 1787, Manuel Orozco and his brother José obliged themselves to pay 1,860 r.v. that they had received from the trading house "Flor, Neumann, Helmeke and Co." to cover emergencies.
			On March 29, 1788, Manuel Orozco and his brother Juan obliged themselves to pay 7,232 r.v. that they had received from the trading house "Flor, Neumann, Helmeke and Co." to cover emergencies.
Francisco de los Reyes	0	Merchant of Malaga (*Tráfico Comercio Terrestre*) in 1771	On March 29, 1784, the trading house of Antonio Luis Martínez promised to pay a debt that Francisco de los Reyes owed to the trading house "Schultz, Pally, Muller". In return, Martínez would receive from Reyes the collection rights on agricultural loans valued in more than 11,000 r.v.

Source: AHPM, *libros* 3136, 3195, 3236, 3331, 3365, 3383, 3384, 3386, 3387 and 3639, and Mairal Jiménez (1999b, pp. 484-485).

TABLE 1.5: Some creditors/buyers and their links with the trading houses of the *Alto Comercio Marítimo*

Creditor/buyer	**No. of contracts for the purchase of agricultural commodities subscribed in 1784**	**Status**	**Links with trading houses**
Antonio Eneas Vahey	1	Merchant of the city of Velez-Malaga in 1784	On, August 12, 1784, Antonio Eneas Vahey, merchant of Velez-Malaga, received 105,000 r.v. from the trading house "Pally, Muller and Co." to buy lemons for the afore-mentioned house.
Cristóbal de Herrera y Rivera	3	Member of the Malaga *consulado* in 1793	On June 3, 1784, Cristóbal de Herrera lent 6,000 r.v. to Julian Ramos, citizen of Benamocarra, to buy lemons for the trading house "Lambrecht, Schnackenburg and Co."
			On June 3, 1784, Cristóbal de Herrera lent 10,000 r.v. to Cristóbal Pardo, citizen of Benamocarra, to buy lemons for the trading house "Lambrecht, Schnackenburg and Co."
			On June 3, 1784, Cristóbal de Herrera lent 10,000 r.v. José Ramos, citizen of Benamocarra, to buy lemons for the trading house "Lambrecht, Schnackenburg and Co."
Francisco de Ortega	3	-	On January 9, 1784, Francisco de Ortega, in the name of the trading house "Patricio Sohan", lent 1,600 r.v. to Antonio Coronado, citizen of Alhaurín el Grande, to buy figs.
			On January 12, 1784, Francisco de Ortega, in the name of the trading houses "Patricio Sohan" and "Timoteo Power, Macnamara and Co.", lent 8,000 r.v. to Miguel Morales, citizen of Alhaurín el Grande, to buy figs.
			On August 19, 1784, Francisco de Ortega lent 6,000 r.v. to Antonio Coronado, citizen of Alhaurín el Grande, to buy figs for the trading houses of the city and for the consul of Sweden.

Source: AHPM, *libros* 3047, 3049, 3167 and 3195, and *Gazeta de Madrid*, 97 (1793, p. 1277).

The greater economic activity of the city was reflected in its increase in population, which rose from around 37,000 inhabitants in 1717 to more than 50,000 in 1787 (Sanz Sampelayo, 1998, pp. 22-23). The city's fiscal relevance within the Kingdom of Granada – an area where the monarchy obtained an important percentage of its resources – also increased.[10] While in the city of Granada, the most populous in this Kingdom, the tax burden per *vecino-pechero* remained stagnant between 1751 and 1780, during the same period in the city of Malaga it almost doubled.[11] Thus, in 1751 the *vecinos-pecheros* of Malaga went from paying on average around 30% less than their opposite numbers in Granada, to almost 45% more in 1780 (Figure 1.4).

In the last quarter of the eighteenth century, and in parallel with this situation of expansion, the city experienced an unprecedented institutional renovation. In 1776 a College of Lawyers was established within the city, as well as the *Montepío de Cosecheros*, an institution created to provide non-interest loans to the farmers of the Bishopric of Malaga. Between 1784 and 1791 three privileged companies trading with America were active in the city (*Compañía de Navieros de Málaga*, *Compañía de Caracas de Málaga*, and *Compañía Marítima de Málaga*). In 1785, in line with the tendency in the rest of Spain, a *consulado* was created.[12] In 1785-1786, the guilds of the coopers and barrel-makers – those most involved in exports – were unified. In 1787, the Marítime College of *San Telmo* was established to train both pilots and sailors. Finally, in 1790 a *Sociedad Económica de Amigos del País* was created to promote the diffusion of ideas favorable to economic development (García de la Leña, 1793, pp.

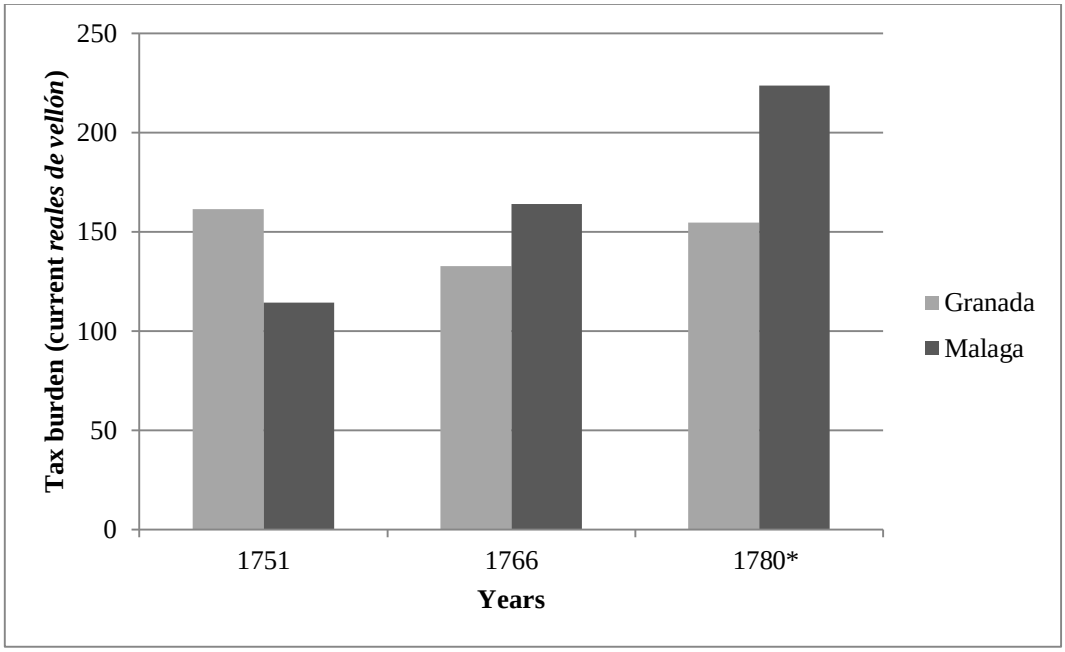
[10] In 1792 the Kingdom of Granada was the Spanish territory that collected the second highest amounts of taxation in the form of *rentas provinciales* and *equivalentes* (9.1% of the total revenues), being only surpassed by the Kingdom of Seville (18.1% of the total revenues). See Artola (1982, pp. 353-355).

[11] *Vecinos-pecheros* were the heads of the households not belonging to a privileged estate, and, consequently, obliged to pay generic taxes.

[12] Previously, in 1633, encouraged by English merchants, a *consulado* was created in the city, though it was suppressed in 1654 because of repeated disputes between the merchants and the town council, as well as at the request of other foreign communities (Flemish, Germans and Hanseatic). In order to cover this gap, in 1645 the English merchants from Malaga, together with those from Seville, Cádiz and Sanlúcar de Barrameda, obtained from the monarchy the concession of a specific *fuero* that allowed them to be judged by a judge with a privative jurisdiction (*juez conservador*) in both litigation between them and in litigation that Spanish individuals initiated against them. In 1727 this privilege was extended to the rest of Spain and not only to English merchants, but also to French and Dutch ones. It should be noted that this *fuero* did not apply to all the merchants of the communities just mentioned, but just to those who were in Spain temporarily (*transeuntes*). Those who were fully settled (*vecinos*) would be judged by the ordinary justice. See Escosura (1853, pp. 148-149), Gámez Amián (1983, p. 63) and Martínez Ruíz (2011, pp. 672-674).

309-311, 313 and 329-332; Villas, 1979a, pp. 242-243; Gámez Amián, 1994, pp. 116-124; Arias de Saavedra Alías, 2001, p. 13).

FIGURE 1.4: Tax burden per *vecino-pechero* for *rentas provinciales* in the cities of Granada and Malaga (1751-1780)



*Note: data for Malaga corresponds to 1779.
Source: Zafra Oteyza (1991, pp. 373-374 and 391-392).

Hence, at the end of the eighteenth century, spurred by both agriculture and trade, the city of Malaga had become one of Spain's most dynamic commercial centres. Far from ending, this trend continued in the nineteenth century once the Peninsular War had ended and the crisis derived from the loss of the American domains had been overcome. Mercantile groups resumed exports of agricultural produce and a few years later used the accumulated capital to diversify Malaga's economy and thus give it a preeminent role in the first phases of the industrial revolution in Spain (García Montoro, 1978; Morilla, 1978).[13]

[13] This dynamism can be perceived not only in its early industrial take-off – by Spanish standards – but also in the greater sophistication with which it regulated mercantile activities. Thus, for example, the Malaga *consulado*'s 1824-1825 ordinances project could have constituted an important reference in the writing of the first Spanish Commercial Code, dated 1829 (España, 1975, pp. 59-188; Prona Tomás, 2015, pp. 47-48).

Of course, neither productive specialization nor capital accumulation would have been possible without the existence of a financial market to provide abundant credit for pursuing agricultural activities. At the same time, the proper functioning of this financial market depended to a large extent on the presence of a set of contract enforcement institutions that performed their role correctly. In the following chapters, I assess their hability to do this.

FIGURE 1.5: View of the city and the port of Malaga (c. 1785)

Source: *Málaga desde el mediodía* (c. 1785), painted by Mariano Sánchez.

1. 3 Sources

Notarial deeds make up the backbone of the current research. These records are located in the Archivo Histórico Provincial de Málaga (hereafter AHPM). I have mainly relied on a database that includes all the deeds recorded by 22 of the 24 notaries of the city in 1784, a total of almost 5,200 documents. The deeds corresponding to the city's other two notaries have not been collected because of their state of deterioration. The choice of focusing on just one year is mainly motived by my aim of identifying the type of documents that the notaries in the city recorded, and within them, measuring the relevance of credit contracts (chapter 2). It should be noted that, for most of the notarial books corresponding to the early modern city of Malaga, the indexes have not been preserved, forcing to the reader to examine the entire book to classify the documents it contains. Furthermore, there were some notaries who rarely included the type of document they were recording in the upper left-hand margin of the first page obliging one to read the whole deed in order to identify it. Consequently, neither classifying notarial deeds nor identifying those notaries with a high level of credit-recording activity is an easy task. For the selection of that year, I have used information from a previous article in which I examined the agricultural credit contracts notarized in this area at the end of the eighteenth century (Peña-Mir, 2016). There, I analyzed the contracts recorded in three notarial offices for the period 1779-1794, although deeds for all three notarial offices were limited to the period 1783-1787, while for the remaining years I worked with data corresponding to one or two of those offices. According to the level of activity of these three notaries between 1783 and 1787, 1784 was the year in which they recorded more credit contracts – probably as a consequence of the ending of the American Revolutionary War (1779-1783) – although the figure for this year was not abnormally high in comparison with the other years.

Among the notarial deeds drawn up in 1784, the information included in almost 1,200 obligation contracts (*obligaciones*), a type of document mainly used for short-term credit operations, constitutes the main source of the thesis.[14] Thus, I have extracted from these contracts all the data corresponding to parties, status, amounts, purposes, guarantees, etc. Regarding the remaining notarized documents (around 4,000 deeds), I

[14] Given the extraordinary primacy of the *obligación* in the area of study, which will be demonstrated in detail in the thesis, I restrict my analysis to this type of credit contract. For an analysis of the long-term credit market, in which the Catholic Church had a prominent role, see Milhaud (2019).

have collected the type of document, as well as the name and the status of the parties involved, in order to complete the information that is lacking in many of the obligation contracts.[15] Furthermore, the information included in both powers of attorneys (*poderes*) and bail bonds (*fianzas*) has been used to analyze legal adaptation in chapter 3.

In chapter 4, where I compare some credit conditions in the notarial credit market of the city before and after the creation of the public mortgage registry (1768), I have also taken data from notarial deeds drawn up in 1764. Specifically, I have compiled a database of 1,300 obligations recorded by fifteen of the city's notaries that year. For these contracts, however, the information collected is limited to loaned amounts, mortgages and the statuses of the debtors.

Finally, although in a more superficial way, I have consulted notarial books for other years in order to explore the links between the trading houses and lower-ranking merchants. On the one hand I have consulted the books of the notary Juan Jerónimo de Molina for the period 1782-1789. I took this decision after ascertaining that in 1784 this notary recorded a high number of documents involving trading houses – the most important economic agents of the city – despite not having any special notarial position that would explain this (for example, marine notary). On the other hand, I have analyzed the document corresponding to the meeting of creditors of the merchant Andrés del Pino (1807), the creditor who subscribed more notarized obligations in 1784.[16] Although the relevance of this information for this thesis is secondary, I believe it will be useful for my future research.

Although it would be desirable to analyze judicial sources to know what percentage of these transactions gave rise to lawsuits, as well as their resolutions and the most common legal problems linked to them, the absence of specific judicial fonds for this period in the Malaga archives seriously limits this possibility. According to the law, the authorities of the judicial districts (the *corregidor* and the *alcaldes mayores*) had competences over first-instance lawsuits – and to a lesser extent over their appeals – in both the capital of the judicial district – the city of Malaga in this case – and the

[15] Sometimes parties did not mention their status in obligation contracts but added it in other types of documents, such as wills, leases, sales, etc.

[16] I would like to thank Antonio Carmona Portillo for sharing the references corresponding to this document with me.

district's remaining municipalities (*corregimiento*/*partido*).[17] Nevertheless the Archivo Histórico Municipal de Málaga (hereafter AHMM), which contains the documentation issued by the town council (*cabildo consitorial*), lacks a specific fond on litigation between private parties. Those lawsuits in which one's own city was involved as a party are scattered in the collection called *Propios, rentas, censos, arbitrios, pósitos, contribuciones y repartos*. Although these documents are not concerned with private credit transactions, examining some of them has allowed me to acquire data on the "executors", agents commonly employed in this area to collect both public and private debts.

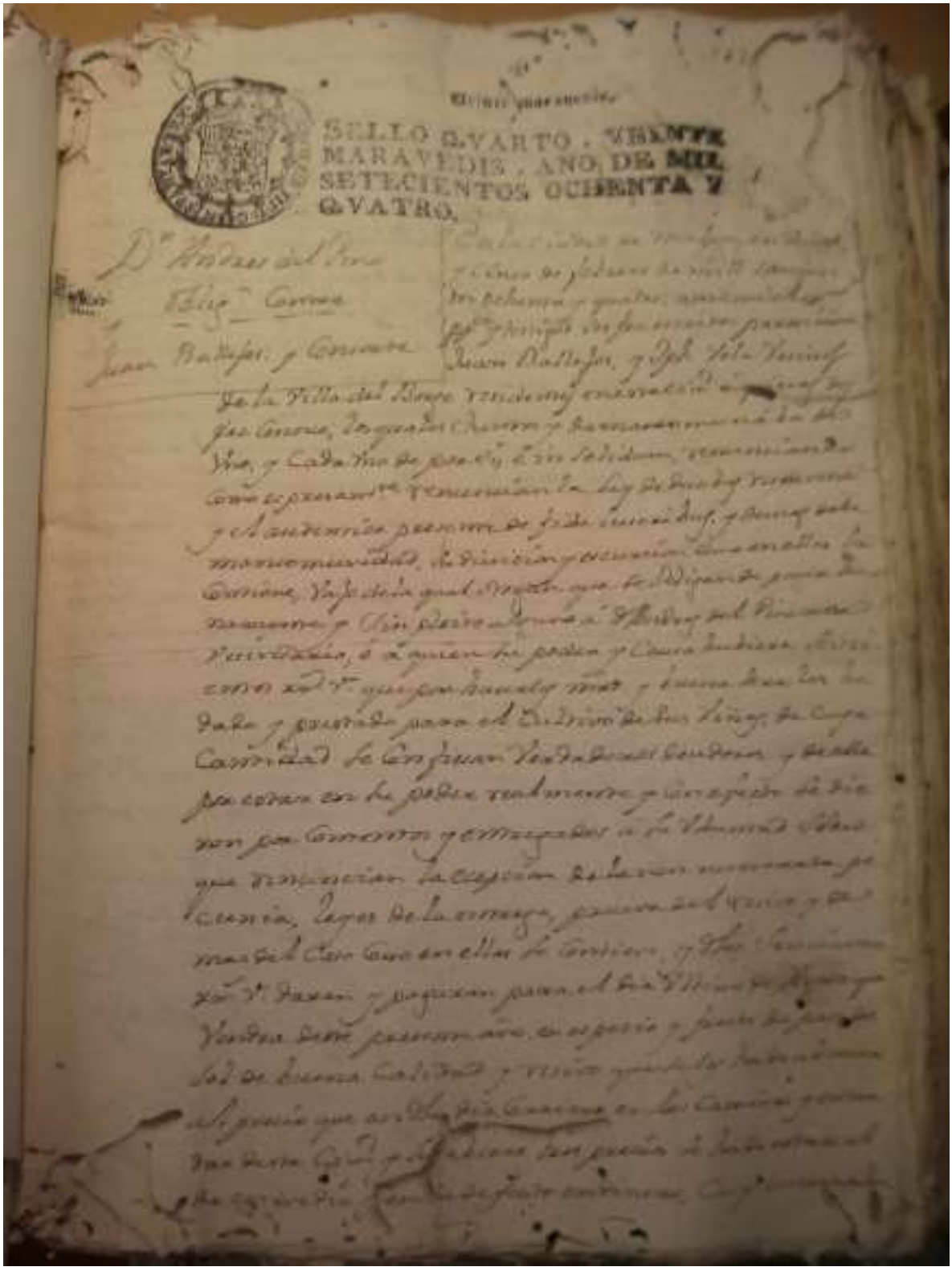
Nor does the AHPM have a judicial fond. However, since several notarial deeds derived from lawsuits, it is possible, after examining them, to obtain valuable information for this research. Thus, among the 1784 notarial records I have been able to locate a couple of documents explain in detail the cases that derived from the breach of notarized obligations. Since this information is very scarce, it is not possible to extrapolate it to all lawsuits, but it is still of use in carrying out a more complete analysis of the degree of effectiveness of the contracting institutions that governed them.

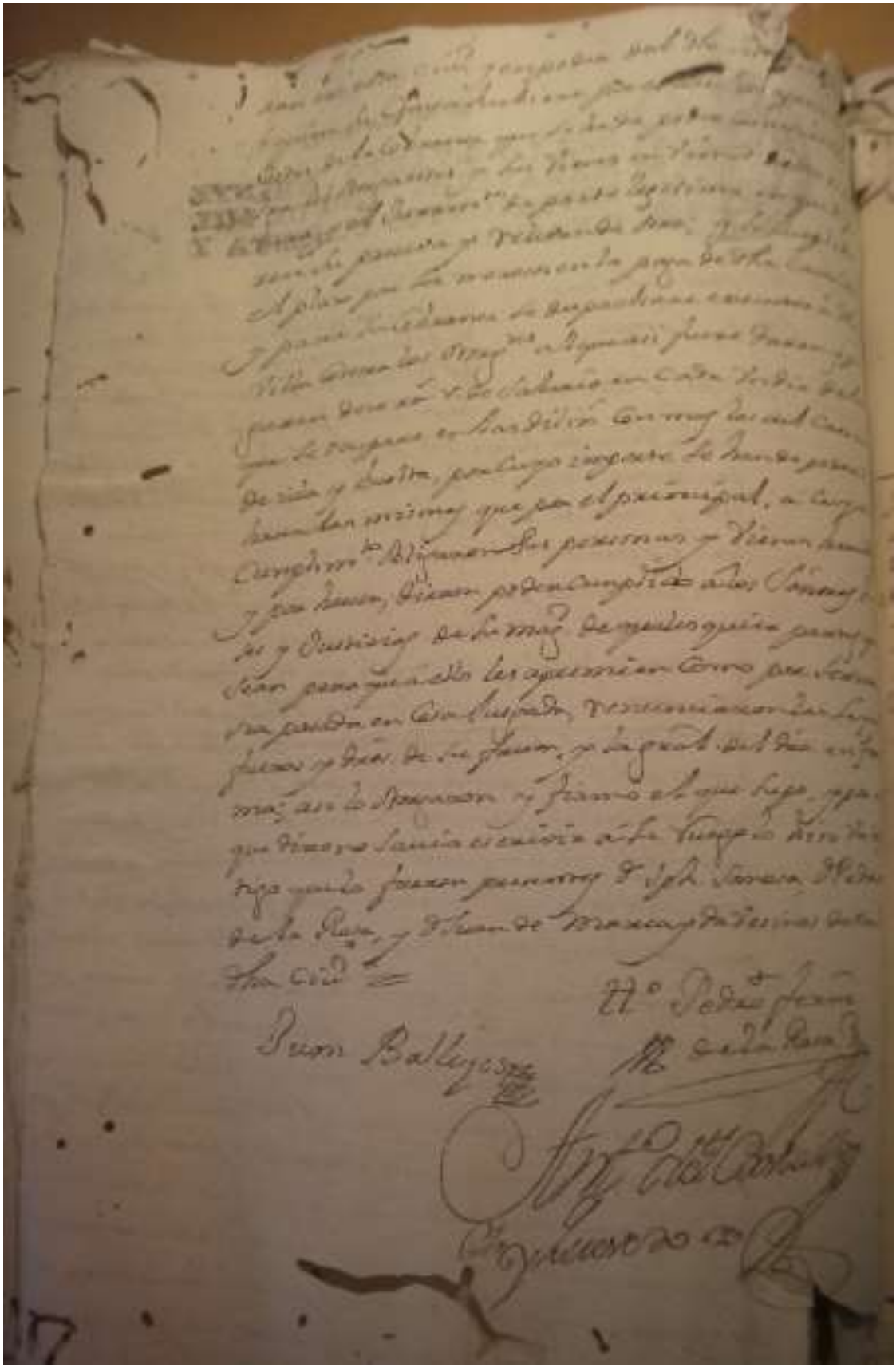
In analyzing the legal framework, I have mainly used two sources. On the one hand I have worked with official legal texts, the *Novísima Recopilación de las Leyes de España* (hereafter NR) being the main one. Published in 1805, this text was a compilation of the Castilian laws that remained in force at that moment, although it seems that not all of them were included and that, among those that were, some laws had been partially repealed (Riesco Terrero, 2007, p. 274).[18] For those laws that I have not located in this source – mostly because they had already been repealed at the time of its publication – I have used updated versions of the immediately previous legal compilation, the *Recopilación de las Leyes de estos Reynos* (1567).[19] Together with the official legal texts, I have worked with contemporary legal handbooks. These handbooks, written by experienced jurists, were acquired by judges, notaries or lawyers to deal with the ambiguities of the statutory law and to solve their legal doubts

[17] See NR, *Libro XI, Título XX, Ley VIII* (1805, pp. 222-224) and Heras Santos (1996, pp. 126-133).
[18] Previous compilations were the *Ordenamiento Real de Medina del Campo* (1433), the *Ordenanzas Reales de Castilla* (1484), and the *Recopilación de Leyes de estos Reynos* (1567). See Planas y Casals, (1873, pp. 32-33) and María e Izquierdo (2005, pp. XLV-XLVI).
[19] *Tomo Primero de las Leyes de Recopilación* (1772) and *Los Códigos Españoles Concordados y Anotados*, *Tomo XII* (1851).

(Sánchez-Arcilla Bernal *et al.*, 2014; Rubio Hernández, 2016). This source is especially useful in understanding the process of legal adaptation, as I will reveal in chapter 3.

FIGURE 1.6: Obligation contract





Source: AHPM, *libro* 3331, pp. 162r-162v.

1. 4 Structure of the thesis

The thesis is divided into three chapters (which can be read independently) analyzing different contracting institutions linked with the notarial credit market.

Chapter 2 constitutes the main core of this research. Here, I study the functions developed by Castilian notaries, focusing on their role in credit markets. Through in-depth analysis of a database that contains all the deeds drawn up by the notaries of the city of Malaga in 1784, I show that the writing of credit contracts – mostly obligations – accounted for a major part of the recording activity of these agents. These documents offered high legal protection to creditors in the event of default, for which reason they were highly valued when financing riskier deals that could not be financed in other ways. Thus, the intervention of notaries was fundamental to the expansion of credit markets.

In chapter 3 I examine the capacity of legal adaptation in the notarial credit market: that is, I measure its ability to introduce modifications that improved the allocation of credit resources in the absence of statutory legal changes. After identifying three dispositions that introduced rigidities in credit markets in Castilian statutory law, I analyze both the jurists' opinions as set out in several eighteenth-century legal handbooks and information from the notarial deeds recorded in Malaga in 1784. The analysis of these two last sources shows that notaries and judges did not scrupulously follow these laws, but applied relaxed versions that removed their distorting elements.

Chapter 4 qualifies the role played by public mortgage registries (*oficios de hipotecas*), an institution created in 1768 with the aim of improving the protection of creditors' rights by improving the registration of mortgaged properties. By comparing obligation contracts notarized in 1764 and 1784 in the city of Malaga, I show that the registries contributed to the better functioning of mortgage credit. Specifically, the major security offered by the mortgages that should be registered according to the 1768 law allowed debtors who added those guarantees to receive higher amounts than those debtors that had not added any pledge, something that had not happened before. The chapter also suggests that this legal innovation was especially favorable for low-status debtors who could not compensate the absence of an effective registry with their prestige.

Finally, in the concluding remarks I summarize the main results of the thesis and point out possible lines of future research.

Chapter 2

Why to notarize a contract? The contribution of notaries to the expansion of credit markets in early modern Spain

This chapter investigates the functioning of notarial credit markets in early modern Spain, focusing on those factors that encouraged their use. By analyzing both the legal framework and a database of notarized credit transactions drawn up in the city of Malaga at the end of the eighteenth century, I show that notaries played a crucial role in the allocation of credit resources. Contracting parties heavily relied on them to carry out riskier deals: high-value contracts, impersonal financial transactions and the financing of non-corporate activities. The choice to notarize these segments was explained by its legal advantages. On the one hand, notarized instruments were easily enforced by the courts in the event of a breach. On the other hand, these documents could be adapted to potential risks by adding additional clauses. Hence, notarization provided legal incentives, without which the credit market would have languished.

2. 1 Introduction

There is a wide consensus among economic historians about the relevance of financial services in promoting economic growth (Levine, 2005; Beck, 2012). In particular, the proliferation of modern financial institutions like banks and stock markets is seen as a *sine qua non* for encouraging that process (Gerschenkron, 1962; Cameron, 1967). Nevertheless, during the medieval and early modern periods, and even during the first half of the nineteenth century, these sophisticated systems were almost absent in many Western countries, so financial needs were covered by other means. Peer-to-peer lending was one of the commonest ways of financing both consumption and investment. In this system, people lent and borrowed primarily without the intermediation of financial institutions (Muldrew, 1998; Briggs, 2009; Van Zanden *et al.*, 2012; Van

Bochove and Kole, 2014; Gelderblom *et al.*, 2016). Although these credit transactions could be contracted through oral agreements or private deeds, states delegated to some public agents, like aldermen, village clerks and especially notaries, the power of certifiying them with public trust (Sabean, 1990; Hoffman *et al.*, 2000; Gelderblom *et al.*, 2018).

The creation of a capillary network of notaries by the states was an important step in the development of a structure for the enforcement of contracts. Notaries offered legal advice, recognized documents, and certified contracts and other legal documents that constituted evidence in the event of a dispute (North, 1990, p. 127). Hence, their action helped to safeguard property rights and contributed to the emergence of more impersonal credit markets.[1]

In this chapter, I assess the extent to which notaries favored the expansion of credit markets in early modern Spain. In particular, I focus on the role played by the notaries of the Crown of Castile, the most populous Spanish territory.[2] The literature on Spanish institutions during the early modern period has long emphasized the supposed absence of an efficient economic organization that guaranteed an environment with low transaction costs. This would be a direct consequence of the predatory character of the rulers, but also of the failure to design a legal framework that supported private

[1] See Hoffman *et al.* (2000 and 2019) and Dermineur (2018 and 2019) for France; Sola (2000), Peña-Mir (2016 and 2020), Carvajal (2018) and Cebreiro Ares (2018) for Spain; De Luca (2013) and Lorenzini (2015 and 2018) for Italy; Costa *et al.* (2014a and 2014b) for Portugal; Gelderblom *et al.* (2018) for the Low Countries; Mata de López (1996), Wasserman (2014a, 2014b and 2018) and Anachuri (2019) for Argentina; Suárez (2001), Burns (2010) and Zegarra (2016, 2017a, 2017b and 2018) for Peru; and Levy (2012) for Mexico.

[2] During the early modern period, Spain was a composite monarchy divided into three historic territories: the Crown of Castile, the Crown of Aragon and the Kingdom of Navarre. At the same time, the Crowns of Castile and Aragon were themselves composite monarchies. The Crown of Aragon included the Kingdom of Aragon, the Principality of Catalonia, the Kingdom of Valencia and the Kingdom of Mallorca. Aragonese territories enjoyed a high degree of self-government. Each of these territories had its own estates or *cortes* (save Mallorca), taxes, currencies, legal system, administrative division, public offices, etc. They also maintained internal customs among themselves, as well as with the Crown of Castile and the Kingdom of Navarre. After the approval of the *Nueva Planta* decrees (1707-1716), Aragonese representative institutions were abolished, internal customs were removed and Castilian administration was introduced. However, attempts to introduce Castilian taxes failed, and previous private law was retained too save in Valencia. The Crown of Castile was also a conglomerate of kingdoms but, excluding the three Basque provinces (Biscay, Gipuzkoa and Álava), their level of integration was greater than in the Aragonese case. Castilian kingdoms were represented in the same *cortes*, and they also shared many institutions, such as administrative division, the legal system and public offices. However, the Crown of Castile was far from being a politically and economically unified area: Castilian municipalities were powerful corporations with prerogatives to negotiate, create and collect taxes, appoint their own officeholders, manage their commons, regulate local markets, administer first-instance justice, etc. For an analysis of the composite nature of the Spanish monarchy, see Nader (1990), Yun (1998), Grafe (2012) and Herrero Sánchez (2017).

contracts (North and Thomas, 1973; North, 1981; and Acemoglu *et al.*, 2005). Furthermore, the traditional historiography views Castilian notaries as poorly instructed and organized, specially when compare with their counterparts from the Crown of Aragon (Giménez-Arnau, 1964; Riesco Terrero, 2007).

To evaluate how notaries influenced credit markets (if at all), I have examined the laws and legal handbooks regulating the notarial profession in Castile and I have analyzed all notarial deeds drawn up in the city of Malaga in 1784 on the basis of which I have constructed a database of almost 1,200 short-term credit contracts (*obligaciones*).

By relying on these sources, I show that notarial credit markets, without becoming hegemonic, occupied a prominent position in the Spanish financial structure. Specifically, they were widely used to finance large sums contracts, transactions that were not sustained by personal relationships (with non-relatives, with individuals of a different socioprofessional status and with inhabitants from other areas) and activities not subject to a regime of corporation. This was due to the legal advantages associated with notarized documents. These contracts ensured faster trials in debt collection lawsuits and priority payments in meetings of creditors. In addition, they could be adapted to specific risks through the introduction of additional clauses (executor, special mortgage, joint liability and guarantor). Thus, the legal design of these instruments increased the degree of certainty in credit transactions. Consequently, creditors placed great value on notarized contracts, giving them a predominant role in riskier operations.

The rest of the chapter is organized as follows. Section 2.2 describes the regulation and training of Castilian notaries during the early modern period. Section 2.3 presents the database of deeds recorded by the notaries of the city of Malaga in 1784, focusing on the analysis of short-term credit transactions to identify those credit segments that may have benefited from notarization. Section 2.4 explores the legal advantages of notarized documents and measures the suitability of notarial credit markets in designing adapted contracts via additional clauses. Finally, section 2.5 concludes.

2. 2 Castilian notaries: a sclerotic body?

Notaries arose in the Middle Ages as officers of the Church or the emperor. From the twelfth century onwards, they started to be appointed by local authorities in Italian city-

states, where they were massively employed in the drafting of contracts for commercial purposes (Gelderblom, 2013, p. 89). During the following centuries, encouraged by the Commercial Revolution, the strengthening of royal powers and the rediscovery of Roman law, notaries proliferated across Western Europe, save in Britain (Hoffman *et al.*, 2019, p.16). Although there were similarities in the regulation of notaries between different countries, there were notable differences too. For example, while in France the monarchy capped the number of notaries active by municipality (*numerus clausus*), in the Low Countries there was no such limit. Furthermore, while in France notaries enjoyed a monopoly over the certification of documents, in the Low Countries aldermen were also authorized to perform this activity (Gelderblom *et al.*, 2018).

The earliest notarial regulation in Castile dates from the reign of Alfonso X (1252-1284). During the following centuries new legal changes were approved in order to remove the deficiencies of this institution. The most important changes were introduced in 1502-1503 by the Catholic Monarchs with the aim of clarifying important elements, such as the conservation of records, the issuing of copies and official levels of fees. Although new modifications were introduced later on, this regulation did not vary substantially until the approval of the Notarial Law in 1862 (Carvajal, 2017, pp. 44-47; Carvajal, 2018, p. 209).

In Castile, as in France, notarial activity was not an open profession; rather, there was a fixed number of notaries in each municipality.[3] Since most Castilian towns were small and with low populations they only had one notary, and the smallest not even that. Nevertheless, the big cities and capitals of the *corregimientos*/*partidos* (judicial districts) had several notaries. For example, in eighteenth-century Malaga there were 24 notaries (Barco Cebrián, 2015, pp. 106). At the end of the early modern period there was a dense network of notaries in both Spain and Spanish America (Herzog, 1996; Extremera Extremera, 2009). According to the Census of Floridablanca (1785-1789) there were 9,611 notaries in Spain, that is, one notary for every 1,068 inhabitants.[4] This

[3] In fact, the *numerus clausus* principle applied to most important Castilian public offices. For instance, in eighteenth-century Malaga there were 45 aldermen, 28 attorneys (Cadastre of Ensenada: Malaga, pp. 88v-91r and 121v-123v, respectively) and 24 brokers (Carrasco, 1999, p. 53). Data on the Cadastre of Ensenada for the city of Malaga (carried out in 1753) are available on the PARES website at http://pares.mcu.es/Catastro/servlets/ServletController?accion=4&opcionV=3&orden=1&loc=1539&pageNum=7 (consulted October 4, 2020).

[4] I include here not only the notaries of the Crown of Castile, but also those of the Crown of Aragon and the Kingdom of Navarre. These data are extracted from the Census of Floridablanca (1785-1789) and are available on the INE website at https://www.ine.es/censo2001/florida.htm (consulted October 4, 2020).

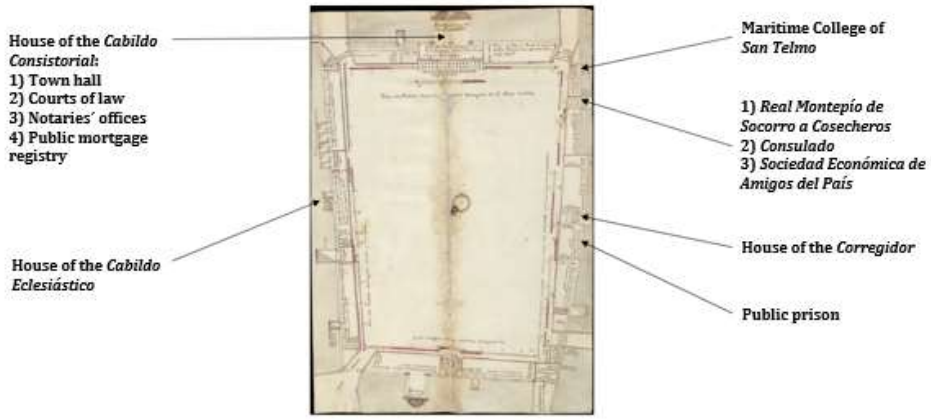
is quite a high number if we consider that today there are 2,785 notaries, that is, one notary for every 16,853 inhabitants.[5]

All the notaries in each municipality worked together in the same place. In Malaga, they worked in the House of the *Cabildo Consistorial*, a building that also housed the town hall, the courts of law, and later the public mortgage registry too. As it can be seen in Figure 2.1, the House of the *Cabildo Consistorial* was located on the *plaza mayor* (main square) of the town (Barco Cebrián, 2015, pp. 125-126).[6] Since 1480 it was compulsory for each Castilian municipality to have a *plaza mayor* where the most important institutions of the town would be located and its political, economic, social and cultural life would take place. Some years later, this system was introduced in the colonies as well (Escobar, 2004).

[5] Data for January 1, 2019. The number of notaries is available on the CGPJ website at http://www.poderjudicial.es/cgpj/es/Temas/Estadistica-Judicial/Estadistica-por-temas/Estructura-judicial-y-recursos-humanos--en-la-administracion-de-justicia/Profesionales-en-la-Administracion-de-Justicia/, while population data are available on the INE website at https://www.ine.es/dyngs/INEbase/es/operacion.htm?c=Estadistica_C&cid=1254736176951&menu=ultiDatos&idp=1254735572981 (consulted October 4, 2020).

[6] In some cities, however, notaries worked in other places. For instance, in Cordoba (Spain) and Lima (Peru) notaries worked in streets located near their respective main squares. See Extremera Extremera (2009, pp. 95-96) and Zegarra (2018, p. 228), respectively.

FIGURE 2.1: Map of the *Plaza Mayor* of Malaga (1770)*



*Note: some of these institutions were created later than 1770: *Real Montepío de Socorro a Cosecheros* (1776), *Consulado* (1785), Maritime College of *San Telmo* (1787) and *Sociedad Económica de Amigos del País* (1789).
Source: author's elaboration based on NR, *Libro X, Título XVI, Ley III* (1805, pp. 106-109), Grana Gil (2006, p. 69), and Camacho (2015).

There were two main requirements to work as a notary in early modern Castile. First, it was compulsory to pass an exam in Madrid, which was evaluated by three members of the Council of Castile. Candidates had to be at least 25 years old and have two proven years of experience as apprentices with a notary, an attorney or a lawyer. In addition, they had to demonstrate their purity of blood (*limpieza de sangre*), to present a report on their good behaviour, to be in good health and to prove that they had enough assets to pay a bail bond.[7] Of course, candidates had to pay fees to take the exam.[8]

[7] In order to ensure that notaries performed their tasks properly, a bail bond was required. For example, in the city of Cordoba, around 1780, it was compulsory to pay a bail bond equivalent to a third of the value of the office (Extremera Extremera, 2009, p. 67). After the creation of the public mortgage registries in Spain in 1768, the oldest town hall notaries of the capitals of the judicial districts, who administered these registries, had to pay a bail bond too (NR, *Libro X, Título XVI, Ley III*, 1805, p. 108). For example, in the city of Malaga, on December 2, 1774, Lorenzo Ramírez, the oldest town hall notary in the city, together with some relatives, mortgaged his office of notary valued at 16,500 r.v. and three houses valued at 30,500 r.v. to administer the public mortgage registry of the judicial district of Malaga. This mortgage was higher than that requested by the Council of Castile: the office and additional assets valued at 11,000 r.v. AHMM, *caja* 343: *expediente* 2.

[8] For example, in an alimony obligation written on April 1, 1784, Vicente Arrumbado and his wife Bárbara Villarcho promised to keep Francisco de Paula del Castillo, their 17-year-old orphan nephew, until he was 25 years old. In addition, they compromised to pay him to take the royal notary's examination or to buy him an attorney's office. AHPM, *protocolos notariales de Málaga capital, libro* 3390, pp. 108r-112r.

Furthermore, if they passed it, they would have to pay a tax equivalent to half of their first year's salary (*media anata*), like other public offices (Extremera Extremera, 2009, pp. 63-78; Pousa Diéguez, 2018, pp. 264-265).

The second main requirement was to acquire a notary's office. As I just noted, in each municipality there was a fixed number of notaries. These offices, known as "notaries of the number" (*escribanos del número*), were venal, and consequently they could be sold, rented, transferred or used as mortgages, as happened with other Castilian public offices. Usually their owners were the own notaries, but this was not always the case. The office could also belong to the son of a dead notary who could not work as notary because he was under 25; to widows and daughters who could not work as notaries because they were women; to private individuals who wanted to use the office to speculate with; to creditors who had received it after a debtor's default; to municipalities which had confiscated it because its owner had not paid his taxes, etc. In all those cases in which the owner of the office did not want to work as notary or could not, the office was sold, rented or transferred. Thus, a man who wanted to work as notary in a specific municipality needed to have enough money to buy or to rent one of the few offices in that place, or to inherit it from a relative (Extremera Extremera, 2009, pp. 153-194). One last possibility was to buy a new office directly from the king. This, however, was not common. In Malaga, for instance, no new notary position was created after the reign of Phillip IV (1621-1665) (Mendoza García, 2007).[9] Once the office had been obtained, new notaries needed the approval of the aldermen of the municipality to start working there (Extremera Extremera, 2009, pp. 72-78).

What happened to those notaries who could not buy, rent nor inherit an office? They had to work as "royal notaries" (*escribanos reales*), who mainly performed two functions. First, they worked provisionally as "notaries of the number" in those municipalities where there was no notary. Notaries who chose this option were constantly looking for places without notaries or covering temporary vacancies in small towns, in both cases with the authorization of the aldermen of the municipality. The second option was to work as an officer for a "notary of the number" with the aim of

[9] However, it seems that a notary position was sometimes occupied by more than one notary at the same time (Barco Cebrián, 2015, p. 274). Thus, the Census of 1771 includes the names of 25 "notaries of the number" for Malaga despite the city accounting for only 24 positions (Mairal Jiménez, 1999, pp. 211-213). Equally, in 1789 García de la Leña also mentioned the existence of 25 "notaries of the number" in the city (García de la Leña, 1789, p. 42).

replacing him in the future or of earning enough money to buy an office. From the seventeenth century onwards the number of "royal notaries" increased considerably, probably because of the difficulties in acquiring an office as a "notary of the number". For this reason, several municipalities imposed a *numerus clausus* on them, just as they did with the "notaries of the number" (Barco Cebrián, 2015, pp. 365-375).[10]

Finally, it is necessary to mention the notaries' income. They did not have a fixed wage, their income depending instead on the number of deeds they drew up. Notaries also obtained revenues by issuing copies, providing testimonies and documentary evidence in trials, or acting as clerks in judicial processes. Official fees regulated the prices of these services, but it seems it was common for notaries to charge higher tariffs (Extremera Extremera, 2009, pp. 109-114).[11] Lastly, some notaries also owned special notaries (town hall notary, war notary, marine notary, etc.), receiving an additional wage paid by the municipality (Barco Cebrián, 2015, pp. 134 and 146). Out of these revenues they had to pay both their own wages and those of their officers.[12]

The laws of Castilian notaries have been harshly criticized by historiography. The sale of the offices has been pointed out as the main problem. Following this argument, notaries would have not been selected on merits, but because of their ability to buy an office (Giménez-Arnau, 1964, pp. 83-100). Additional factors made this problem worse. First, the educational requirements to work as notary were very low (Riesco Terrero,

[10] In the city of Malaga, where there were 25 "royal notaries" in 1771, authorities capped their number at eight at the end of that century (Mairal Jiménez, 1999b, pp. 213-214; Mendoza García, 2011, p. 71). In Madrid, a maximum of 150 "royal notaries" was imposed in 1783 (NR, *Libro VII*, *Título XV*, *Ley XXXII*, 1805, pp. 380-382).

[11] In 1503 the Catholic Monarchs established official fees (*aranceles*) for notarial services in Castile. Even so, it seems that some cities maintained their own official fees, like Cordoba (Extremera Extremera, 2009, pp. 109-110). During the Bourbon period, in 1722 and 1788, the Council of Castile established new official fees in 1722 and 1782. Although these two official tariffs were valid for the notaries of Madrid (those of 1722 added others for notaries who worked for the high courts), their inclusion in legal handbooks and law compilations, and the fact that they were passed by the Council of Castile, suggest that they should have been obligatory to use, or at least to have been used as reference, throughout Spain. See Martínez Salazar (1789, pp. 269-304), Bustoso y Lisares (1828, pp. 153-280) and *Los Códigos Españoles Concordados y Anotados*, *Tomo XII*, *Libro II*, *Título VIII*, *Autos XIV-XVII* (1851, pp. 51-62).

[12] According to the Census of 1771, the annual income of the "notaries of the number" of the city of Malaga ranged between 3,300 and 8,800 r.v., 5,654 r.v. being the average income. Regarding their officers, their annual income ranged between 80 and 1,650 r.v., although no income is mentioned for eight of them. Their average income, leaving aside those officers whose income is not mentioned, was 929 r.v. The average income of the "notaries of the number" was higher than that of other public officers, such as attorneys (2,289 r.v.) or sheriffs (1,100 r.v.). They also enjoyed higher incomes than some private-sector professionals, such as shipmasters (2,539 r.v.), masters of the guild of coopers – the most important craft guild of the city (Villas, 1992, pp. 305-307) – (3,064 r.v.), or lawyers (3,572 r.v.), although lower incomes than others, like cloth merchants (9,829 r.v.) or trading houses of the *Alto Comercio Marítimo* (41,166 r.v.). See AHMM, *caj*a 431: *expediente* 116 and Mairal Jiménez (1999b, pp. 29-32, 49-50, 208-213, 323-331, 354-361, 372-374 and 444-456).

2007, pp. 284-285). Second, it started to be common that the monarchy, breaching its own regulations, would give special permission for individuals under 25 years old to work as notaries and also to recognize exams that had not sat in Madrid (Barco Cebrián, 2015, p. 101 and 281-282).[13] Third, those local colleges that were responsible for supervision of notaries were poorly organized (Riesco Terrero, 2007, p. 283).[14] Fourth, according to some contemporary testimonies, cases of corruption and negligence by notaries were frequent (Marchant Rivera, 2019, pp. 54-58). Fifth, Castilian legislation had important deficiencies: laws were scattered, and they were only compiled after many years in force. In addition, compilations included laws that had been partially or totally repealed in some areas or in the entire territory, which created confusion (Riesco Terrero, 2007, pp. 273-274). As a consequence of the weakness of the statutory law, Castilian and American notaries, like other legal agents (attorneys, lawyers, judges, etc.), commonly used legal handbooks written by experienced professionals. In a context characterized by legal ambiguities, the dispersal of sources, institutional overlapping and weak legal skills, these handbooks were useful tools for resolving legal doubts (Sánchez-Arcilla Bernal *et al.*, 2014; Rubio Hernández, 2016).

All these reasons explain why Castilian notaries have traditionally been considered worse instructed and worse organized than their counterparts in the Crown of Aragon. While Castilian system would be characterized by the sale of offices, low legal education, nepotism and corruption, in Aragon notaries would be prestigious professionals ruled by well-organized colleges that ensured rigorous examinations and compliance with additional requirements (Giménez-Arnau, 1964, pp. 83-100; Riesco Terrero, 2007, pp. 268 and 283).[15]

Even though the regulation of Castilian notaries might have been unsuitable, deficiencies could be partially solved through training. As already noted, to be a notary it was compulsory to prove one had two years of experience as an apprentice with a notary, an attorney or a lawyer. During these two years apprentices read legal handbooks and learned how to write a legal document or how to proceed in different

[13] For example, some notaries from Malaga took their exams in Granada or even in their own city of Malaga (Barco Cebrián, 2015, pp. 281-282).
[14] In the city of Malaga there was not even a college of notaries (Barco Cebrián, 2015, p. 124).
[15] This particular circumstance would explain, for example, why Aragonese archives preserve notarial deeds written from the thirteenth century onwards while in Castile notarial records were not systematically kept until the sixteenth century, or why Aragonese notaries had a greater knowledge of Latin than Castilian notaries (Pagarolas i Sabaté, 2010, pp. 315-336; Carvajal, 2017, p. 46).

judicial processes (Barco Cebrián, 2015, p. 122-123). Apprentices also acted as witnesses to notarized documents. Under Castilian law each notarial deed had to have three witnesses (Febrero, vol. 3, 1783, pp. 413-414), and although the contracting parties could ask relatives or friends, notaries usually used their own employees for this purpose (Barco Cebrián, 2015, p. 124).[16] Regulation prevented apprentices from writing notarial documents since this was an exclusive prerogative of the notaries. Even so, the existence of different calligraphies in notarial books suggests that this regulation was unfulfilled (Barco Cebrián, 2015, p. 102).

Castilian notaries also acquired legal skills by performing other legal professions, such as attorneys (*procuradores del número*). Attorneys represented their customers before the court and were delegated to carry out legal proceedings on their behalf (Gayol, 2002, pp. 119-120). These public offices had lower social prestige than notarial offices, so presumably they were cheaper. For that reason many individuals preferred to acquire an attorney office with the aim of improving their abilities and saving money to buy a notarial office in the future (Barco Cebrián, 2015, pp. 170-172). At the same time attorneys regularly collaborated with notaries as witnesses, which helped make them familiar with notarial practices and to build contacts until they had the opportunity to improve their positions.[17] Something similar occurred with "royal notaries",[18] officers[19] and law interns.[20]

Other notaries gained experience by performing their functions in small and medium-size towns in judicial districts before taking the leap to the big cities, where more

[16] Appendix 2.1 includes the names of all those witnesses who appear in at least 25.0% of the obligation contracts written by the notaries of the city of Malaga in 1784, a percentage high enough to prove a stable link between the notary and that witness. I have identified a total of 78 recurrent witnesses, nine of whom became "notaries of the number" in the following years. Most notaries had 3-4 recurrent witnesses. With the exception of those witnesses who already had a public office (mainly attorneys) I believe that the remainder could be identified as employees of the notary (apprentices and officers).

[17] In 1784 at least eight attorneys were recurrent witnesses of the notaries of Malaga, and two of them (Juan Ruíz de la Herrán and Miguel Coso) became "notaries of the number" in the following years (Appendix 2.1). Furthermore, two of the attorneys quoted in the Cadastre of Ensenada (Joaquín Fernández de la Herrán and Manuel de Torres) and another four quoted in the Census of 1771 (Francisco Ferrer, José Antonio Sanmillán, Juan Lara y León and Manuel del Pino) worked as notaries of the number in 1784 (Cadastre of Ensenada: Malaga, pp. 122r-122v; Appendix 2.2).

[18] In 1784 at least three "royal notaries" were recurrent witnesses of the notaries of Malaga, and one of them (Juan de Ribera) became "notary of the number" in the following years (Appendix 2.1). Also, Miguel Fernández de la Herrán, quoted in the Cadastre of Ensenada as a "royal notary", was working as a "notary of the number" in 1784 (Cadastre of Ensenada: Malaga, p. 250r).

[19] Three of the officers quoted in the Census of 1771 (Ambrosio Cuartero y Llanos, Blas de Mesa and Juan Jerónimo de Molina) were working as "notaries of the number" in 1784 (Appendix 2.2).

[20] José Avendaño y Relosillas, quoted in the Census of 1771 as law intern, was working as "notary of the number" in 1784 (Appendix 2.2).

complex affairs were notarized. [21] Just like attorneys, these individuals found it easier to buy these positions than a notarial office in an urban area. Of course, the level of notarial activity in rural areas was much lower, not only because they were less populated, but also because their inhabitants would subscribe several of their contracts in the capital of the judicial district (for example, when they went there looking for credit). Even so, working in small towns also involved some advangages. Being sparsely populated towns, it was easy for notaries who worked there to gather information on their neighbours. This information could be very valuable, for example, in collaborating with urban lenders if the notary finally acquired an office in a big city.

Hence, there was no single itinerary for working as a notary in Castile. Many candidates had to realize a sort of *cursus honorum* before they could work as "notaries of the number" in an important place. Furthermore, in this that process they acquired both legal skills and information that would be useful in their future careers.

2. 3 What did notaries do?

Assessing whether Castilian notaries were highly employed as recorders and if, within this activity, the notarization of credit contract was significant, requires a detailed analysis of their books. For that reason, I have collected all the deeds recorded by the notaries of the city of Malaga in a specific year. At the end of the eighteenth century Malaga was the capital of a homonymous judicial district and one of the most highly populated Spanish cities.[22] The economy of the city and its surrounding area was based on the production and subsequent exportation of agricultural commodities. Malaga was one of the main Spanish exporters of wine and raisins, and it also occupied a notable position in the export of other agricultural commodities, such as almonds, figs, lemons

[21] This is what happened to Juan Benítez de Castañeda and Felipe Pérez de Mérida, who in 1784 were working as "notaries of the number" in the towns of El Borge and Cartama, respectively. AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, p. 297r, and *libro* 3306, p. 1000r, respectively. In 1788 Benítez de Castañeda received a position as "notary of the number" in the city of Malaga, and Pérez de Merida did so in 1794. *Libro en el que se hallan los escribanos que ha habido en la Ciudad de Málaga, sus entradas, salidas y los oficios que expresamente han usado y así mismo los reformados*, 1808.

[22] With 51,098 inhabitants according to the Census of Floridablanca (1785-1789), Malaga was the seventh most populous Spanish city. In the entire judicial district there were 91,254 inhabitants. These data are available on the IECA website at https://www.juntadeandalucia.es/institutodeestadisticaycartografia/ehpa/ehpaTablas.htm (consulted October 4, 2020). For a list of the 22 municipalities that composed the *Corregimiento* of Malaga, see *España dividida en provincias e intendencias, Tomo I* (1789, p. 315).

and oranges (Nadal 2003, p. 34; García Fernández, 2006). These commodities had northern Europe as their main destination, especially England (Gámez Amián, 1986, pp. 158-162). Furthermore, in the last third of the eighteenth century, derived from the reforms that suppressed the Cádiz monopoly on the Indies trade – mainly 1778 reform – exports to Spanish America gained in importance. Thus, between 1778 and 1796 the port of Malaga was the third largest Spanish exporter to this area (Fisher, 1981; Gámez Amián, 1994). Within this economic structure, credit played a fundamental role. Agricultural producers, mostly owners of small plots, needed periodic flows of capital to finance agricultural work on their farms. This money was mainly provided by merchants, who were repaid in agricultural commodities some months later (Peña-Mir, 2016).[23]

I have compiled all the deeds drawn up by 22 "notaries of the number" of the city of Malaga in 1784. This database includes all the recording activity in the city that year with the exception of the deeds recorded by two other notaries, whose books have been almost entirely destroyed.[24] I decided to focus on just one year because I wanted to know what notaries actually did and whether they were actively involved in the allocation of credit. It should be noted that most of the indexes of the books of Malaga's notaries have not been preserved. Thus, counting and classifying notarial deeds requires examining these books page by page. For the same reason it is not possible to identify the notaries who performed a more active role in credit markets without examining the entire books. Furthermore, although in many deeds notaries indicated in the upper left-hand margin of the first page the type of document they were recording, in many other cases they did not do so. Consequently, identifying their typologies requires reading the deeds. 1784 was a year of economic recovery after Spain's participation in the American Revolutionary War (1779-1783). Consequently, Spain fully restored

[23] In fact, agricultural specialization determined the financial cycle. Farmers brought their harvests to the city in September, these harvests being exported in the fourth quarter of the same year and, to a lesser extent, in the first quarter of the next year. In that context, the influx of liquidity was used to pay debts and take out new loans, not only for the agricultural sector but also for the whole of the economy (García Fernández, 2006, pp. 169-170; Villar García, 2011, p. 16). In this sense, the dates on which the short-term credit contracts (obligations) were recorded are illustrative: in 1784, 71.0% of the contracts and 65.9% of the amounts were concentrated in the first and the fourth quarters of the year. See footnote No. 24.

[24] AHPM, *protocolos notariales de Málaga capital*, *libros* 2859, 2914, 3006, 3027, 3047, 3049, 3050, 3136, 3150, 3160, 3167, 3174, 3195, 3236, 3256, 3269, 3306, 3323, 3331, 3338, 3356, 3365, 3383, 3390 and 3392.

commercial relationships not only with its American domains, but also with England, the main European destination for Malaga's exports.[25]

In total, these 22 notaries drew up 5,187 documents in 1784 (Table 2.1). Notaries recorded a wide variety of documents, including apprenticeship contracts, dowries, sales and wills, but four types of document accounted for almost three quarters (73.1%) of their recording activity: powers of attorney, obligations (credit), leases and payments. And although there was some specialization among notaries, these categories accounted for the bulk of the recording activity for most of them (see Appendix 2.2).[26]

Focusing on credit notarization, this represented a large part of the records: 24.4%. Among them obligations accounted for the lion's share, 22.8% of the deeds written that year. In fact, obligations constituted the second most important category, being only surpassed by the powers of attorney (27.8%). Obligations were documents that "recorded a generic agreement in which a person recognized the mandatory nature of paying a debt or carrying out a future work" (Carvajal, 2018, pp. 216-217), and they were mainly used as short-term loans. The remaining credit contracts accounted for a very small percentage of notarial recording activity in Malaga. Annuities (*censos consignativos* and *censos reservativos*) represented 1.4% of the deeds, while the other credit modalities together accounted for only 0.2%.[27] Annuities were the main long-term credit instrument, and in fact, for a long time, they were the main credit modality in Spain.[28] However, from the mid-eighteenth century their relevance decreased, and they were surpassed by obligation as main credit modality in several areas.[29]

[25] This does not mean that the size of the sample for this year was abnormally high and consequently unrepresentative. For example, in 1784 three notaries of Malaga (Ambrosio Cuartero y Llanos, Antonio del Castillo Quevedo and José de Avendaño y Relosillas) recorded 151 agricultural credit contracts with a total value of 333,922 r.v. In 1785 and 1787 these three notaries had a similar level of activity: together, they recorded 137 agricultural credit contracts valued at 275,730 r.v. in 1785 and 139 contracts valued at 303,277 r.v. in 1787. In 1783 and 1786, their level of activity was lower, but not substantially: there were 94 agricultural credit contracts valued at 270,076 r.v. in 1783 and 101 contracts valued at 221,068 r.v. in 1786 (Peña-Mir, 2016).

[26] According to Burns (2010, p. 85) in seventeenth-century Cusco (Peru), then governed by Castilian law, obligation contracts and powers of attorneys were the main deeds recorded by notaries (20.5% and 15.5% respectively), followed by labor contracts (10.5%), receipts (9.4%) and sales (9.4%).

[27] I include here debt transfers, protests and repurchases.

[28] For a detailed analysis on the annuity market and the role played in it by the ecclesiastical institutions, see Milhaud (2019).

[29] For an analysis of the reasons that may have led to the replacement of annuities by obligations as the leading private debt instrument, see Tello (2007) and Milhaud (2018a).

TABLE 2.1: Notarial records drawn up by notaries of Malaga in 1784

Categories	Number	%
Annuities	74	1.4
Annuity redemptions	27	0.5
Apprenticeship contracts	34	0.6
Bail bonds	248	4.8
Debt and land transfers	24	0.5
Dowries	50	1.0
Leases	798	15.4
Obligations (credit)	1,181	22.8
Obligations (others)*	184	3.5
Payments	375	7.2
Powers of attorney	1,438	27.8
Sales	202	3.9
Wills	180	3.5
Other	372	7.2
Total	**5,187**	**100.0**

*Note: this category includes marriage and alimony obligations, concession and tax-farming contracts, recognitions of tax and ecclesiastical debts, and smugglers' pardons.
Source: see footnote No. 24.

Was the level of notarial activity in Malaga high in comparison with other areas? Table 2.2 shows the average number of deeds recorded annually by notaries in a sample of European municipalities at the end of the eighteenth century. On average the number of deeds recorded by the notaries of the city of Malaga (236) was much higher than in other municipalities, except for Amsterdam (425), whose population was more than four times higher.[30] Certainly, 236 deeds is not a particularly impressive figure (4.5 deeds per week), but it is clearly above the 1.2 deeds per week in Antwerp or the 0.5 per week in Ghent, two cities with a similar number of inhabitants.[31] Thus, notaries of Malaga would have obtained an important share of their income from recording activity, unlike what happened, for example, with their counterparts in the Low Countries, who depended heavily on the income from other works (Gelderblom *et. al*, 2018, p. 183). Although I do not have information for other Spanish cities, data for seventeenth-century Cusco in Peru, an area under Castilian rule, also show a high level of activity.[32]

[30] In 1780 Amsterdam had around 221,000 inhabitants (Gelderblom *et al.*, 2018, pp. 167-168).
[31] In 1780 Ghent had around 51,000 inhabitants and Antwerp around 60,000 (Gelderblom *et al.*, 2018, pp. 167-168).
[32] The six notaries in Cusco had a similar degree of activity in the second half of the seventeenth century: they wrote 230 deeds per notary in 1650 and 237 deeds per notary in 1700 (Burns, 2010, p. 85).

TABLE 2.2: The average number of deeds per notary per year in some European municipalities (c. 1780)

Municipality	Area	Number of notaries	Average number of deeds per notary per year
Amsterdam	Low Countries (Dutch Republic)	57	425
Den Bosch	Low Countries (Dutch Republic)	16	54
Leiden	Low Countries (Dutch Republic)	13	101
Utrecht	Low Countries (Dutch Republic)	60	34
Antwerp	Low Countries (Habsburg Monarchy)	29	66
Ghent	Low Countries (Habsburg Monarchy)	55	27
Rovereto	Italy (Habsburg Monarchy)	16	81
Trento	Italy (Prince-Bishopric of Trent)	35	33
Malaga*	Spain (Crown of Castile)	24	236

*Note: data for Malaga have been obtained by extrapolating the data from 22 notaries to all the notaries in the city (24 notaries).
Source: for Amsterdam, Den Bosch, Leiden, Utrecht, Antwerp and Ghent, see Gelderblom *et al.* (2015, p. 7), and Gelderblom *et al.* (2018, p. 182); for Rovereto and Trento, see Lorenzini (2018, pp. 110-111); for Malaga, see footnote No. 24.

Focusing exclusively on credit contracts, a similar picture emerges (Table 2.3). In the city of Malaga notaries recorded more credit contracts (1,307) than in the other municipalities, except Paris (about 9,000), whose population was almost twelve times higher.[33] In fact they wrote more contracts than the notaries and aldermen from the Low Countries together.

[33] In 1780 Paris had around 604,000 inhabitants (Hoffman *et al.*, 2019, p. 261).

TABLE 2.3: Credit contracts recorded by aldermen and notaries in some European municipalities (c. 1780)

City	Area	Number of contracts	Estimated number of contracts per 1,000 inhabitants
Amsterdam (aldermen+notaries)	Low Countries (Dutch Republic)	476+239= 715	2.4+1.1= 3.5
Den Bosch (aldermen+notaries)	Low Countries (Dutch Republic)	29+216= 245	2.3+16.8= 19.1
Leiden (aldermen+notaries)	Low Countries (Dutch Republic)	61+44= 105	2.0+1.4= 3.4
Utrecht (aldermen+notaries)	Low Countries (Dutch Republic)	48+193= 241	1.5+6= 7.5
Antwerp (aldermen+notaries)	Low Countries (Habsburg Monarchy)	185+162= 347	0.8+2.7= 3.5
Ghent (aldermen+notaries)	Low Countries (Habsburg Monarchy)	20+444= 464	0.4+8.7= 9.1
Rovereto (notaries)	Italy (Habsburg Monarchy)	212	42.4
Trento (notaries)	Italy (Prince-Bishopric of Trent)	110	12.2
Mirande (notaries)	France (Kingdom of France)	83	55.3
Paris (notaries)	France (Kingdom of France)	9,000 (approx.)	14.9
Malaga (notaries)*	Spain (Crown of Castile)	1,307	25.5

*Note: data for Malaga have been obtained extrapolating the data from 22 notaries to all the notaries in the city (24 notaries). I have only included obligations and a particular type of annuity (*censo consignativo*) in order to compare the same contracts collected for the Low Countries (Gelderblom *et al.*, 2018, p. 165**).**

Source: for Amsterdam, Den Bosch, Leiden, Utrecht, Antwerp and Ghent, see Gelderblom *et al.* (2015, pp. 5 and 9), and Gelderblom *et al.* (2018, p. 166); for Rovereto and Trento, see Lorenzini (2018, pp. 106-109); for Mirande and Paris, see Hoffman *et al.* (2019, pp. 51-52 and 261); for Malaga, see footnote No. 24.

In the rest of this section, I analyze the credit contracts further. Given their relevance (93.2% of all notarized credit contracts), I restrict my analysis to the obligation deeds: 1,181 contracts that involved 4,088,397 r.v. This is a large amount given that, for example, the public expenditure of the city that year was 1,056,736 r.v., almost four times less (Mairal Jiménez, 2003, p. 203).

Beginning with the purpose of the contracts, analysis of the database clearly shows the relevance of agricultural loans (Table 2.4). As already noted, agricultural credit performed an important role in this area, given the farmers' periodic needs for capital and the merchants' interest in securing a supply of agricultural commodities. Agricultural loans set out their purpose in the contracts using expressions such as "for

the work of his farm" or "for the cultivation of his vineyards". They represented half of all the credit obligations recorded in 1784, but only around a third of the amounts, since on average they involved smaller sums.[34] These contracts mainly involved rural debtors from the suburbs of the city of Malaga and, especially, from nearby municipalities, while debtors from the inner city of Malaga had only a minor presence.[35] Regarding the remaining contracts, they specified more varied functions and probably had a less periodic pattern too: credit sales,[36] recognition of debts, emergencies (*urgencias*), etc. Although the territorial origins of these debtors were more balanced than in the agricultural credit market, the majority of the contracts and the amounts involved debtors from inner city of Malaga.[37] Finally, differences between the two markets are also evident in respect of payments: agricultural loans were mainly paid in agricultural commodities,[38] while for other contracts payment in money was more relevant (Table 2.5).[39]

[34] The average agricultural contract was 2,068 r.v., while for the other contracts the average amount was 5,304 r.v.

[35] The agricultural contracts in which the debtors had their residence out of Malaga's inner city accounted for 85.1% of the contract and 80.1% of the amounts.

[36] Of these, credit sales of cattle were the most relevant in terms of the number of contracts (109 contracts worth 176,714 r.v.), while credit sales of raw materials and manufactures were predominant in terms of amounts (48 contracts and 333,181 r.v.).

[37] For the remaining contracts the debtors from the inner city of Malaga accounted for 62.0% of the contracts and 68.6% of the amounts.

[38] The amount of agricultural commodities to deliver would be calculated using their prices in the city at the payment date. For some commodities Malaga's local authorities fixed the price. This was the case of the wine and the raisins, whose prices, since 1628, were fixed by the town council at the end of September (*rompimiento*). These official prices would be applied not only in the city itself but also in the rest of municipalities of the Bishopric of Malaga (until 1717). Nevertheless, these prices were rarely enforced. Their real functions were others: on the one hand, they were a reference for the payment of taxes; on the other, it forced other ports in the Bishopric (Velez-Malaga, Marbella, Estepona) to delay exports until prices were received from Malaga (Pezzi Cristóbal, 2003, pp. 175-180; Martínez Ruíz, 2011, pp. 671-672). In fact, most of the obligation contracts that established the payment in agricultural commodities set the payment date in the second half of August or in early September, that is, before the *rompimiento*. Therefore, the price of these commodities was determined by markets. Even so, it cannot be ruled out that the most powerful lenders had the capacity to impose prices to their debtors. For instance, in an obligation contract signed on October 13, 1784 between José Recio y Vallejo, citizen of Malaga (creditor), and Juan Cortés, citizen of Benamargosa (debtor), both parties agreed that the latter would deliver his raisins "at the price that Andrés del Pino (the most important lender in 1784) will charge to his debtors". AHPM, *protocolos notariales de Málaga capital*, *libro* 3323, pp. 323r-323v.

[39] Analyses for other areas do not offer a detailed description of the purpose of the notarized obligations, which suggests that no category had a predominant role (as happened with agricultural loans in Malaga). Even so, they carry out a description of the typology of obligation contracts. In Astorga between 1751 and 1800, credit sales were the most important operations, accounting for 73.7% of the contracts, while recognition of debts and loans only accounted for 9.4% and 8.4% respectively (Rubio, 1989 p. 575). In Valladolid between 1795-1815, the recognition of debts accounted for 44.5% of the contracts, followed by loans (26.8%) and credit sales (18.2%) (Carvajal, 2018, p. 215). In Oviedo at the end of the eighteenth century, the proportions more balanced. There, the recognition of debts accounted for 35% of the contracts, credit sales for 33% and loans for 30% (Gómez Álvarez, 1993, p. 172).

TABLE 2.4: Purpose

Purpose	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Agricultural loans	604	51.1	1,245,186	30.4
Credit sales	199	16.8	559,681	13.7
Recognitions of debts	120	10.1	939,832	23.0
Emergencies	100	8.4	391,768	9.6
Others	103	8.7	767,519	18.8
Unspecified	55	4.6	184,411	4.5
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

Source: see footnote No. 24.

TABLE 2.5: Payment

	Agricultural loans				**Other credit obligations**			
Payment	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Agricultural commodities	550	91.0	1,080,650	86.8	82	14.2	340,397	12.0
Money	50	8.3	154,659	12.4	416	72.1	2,203,274	77.5
Agricultural commodities and money	2	0.3	8,777	0.7	18	3.1	79,176	2.8
Others	2	0.3	1,100	0.1	38	6.6	114,582	4.0
Unspecified	0	0.0	0	0.0	23	4.0	105,782	3.7
Total	**604**	**100.0**	**1,245,186**	**100.0**	**577**	**100.0**	**2,843,211**	**100.0**

Source: see footnote No. 24.

Table 2.6 summarizes the size of the contracts. About 80% of them amounted to less than 5,000 r.v. Those obligations whose values ranged between 1,000 and 4,999 r.v. accounted for the majority of the contracts (43.3%), although those obligations between 10,000 and 49,999 r.v. involved the largest amounts (33.4%). The average amount was 3,592 r.v.,[40] a considerable amount given into that an unskilled rural labourer in Malaga earned 330 r.v. per year.[41]

[40] Excluding those contracts whose amount is not specified.

[41] An unskilled rural labourer in Malaga earned between 2.5 and 3 r.v. per day at the end of the eighteenth century, giving an average of 2.75 r.v. per day (Villar García, 1982, p. 152). In Castile, a farmer has been estimated to work 120 days per year (Álvarez-Nogal and Prados de la Escosura, 2007, p. 327). Thus, an unskilled rural labourer in Malaga would have earned 330 r.v. per year during this period.

TABLE 2.6: Contract size

Contract size (*reales de vellón*)	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Up to 499	202	17.1	64,597	1.6
500-999	238	20.1	160,986	3.9
1,000-4,999	512	43.3	1,052,220	25.7
5,000-9,999	102	8.6	691,619	16.9
10,000-49,999	79	6.7	1,366,386	33.4
50,000-99,999	3	0.2	197,589	4.8
Over 100,000	2	0.2	555,000	13.6
Unspecified	43	3.6	-	-
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

Source: see footnote No. 24.

Given the high amounts that notarized obligations involved, it seems reasonable to assume that the size of the contract should have been one of the main determinants in decisions to use this market. Thus, notarial credit markets covered a niche that could not be filled by the two main credit alternatives: philanthropic loans and non-notarized contracts.

Philanthropic loans were chanelled through a variety of royal and ecclesiastical institutions: *pósitos*, *montes de piedad* and *montepíos*. *Pósitos* were public granaries that existed in many Spanish municipalities.[42] Although they made cash loans, their main function was to lend flour and cereals for planting at a low interest rate (Anes, 1969, pp. 73-94; Gómez Díaz and Fernández-Revuelta Pérez, 1998).[43] *Montes de piedad* were pawnshops located in some cities.[44] They lent microcredit and in some cases accepted interest-bearing deposits too (Carbonell-Esteller 2000; Titos Martínez, 2003, pp. 19-21). Finally, *montepíos* were institutions that offered non-interest loans to finance certain specific sectors (Plaza Prieto, 1976, p. 757).[45]

The main advantage of philanthropic institutions was their capacity to make non-interest or low-interest loans to a large percentage of the population. For instance, in 1770, 18% of the households in one of the poorest neighbourhoods of Barcelona received loans from the *Monte de Piedad* of that city (Carbonell-Esteller, 2000, p. 86).

[42] In 1773 there were 8,090 *pósitos* in Spain (Anes, 1969, p. 81), two of them in the city of Malaga (Villas, 1979b, pp. 128-129).
[43] In 1773, Spanish *pósitos* had reserves of grain and flour estimated at 371,856,575 r.v. and reserves of money estimated at 43,069,791 r.v. (Anes, 1969, p. 83).
[44] There were *montes de piedad* in Madrid, Barcelona, Zaragoza, Granada, Salamanca, Murcia and Jaén (Ruíz Martín, 1970, p. 178; Plaza Prieto, 1976, pp. 757-758).
[45] These *montepíos* made loans to farmers (Valencia, Malaga, Zaragoza and southeast Spain), wool craftsmen (Granada) and fishermen (Galicia). See Ruíz Martín (1970, pp. 179-180) and Plaza Prieto (1976, p. 757).

In 1794, the *Monte de Piedad* of Jaén made 8,030 loans in a city of 16,249 inhabitants (Titos Martínez, 2003, p. 21). During the eighteenth century the *Monte de Piedad* of Granada was able to make around 50,000 loans in some years in a city of 56,541 inhabitants (Titos Martínez, 2003, p. 20).[46]

Nevertheless, this capacity to provide funds for a huge number of debtors contrasted with their problems in lending large amounts. On the one hand their regulations set maximum amounts. On the other hand it was common for their resources to be taken to finance war expenditure and infrastructural expenses, or else they were poorly managed or even had their funds embezzled by their managers (Anes, 1969, pp. 88-94; Gámez Amián, 1998, pp. 53-58). Analysis of the accounts of the *Montepío de Cosecheros*, an institution created with the purpose of reducing farmers' dependence on usurious lenders in the Bishopric of Malaga,[47] is enlightening. In 1789 the *Montepío* accounted for 10,345 borrowers, with an average loan of 373 r.v. Five years earlier, in 1784, the number of agricultural loans drawn up by the notaries of the city of Malaga was much smaller (only 604 obligation contracts),[48] though the average amount was much higher: 2,068 r.v. (Table 2.7). Similar conclusions can be obtained by comparing the accounts of the *montes de piedad* of Granada and Jaén – Malaga did not have an institution of this type – and the notarized obligations used to cover emergencies (Table 2.8). This shows that, although individuals could rely on philanthropic institutions to cover small needs, they had to turne to notarized contracts with private lenders for larger-scale operations.

[46] Population data for Jaen and Granada are extracted from the Census of Floridablanca (1785-1789). These data are available on the IECA website at https://www.juntadeandalucia.es/institutodeestadisticaycartografia/ehpa/ehpaTablas.htm (consulted October 4, 2020).
[47] This territory corresponded approximately to the modern province of Malaga.
[48] This calculation, however, does not include the obligations recorded by the notaries of the rest of the municipalities of the Bishopric.

TABLE 2.7: Comparison between the loans of the *Montepío de Cosecheros* of the Bishopric of Malaga and the notarized obligations used as agricultural loans recorded in the city of Malaga

	***Montepío de Cosecheros* of the Bishopric of Malaga (1789)**	**Notarized obligations: agricultural loans (Malaga, 1784)**
Max. term	After selling the harvest (around 12 months)	Unlimited*
Max. amount per debtor (*reales de vellón*)	2/3 of the estimated value of the farmer's harvest	Unlimited**
Loaned amounts (*reales de vellón*)	3,877,748	1,245,186
Number of contracts	10,395 (borrowers)	604
Average contract (*reales de vellón*)	373	2,068***
Interest rate	Non-interest	6%****

*Note: 34 months was the longest maturity that year.
**Note: 33,400 r.v. was the largest amount that year.
***Note: contracts whose amount is not specified are excluded.
****Note: see footnote No. 55.
Source: for the *Montepío de Cosecheros* of the Bishopric of Malaga, see *Reglamento para el Real Monte Pio de Socorro a los Cosecheros de vino, aguardiente, pasa, higos, almendra, y aceyte del Obispado de Málaga* (1776, pp. 10, 12 and 14), and *Gazeta de Madrid*, 30 (1789, pp. 262-263); for notarized obligations, see footnote No. 24.

TABLE 2.8: Comparison between the loans of the *montes de piedad* of Granada and Jaén and the notarized obligations used to cover emergencies recorded in the city of Malaga

	***Monte de Piedad* of Granada (1763)**	***Monte de Piedad* of Jaén (1794)**	**Notarized obligations: emergencies (Malaga, 1784)**
Max. term	4 months and 1 day	4 months and 1 day	Unlimited*
Max. amount per debtor (*reales de vellón*)	750	300 and 2/3 of the value of the pledge	Unlimited**
Loaned amounts (*reales de vellón*)	2,006,586	769,903	391,768
Number of contracts	14,978 (borrowers)	8,030	100
Average contract (*reales de vellón*)	134	96	3,917
Interest rate	Non-interest	Non-interest	6%***

*Note: 520 months was the longest maturity that year.
**Note: 35,000 r.v. was the largest amount that year.
***Note: see footnote No. 55.
Source: for the *Monte de Piedad* of Granada, see Roca Roca (1968, pp. 19-25), and Titos Martínez (2003, p. 19); for the *Monte de Piedad* of Jaén, see Titos Martínez (2003, pp. 20-21); for notarized obligations, see footnote No. 24.

The second main alternative was to borrow money through informal means, that is, through peer-to-peer loans contracted via oral agreements or private deeds. Some analyses for other countries have emphasized the greater relevance of non-notarized deeds over notarized ones. In early modern Low Countries, for example, merchants only used notaries when they anticipated difficulties with their partners or when they wanted to introduce some unusual clauses in their contracts. Consequently, on average merchants only notarized two or three documents per year (Gelderblom, 2013, pp. 92-94). In seventeenth-century Buenos Aires (Argentina) the number of private deeds mentioned in the wills of the inhabitants of the city was higher than the number of public deeds, although this second group accounted for larger sums of money (Wasserman, 2014b, pp. 12-16). In eighteenth-century Florimont (France) the non-notarial credit market was larger than the notarial one. There, non-notarized credit contracts were mainly used for small loans and transactions that involved residents of the same town (Dermineur, 2019).

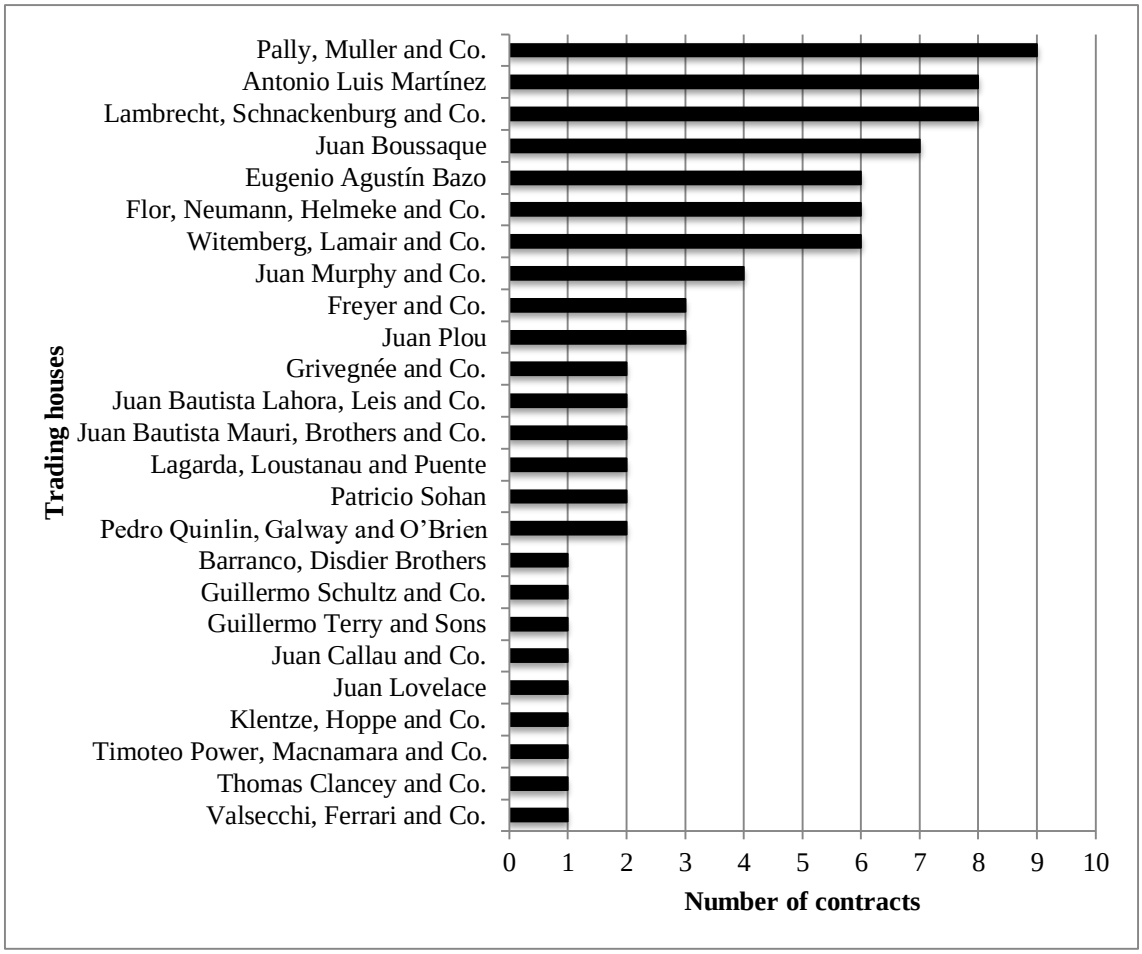
Because informal agreements were not certified and preserved in public archives, it is almost impossible to measure the size of the non-notarized credit market in Malaga, but probably it was large, as the 1784 will of Ciriaco de Herrera, a craftsman from the city of Malaga, suggests:

"I declare that several amounts of money are owed to me, some of them by deeds, some of them by receipts and most of them without any document. And because my son Don Cristóbal knows all of them, he will identify them and he will charge them, knowing that only in the case that the debtor is a pernicious one, he shall be prosecuted, but in the case that he isn't, he shall be made to pay without the intervention of law as a gesture of kindness. That way he won't have to undergo any more grieving and my conscience will be relieved."[49]

That year Ciriaco de Herrera notarized three obligation contracts, and his son Cristóbal de Herrera y Rivera, another five, so I would expect the number of non-notarized credit contracts to be much larger. Probably the amount of the contract was an important determinant of whether to notarize or not a peer-to-peer transaction. Larger sums implied greater risks, a problem that could be partially solved through the additional legal protection inherent in notarization – explained in the next section. The example of the trading houses of the *Alto Comercio Marítimo* is enlightening, as they were the most dynamic agents in the city of Malaga.[50] Nevertheless, they were not involved in many notarized obligation contracts (Figure 2.2). In 1784, 25 trading houses were involved in just 81 contracts (around three contracts per house on average), and some houses did not subscribe any.[51] Among these deeds, however, were eight of the ten largest obligations notarized in the city of Malaga in 1784, which proves that trading houses relied on this service when large sums of money were at stake.

[49] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3195, pp. 222r-229v.
[50] According to the Cadastre of Ensenada (1753), the members of the *Alto Comercio Marítimo* only represented 3.14% of those employed in the commercial sector of the city, but they generated 46.3% of its profits (Villas, 1999, p. 101). At the time of his death in 1804 Juan Bautista Maury, the leader of the most prominent trading house of the city, had assets valued at 8,729,541 r.v., more than double the amount lent through notarized obligations in the city of Malaga in 1784 (Gámez Amián, 1994, p. 130).
[51] In 79 cases as creditors – in nine of them as proxies for creditors who resided outside the city of Malaga – and in two cases as debtors. In notarial records for 1784 I have found references to another ten trading houses that did not subscribe any obligation contract that year: Campos, Palas and Co.; Francisco Menescau, Fisson and Co.; Gerokens, Wasberg and Co.; Guillermo Laird; Guillermo Lovejoy and Co.; Hudson and Wigram; Jaime Setta and Co.; Menvielle, Westertrom and Lienau; Rosa Pérez Solano and Co.; and Tomas Quilty and Co. See footnote No. 58.

FIGURE 2.2: Trading houses of the *Alto Comercio Marítimo* involved in obligation contracts



Source: see footnotes No. 24 and No. 58.

As Table 2.9 shows, it is difficult to calculate the return on capital because contracts rarely included the interest rate (fewer than 1%).[52] Most of them stated that the amount had been loaned "at the mercy of the lender".[53] According to several testimonies, however, the borrowers of this area paid high interest rates.[54] In this sense it seems that

[52] The same picture emerges in Alicante, where only 6.3% of the agricultural loans notarized between 1790 and 1799 included the interest rate (Cuevas, 2001, p. 112).

[53] Among those few obligation contracts that included the interest rate (10), most of them (6) were sea loans.

[54] For example, the bylaw of the *Montepío de Cosecheros* mentioned "the damages and vexations suffered by the farmers of the Bishopric of Malaga due to the loans that other persons made them with the obligation to pay an interest, or to pay them with their fruits at a lower price." Own translation. *Reglamento para el Real Monte Pio de Socorro a los Cosecheros de vino, aguardiente, pasa, higos, almendra, y aceyte del Obispado de Málaga* (1776, p. 3). In the nineteenth century there are testimonies in the same sense. In the Congress of Deputies session of July 15, 1841, Cristóbal Pascual, deputy of Malaga, said: "It is true that many thousands of *arrobas* of raisins have been exported from the ports of the Province of Malaga; but it is also true that the beneficiaries of this exportation have been the merchants and not the farmers; it is necessary for the Congress to know that merchants lend to farmers

creditors may have included the interest in the amount supposedly given by the creditor to avoid the usury laws (Zegarra, 2017b, p. 81).[55]

TABLE 2.9: Interest rate

Interest rate	Number of contracts	%	Amount (*reales de vellón*)	%
Specified	10	0.8	614,348	15.0*
Unspecified	1,171	99.2	3,474,049	85.0
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

*Note: this percentage is explained by the fact that the largest contract in the database (450,000 r.v.) included the interest rate. Without this contract the percentage falls to 4%.
Source: see footnote No. 24.

It is equally problematic to determine the real duration of these contracts. Most obligations laid down maturities of twelve months or less, the average maturity being 10.3 months (Table 2.10).[56] Yet, only a few (fewer than 20%), gave the date at which the debt was finally paid in the left-hand margin of the first page of the document (Table 2.11). This does not mean that the other contracts went unpaid, only that their payments was non-notarized. Contracting parties could choose whether to notarize the payment. If they chose do so, the notary had to write a deed of payment, as well as find the original contract so as to annotate it with the date of the payment (Febrero, vol. 2, 1783, pp. 205-206). Of course, the contracting parties had to pay a fee for this service (Martínez Salazar, 1789, p. 287), so they would only notarize the payment under specific circumstances. The data suggest that notarized payments were more important for contracts that involved larger sums: only 12.9% and 11.3% of those contracts for a

what they need at 25% annual interest, then, the merchant takes the harvest, he loads it, and later he squares accounts with the farmer." Own translation. *Diario de las Sesiones de Cortes. Congreso de los Diputados. Legislatura de 1841, Tomo III*, 104 (1875, p. 2273).

[55] Official laws established interest-rate ceilings for credit contracts. For example, at the end of the eighteenth century the legal maximum interest rate was 3% for annuities and 6% for obligations. These laws are included in the *Libro X* of the NR (1805): *Título XV*, *Leyes VIII-IX* (for annuities); and *Título VIII*, *Ley V*; *Título XI*, *Leyes XII-XIII*; *Título XIII*, *Leyes XIV*, *XVII-XVIII* and *XXI* (for obligations). This regulation did not apply to all credit modalities: in sea loans, for example, contracting parties could set interest rates freely (Bustos Rodríguez, 2005, pp. 425-427). With regard to the obligation contracts of my database that included the interest rate, all of them complied with the usury laws. Two of them mentioned an annual interest of 3%, and another two of 6% annually. For those obligation contracts used as sea loans (six contracts), interest rates ranged from 2% (travel to Gibraltar) to 21% (travel to Saint Thomas).

[56] Similar maturities were agreed in Valladolid, where 66.2% of the obligations notarized between 1795 and 1815 had a duration of twelve months or less (Carvajal, 2018, p. 219); in Alcoi, where the average maturity of obligations and repurchases between 1780 and 1789 was 14.52 months (Cuevas, 1999, p. 191); and in Madrid, where the average maturity of mortgage obligations registered in the public mortgage registry between 1778 and 1828 was one year (Milhaud, 2018a, p. 22).

value of up to 499 r.v. and between 500 and 900 r.v. respectively notarized their payments. For contracts with a value between 5,000 and 9,999 r.v. and between 10,000 and 49,999 r.v., however, the percentages increased to 30.4% and 44.3% respectively. Notarized payments were probably also common for transactions with agents with whom there was no previous relationship or for payments derived from litigation. The sample includes 210 obligations that mention both the agreed maturity and the real date of payment. On average these 210 contracts agreed durations of 8.7 months, but their real duration was 24.5 months.[57] Hence, delays were common, although it cannot be ruled out that in some cases the notarization was made some months later than the real payment as a requirement to start a new transaction. It is also possible that notarized payments were mainly used for delayed payments.

TABLE 2.10: Maturity agreed in the contract

Maturity (months)	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Up to 6	377	31.9	1,066,137	26.1
6-12	598	50.6	1,516,963	37.1
12-24	61	5.1	170,662	4.2
24-60	33	2.8	225,626	5.5
Over 60	11	0.9	514,882	12.6
Unspecified	101	8.5	594,127	14.5
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

Source: see footnote No. 24.

TABLE 2.11: Evidence of payment (over contract size ranges)

Contract size (*reales de vellón*)	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Up to 499	26	12.9	9,022	13.9
500-999	27	11.3	18,444	11.4
1,000-4,999	98	19.1	202,909	19.3
5,000-9,999	31	30.4	207,593	30.0
10,000-49,999	35	44.3	652,908	47.8
50,000-99,999	2	66.6	130,659	66.1
Since 100,000	0	0.0	0	0.0
Unspecified	3	7.0	-	-
Total	**222**	**18.8**	**1,221,535**	**29.9**

Source: see footnote No. 24.

[57] Specifically, 46 of the contracts were paid on time, while 164 suffered delays.

Analyzing the socioprofessional status of the contracting parties is complicated because most obligations did not mention it. However, it is possible to identify the status of many creditors and a few debtors through other notarial deeds and other sources.[58] Mercantile groups (trading houses and merchants) were the most prominent creditors: together they accounted for 32.3% of the contracts and for 58.3% of the amounts (Table 2.12).[59] Among them, in terms of loaned capital, trading houses were the most important creditors since their contracts involved more than a third of the amounts even if they only subscribed 6.8% of the obligations. In terms of the number of contracts, however, merchants were the most active group, subscribing more than a quarter of obligations. This pattern seems logical given that these two groups performed different commercial functions. Trading houses, which were mostly foreign, were highly capitalized and had strong links with other commercial sites, so they focused on

[58] For example, there are some creditors and debtors whose status is not mentioned in some obligation contracts but is included in others, so it is possible to identify them. For the same reason it is also possible to find their status in other notarized deeds written in 1784, such as leases or payments. Of course, I have only assigned status to those individuals for whom I have evidence that there were not several individuals with the same name and surname in the same municipality (for example, if I find a notarized deed that mentions the "priest José del Castillo, citizen of the city Malaga" and other notarized deed that mention "José del Castillo and his wife, both citizens of the city of Malaga", I know that there are several individuals with the same name and surname in the city that year, so I can not assign status to those individuals called "José del Castillo"). Furthermore, in the case of merchants and trading houses, I have identified many of them from additional sources. The Census of 1771 included individuals who performed several mercantile professions in the city: *Corredores Intrusos*, *Corredores de Alhóndigas*, *Corredores de Bestias*, *Corredores de Lonjas y Alhóndigas*, *Corredores de pasas, almendras y cascaras de naranja*, *Empleantes de azúcares, cacao, canela, chocolate y Pimienta*, *Marchantes*, *Mercaderes (Malteses)*, *Mercaderes de Paños, Lienzos y otros Géneros*, *Mercería y Quincallería*, *Tráfico Comercio Terrestre*, *Tratantes de Cordobanes, suelas, badanas y becerros por mayor* and *Casas del Alto Comercio Marítimo* (AHMM, *caj*a 431: *expediente* 116; Mairal Jiménez, 1999b). The municipal registers of 1776 mentioned all the partners and the employees of three mercantile groups of the city: *Casas del Alto Comercio Maritimo* of Malaga, *Mercaderes de Vara* and *Casas de Mercería* (Villar García, 1997, pp. 201-207). The members of the board of the Malaga *consulado* in 1785 are included in García España (1975, p. 55). The names of the foreign trading houses that did business in Malaga in 1791 are included in Villar García (1981, pp. 257-258). On December 3, 1793, the government gazette, *Gazeta de Madrid*, included the names of those members of the Malaga *consulado* who offered funds to the king to finance the war against France (*Gazeta de Madrid*, 97, 1793, pp. 1276-1277). Finally, some merchants and trading houses that operated in Malaga during this period are mentioned in Gámez Amián (1994) and Carmona Portillo (2017, p. 158). Since these sources are not from 1784, it cannot be ruled out that some individuals performed a different activity that year. Nevertheless, given the commercial nature of a high percentage of the credit activity, it seems likely that many of them had mercantile occupations that time.

[59] Mercantile groups also had a hegemonic position in Madrid, where they accounted for 46.5% of the obligation contracts and for 49.3% of the amounts between 1750 and 1808 (Sola, 2000, p. 225); in Alcoi, where they accounted for 38.48% of the amounts loaned through obligations and repurchases between 1770 and 1819 (Cuevas, 1999, p. 173); and probably in Almería and Cuevas, where ecclesiastical groups only accounted for 7.5% and 1.4% respectively of the amounts loaned through mortgage obligations between 1769 and 1800 (Díaz López, 2001, p. 142). In other areas, however, ecclesiastical groups surpassed them: in Astorga, between 1751 and 1800, merchants only accounted for 10.0% of the obligation contracts, while ecclesiastical groups accounted for 49.7% (Rubio, 1989, p. 581). In Valladolid, the picture was more balanced: between 1795 and 1815 ecclesiastical groups accounted for 23.2% of the obligation contracts and 32.7% of the amounts, while businessmen accounted for 14.0% of the obligation contracts and 32.8% of the amounts (Carvajal, 2018, p. 218).

import-export activities. Merchants, both native and foreign, occupied a subordinate position with respect to trading houses, working as intermediaries between them and the local population. On the one hand, they worked as wholesalers and retailers of imported goods. On the other hand, they ensured the supply of agricultural commodities to trading houses (Villar García, 1997, pp. 192-200; 2011, p. 16).[60] Regarding debtors, I have not been able to identify many of them (Table 2.13).[61] Even so, given the relevance of agricultural loans, it seems reasonable to assume that many of them were just farmers. Finally, regarding gender, there was a clear primacy of men as both creditors and debtors (Table 2.14).[62]

[60] This pattern of specialization is clearly perceived in the relative participation of trading houses and merchants in both credit markets. Thus, merchants constituted the most active group in agricultural loans (45.9% of the loaned amounts), followed by trading houses (11.0% of the loaned amounts). For the remaining contracts, however, it was just the opposite, trading houses being the most important creditors (47.6%) of the loaned amounts), while merchants occupied the second position (11.3% of the loaned amounts). Specifically, trading houses accounted for 40.0% of the loaned amount in credit sales, 54.9% of the amounts involved in recognition of debts, 49.8% of the amounts loaned for emergencies, 52.6% of the capital loaned for other purposes, and 8.7% of the amounts loaned in contracts whose purpose is not specified, while merchants accounted for 11.3%, 14.1%, 11.7%, 6.6% and 14.5% respectively of the amounts loaned in these five categories.

[61] In Valladolid between 1795 and 1815, debtors merely described as "citizens" accounted for 88.3% of the obligation contracts and for 73.5% of the amounts (Carvajal, 2018, p. 218). In Madrid, however, it was more common for debtors to mention their statuses. There, debtors described as "citizens" only accounted for 27.3% of the obligation contracts and 14.3% of the amounts (Sola, 2000, p. 232).

[62] Madrid in this regard is quite similar: women only lent 6.3% of the amounts loaned through obligations between 1750 and 1808 (Sola, 2000, pp. 225-230).

TABLE 2.12: Socioprofessional statuses of creditors

	Based on the contract information				**Based on the contract information and additional sources**			
Status	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Trading houses*	71**	6.0	1,484,807	36.3	81	6.8	1,492,003	36.5
Merchants	16	1.3	67,121	1.6	301	25.5	893,072	21.8
Craftsmen	6	0.5	748	0.02	17	1.4	31,137	0.7
Clergy and ecclesiastical agents	24	2.0	104,470	2.5	70	5.9	173,660	4.2
Municipal officers	1	0.1	3,780	0.1	34	2.9	24,565	0.6
Military	15	1.3	56,016	1.4	26	2.2	63,386	1.5
Pósito Antiguo	21	1.8	2,861	0.1	21	1.8	2,861	0.1
Others	35	2.9	172,754	4.2	40	3.4	175,722	4.3
Unspecified	992	84.0	2,195,840	53.7	591	50.0	1,231,991	30.1
Total	**1,181**	**100.0**	**4,088,397**	**100.0**	**1,181**	**100.0**	**4,088,397**	**100.0**

*Note: I include here both the members of the *Alto Comercio Marítimo* and the merchants who resided in other commercial locations than the city of Malaga and its hinterland.

**Note: there are several of these contracts in which the document specified that the creditor carried out a mercantile activity but did not specify that it was a member of the *Alto Comercio Marítimo* (usually identified as *Casas*, as members of the *Comercio Marítimo* or as members of the *Comercio Alto Marítimo*). I have identified them as member of this institution using the sources provided in the footnote No. 58.

Source: see footnotes No. 24 and No. 58.

TABLE 2.13: Socioprofessional statuses of debtors

	Based on the contract information				**Based on the contract information and additional sources**			
Status	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Merchants	4	0.3	133,000	3.2	32	2.7	278,095	6.8
Shipmasters	13	1.1	158,705	3.9	14	1.2	165,425	4.0
Craftsmen	8	0.7	22,407	0.5	14	1.2	43,065	1.0
Clergy and ecclesiastical agents	14	1.2	47,351	1.1	15	1.3	48,951	1.2
Military	17	1.4	131,932	3.2	20	1.7	146,532	3.6
Others	20	1.7	537,823	13.1	26	2.2	552,297	13.5
Unspecified	1,105	93.5	3,057,179	74.8	1,060	89.7	2,854,032	69.2
Total	**1,181**	**100.0**	**4,088,397**	**100.0**	**1,181**	**100.0**	**4,088,397**	**100.0**

Source: see footnotes No. 24 and No. 58.

TABLE 2.14: Gender of creditors and debtors

	Creditors				Debtors			
Gender	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Men	1,054	89.2	3,777,548	92.4	1,066	90.2	3,630,401	88.8
Women	93	7.9	279,278	6.8	30	2.5	161,866	3.9
Both	13	1.1	28,710	0.7	85	7.2	296,130	7.2
Others*	21	1.8	2,861	0.1	0	0.0	0	0.0
Total	**1,181**	**100.0**	**4,088,397**	**100.0**	**1,181**	**100.0**	**4,088,397**	**100.0**

*Note: *Pósito antiguo*
Source: see footnote No. 24.

A detailed analysis of the contracts shows that these credit transactions rarely involved individuals who belonged to the same socioprofessional group. Thus, in only 0.7% of the obligations did both the creditor and the debtor have the same socioprofessional status.[63] In the same vein I have only identified family ties between the two parties in 0.8% of the contracts. This suggests that people notarized their agreements when private trust proved to be insufficient. Of course, if this was so, it would also apply to the residence of the contracting parties. Castilian towns were local communities based on strong identity links among their members (Nader, 1990; Thompson, 1995; Herzog, 2003), so I expect that if parties resided in the same place, the creditor would be more likely to know the debtor and, in the same way, it would also be easier to monitor him. Consequently, many financial transactions between individuals from the same area could take place through oral agreements or private deeds. If they resided in different areas, however, the creditor could have felt much more uncertainty, and the incentives to notarize the contract would be greater.

The additional safeguard of notarization for operations that involved contracting parties from different places would be also helpful given the high incidence of the jurisdictional barriers. Under Castilian law, the courts of the judicial districts only had full competence over district capitals where they were located (the city of Malaga for instance). This means that, although they could initiate legal processes against non-local debtors who owed money to local creditors, they had to delegate the effective application of the judicial decisions (summons, payment claim, arrest of the debtor, seizure of his assets, auctioning them, etc.) to the authorities and the public officers of the municipality where the debtor lived. This process was even more complex if the

[63] 1.2% assuming trading houses and merchants were members of the same socioprofessional group.

debtor lived in a municipality outside the judicial district, since they needed the additional collaboration of the courts of that district.[64] It is easy to imagine this system creating significant problems. On the one hand, it would delay the application of judicial decisions. On the other hand, since the interests of the local authorities were aligned with the interests of the debtors, they would not do everything in their power to guarantee immediate payment of the debt.[65] Notarization would not avoid the problems created by jurisdictional fragmentation, but it would mitigate them by ensuring the initiation of a fast-track legal procedure (*juicio ejecutivo*) even in absence of the debtor.[66]

The data confirm the greater relevance of transactions between citizens (*vecinos*) from different places. Most creditors lived in Malaga's inner city (97.2%).[67] For debtors, however, the picture is quite different. Only 37.9% of them lived in the inner city of Malaga, although they were involved in more than the half the loaned amounts.[68] 7.0% of the debtors lived in the suburbs of the city. Finally, in 55.0% of the contracts, debtors lived outside the city of Malaga.[69] More than two thirds of the debtors who lived outside the city were concentrated in other municipalities in the judicial district of Malaga. The remaining debtors were dispersed over other locations, most of them within the boundaries of the current province of Malaga, with only a few living in remoter areas

[64] NR, *Libro XI*, *Título XXIX*, *Leyes I-II*, *V*, *VII-VIII* and *XI* (1805, pp. 277-282). If the collateral was located in a third municipality different from those in which the court was located and the debtor resided, the collaboration of the authorities in the third municipality was also required. See NR, *Libro XI*, *Título XXIX*, *Ley VII* (1805, pp. 278-279).

[65] In Castile, mayors, like some other public officers, used to be elected annually from among the men of the towns by their own citizens or by the authorities on the town council –although they had to be approved later by the *corregidores* of the districts. This high degree of political autonomy, joined to a territorial structure dominated by a huge number of sparsely populated towns, should have contributed to strengthen the links between the authorities and the other members of their communities, creating a sort of local legal order. See Nader (1990) and Herzog (2003).

[66] As will be explained in detail below, for non-notarized contracts and oral agreements the initiation of a fast-track legal procedure required the debtor to recognize or confess the debt before the judge. For notarized contracts, however, the process started the moment the creditor showed a copy of the document to the judge. Consequently, the presence of the debtor was not required.

[67] In Madrid the presence of non-local creditors was higher than in Malaga, although it was far from being the majority. Between 1750 and 1808 they accounted for 11.3% of the obligation contracts and 8.9% of the amounts (Sola, 2000, p. 225).

[68] Once again Malaga was not exceptional. In Madrid, between 1750 and 1808, non-local debtors accounted for 29.6% of the obligation contracts and 25.0% of the amounts (Sola, 2000, p. 232).

[69] The case of Ciriaco de Herrera and his son, mentioned earlier, serves as an example of this: in six of the eight contracts that they subscribed in 1784 the debtors lived outside the city of Malaga.

(Table 2.15 and Figures 2.3 and 2.4).[70] Thus, most debtors were concentrated in a radius of 30 km from the city of Malaga (Table 2.16).[71]

The existence of 35.6% of contracts in which both the creditor and the debtor resided in the inner city of Malaga shows that the notarization of transactions between individuals from the same place was not uncommon. However, the comparison between the average size of these contracts and the size of others in which the contracting parties resided in different areas suggests that the threshold for the former to be notarized was quite a bit higher: on average those notarized contracts in which both parties lived in the inner city of Malaga amounted to 5,137 r.v., almost double the amount received for the other contracts (2,775 r.v.).

[70] In fact, the majority of them were concentrated in two bordering judicial districts: the *Corregimiento* of Velez-Malaga, located east of the *Corregimiento* of Malaga (124 contracts and 588,530 r.v.), and the *Corregimiento* of the Cuatro Villas de la Hoya de Malaga, located west of the *Corregimiento* of Malaga (52 contracts and 100,414 r.v.). Both judicial districts were part of the *Corregimiento* of Malaga until their independence in 1641 and 1667 respectively (Álvarez y Cañas, 202, p. 69).

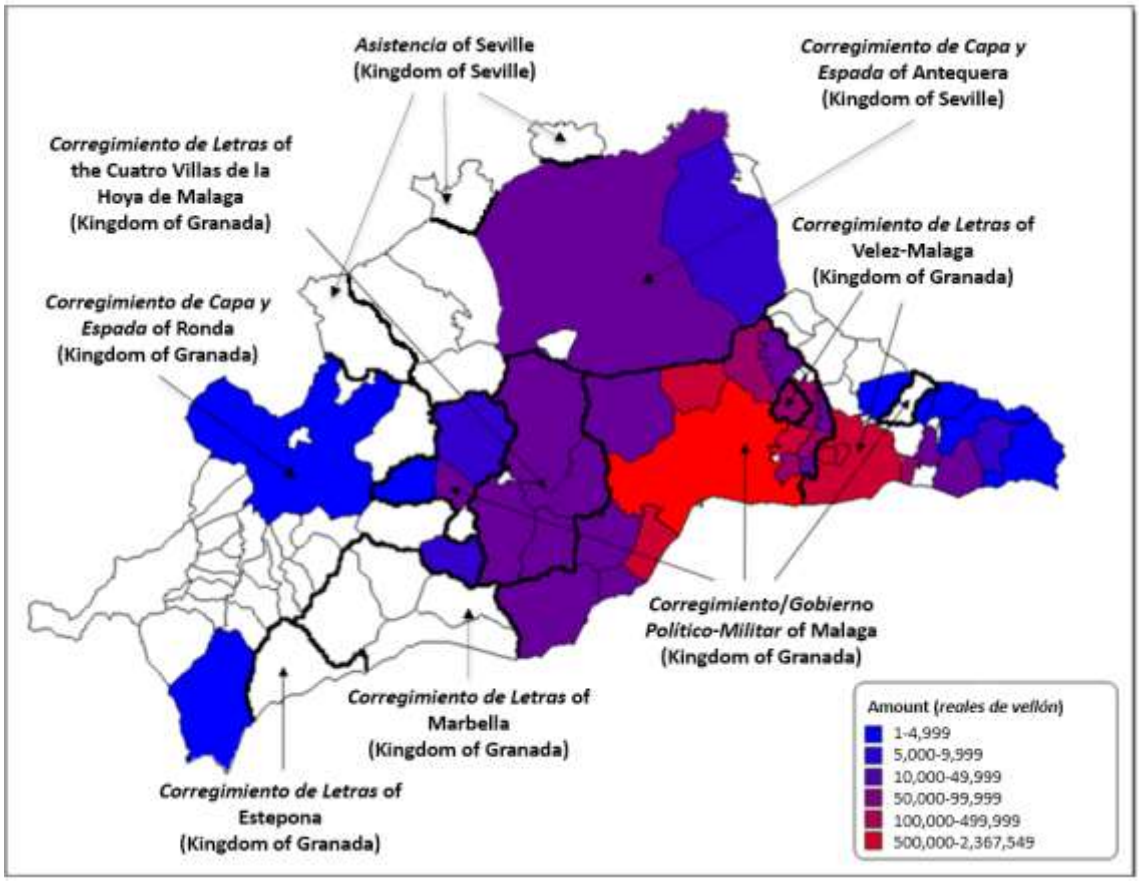
[71] In the cities of Ágreda, Noviercas and Ólvega, the average distance between creditor and debtor's residences was 14.6 km in 1725 and 3.5 km in 1735 (Milhaud, 2018b, pp. 9 and 14). In the city of Valladolid between 1795 and 1815, notarial credit markets involved debtors from towns in a 40 km area (Carvajal, 2018, p. 214). In Murcia during the eighteenth and nineteenth centuries, local creditors lent money to debtors who lived in a radius of 20-25 km from their municipalities (Pérez Picazo, 2005, p. 59).

TABLE 2.15: Residence of creditors and debtors

	Creditors				Debtors			
Residence	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
City of Malaga: inner	1,148	97.2	3,807,000	93.1	448	37.9	2,197,793	53.7
City of Malaga: suburbs*	1	0.1	3,200	0.1	83	7.0	169,756	4.1
Other municipalities in the judicial district of Malaga	3	0.2	15,451	0.4	450	38.1	851,381	20.8
Other judicial districts	24	2.0	161,370	3.9	195	16.5	772,451	18.9
Outside Spain**	3	0.2	95,996	2.3	5	0.4	97,016	2.4
Unspecified	2	0.2	5,380	0.1	0	0.0	0	0.0
Total	**1,181**	**100.0**	**4,088,397**	**100.0**	**1,181**	**100.0**	**4,088,397**	**100.0**

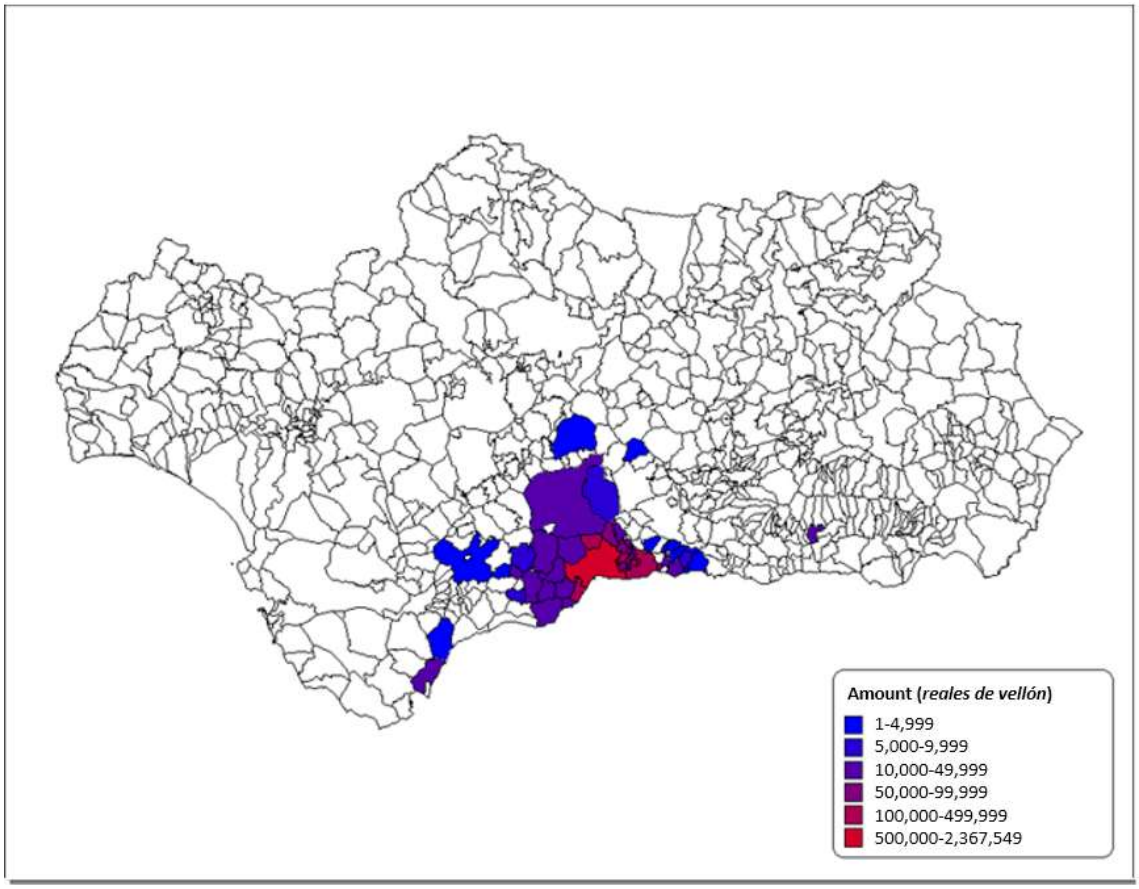
*Note: Arroyo del Cabrero, Benagalbón, Bezmiliana, Campanillas, Chilches, El Palo, Fontilla, Granadillas, Olías, Sancti Petri, Sandoval, Santo Pitar, Totalán, Tres Cruces and Vardel. These places are quoted in notarial deeds as *partidos* or *arrabales* of the city, and none of them is mentioned as a municipal form (*ciudad*, *villa*, *lugar* or *puebla*) in the list of municipalities of the *Corregimiento* of Malaga published in 1789 (*España dividida en provincias e intendencias, Tomo I*, 1789, p. 315).
**Note: for creditors, they resided in Ostend, Paris and Mexico City. These three operations were carried out employing a proxy who lived in Malaga. For debtors, the five operations were sea loans that involved debtors from Tabasco (2), Denmark, England and the Holy Roman Empire.
Source: see footnote No. 24.

FIGURE 2.3: Geographical distribution of the loaned amounts in obligation contracts written by notaries of Malaga in 1784: current province of Malaga



Source: see footnote No. 24; for the administrative division of this area, as well as for the boundaries of both *corregimientos* (thick lines) and municipalities (thin lines), see *España dividida en provincias e intendencias, Tomo I* (1789, pp. 314-316 and 467-468), Heras Santos (1996, pp. 127 and 136-139), and Álvarez y Cañas (2012, pp. 35-38, 58-59, 69-71, 76-77, 84 and 86).

FIGURE 2.4: Geographical distribution of the loaned amounts in obligation contracts written by notaries of Malaga in 1784: Andalusia*



*Note: This map includes all the contracts in the database except one in which the debtor lived in the city of Cartagena (Murcia), 320 km from the city of Malaga, and the five contracts in which the debtors resided outside Spain.
Source: see footnote No. 24; for the administrative division of this area, as well as for the boundaries of municipalities, see *España dividida en provincias e intendencias, Tomo I* (1789, pp. 314-316 and 467-468), and Álvarez y Cañas (2012, pp. 35-38, 58-59, 69-71, 76-77, 84 and 86).

TABLE 2.16: Distance between the city of Malaga and the residence of the debtor*

Distance (km)	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Up to 10**	470	39.8	2,252,955	55.1
Up to 20	345	29.2	682,924	16.7
Up to 30	301	25.5	803,522	19.6
More than 30	65	5.5	348,996	8.5
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

*Note: distances between Malaga and the residences of the debtors are defined "as the crow flies".
**Note: All the contracts in which the debtor resided in inner city of Malaga are included in this category. Certainly, the distance between the centre of the city and its boundaries with some of its suburbs exceeded 10 km. Even so, since the contract did not mention the neighbourhood of the inner city where the debtor resided, it is not possible to know if he resided within a radius of 10 km or at a greater distance.
Source: see footnote No. 24; distances have been obtained at https://www.distance.to (consulted October 4, 2020).

Regarding their jurisdictions, practically all creditors resided in royal domains (*realengo*), something that was logical given that most of them lived in the city of Malaga (a royal city). Most of the debtors also lived in royal domains, although around 10% were citizens of towns under the jurisdiction of the nobility (*señoríos*) or citizens of independent municipalities that belonged neither to the king, nor to the nobility, nor to the Church, nor to the military orders (Table 2.17). Both lordships and independent municipalities enjoyed a higher degree of freedom to elect their officers and to administer justice than *realengo* towns. For example, while newly elected mayors in the latter needed to be confirmed by the *corregidor* of the district, neither in the lordships nor in the independent municipalities was this requirement required (Heras Santos, 1996, pp. 134-135; Oto-Peralías, 2019, p. 5).[72]

TABLE 2.17: Jurisdictions of creditors and debtors

	Creditors				**Debtors**			
Jurisdiction	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
Royal domains	1,174	99.4	3,995,840	97.7	1,053	89.1	3,604,524	88.1
Lordships	2	0.2	15,012	0.3	50	4.2	173,119	4.2
Independent municipalities	1	0.1	2,451	0.05	73	6.2	213,738	5.2
Out of Spain*	2	0.2	69,714	1.7	5	0.4	97,016	2.4
Unspecified	2	0.2	5,380	0.1	0	0.0	0	0.0
Total	**1,181**	**100.0**	**4,088,397**	**100.0**	**1,181**	**100.0**	**4,088,397**	**100.0**

*Note: of the creditors, in one of the contracts the creditor resided in Ostend, while in the other the creditor resided in Mexico City. Both operations were carried out employing a proxy who resided in Malaga. Of the debtors, the five operations were sea loans that involved debtors from Tabasco (2), Denmark, England and the Holy Roman Empire.
Source: see footnote No. 24; for the jurisdiction of the municipalities, see *España dividida en provincias e intendencias, Tomo I* (1789, pp. 314-316 and 467-468), Villalobos y Martínez-Pontrémuli (1986, p. 1312), and Soria Mesa (1995, p. 103).

Finally, it seems that notarized credit contracts also performed an important role to finance those sectors that lacked the support of professional corporations. In the Bishopric of Malaga, in addition to craftsmen and merchant guilds, there were corporations that grouped the producers of several agricultural commodities in some

[72] For independent municipalities see, for example, the case of the town of Casabermeja, located in the *Corregimiento* of Malaga (Cadastre of Ensenada: Casabermeja, pp. 617r-617v). Data on the Cadastre of Ensenada for the town of Casabermeja (carried out in 1752) are available on the PARES website at http://pares.mcu.es/Catastro/servlets/ServletController?accion=4&opcionV=3&orden=1&loc=12993&pageNum=5 (consulted October 4, 2020).

cities. Specifically, wine, lemons and oranges were produced under this regime.[73] These organizations were created partly to create barriers to entry in their markets and to ensure high prices for their commodities, goals that, logically, confronted those of the merchants and trading houses. In order to avoid falling under the control of mercantile groups, the members of these corporations presumably financed each other or created common funds that were assigned through non-notarized documents.[74] Furthermore, it cannot be ruled out that they enjoyed privileged access to some public funds.[75] As a result, their participation in notarial credit markets would be minor, as is confirmed by the data: only 6.2% of the obligations recorded in 1784 agreed the total or partial payment in wine, lemons or oranges.[76] Just the opposite happened with the raisins – along with the wine the most important commodity exported from Malaga (Gámez Amián, 1986, p. 155). While most wine, lemon and orange producers were residents of the cities of Malaga and Velez-Malaga, raisin producers were dispersed over many small towns and lacked the support of a corporation.[77] For this reason they depended heavily on periodic loans from merchants, many of which would be notarized. Thus, 35.3% of the obligation contracts notarized in 1784 agreed the total payment in

[73] In the city of Malaga, wine producers were grouped in the *Hermandad de Cosecheros de Viñas* (Ponce, 1995) and lemon producers in the *Junta del Limón* (Gámez Amián, 1983, pp. 138-139). In the city of Velez-Malaga, lemon and orange producers were grouped in the *Unión y Señorío de Huertas* (Pezzi Cristóbal, 2003, pp. 190-203).

[74] It should be noted that these corporations had a high economic capacity. On the one hand, among their members there were prominent figures of the elites of the cities of Malaga and Velez-Malaga (Ponce, 1990, p. 30; Salcedo, 2002, p. 49). Thus, in 1792, among the 20 members of the board of the *Hermandad de Cosecheros de Viñas* (2 *hermanos mayores* and 18 *consiliarios*), there were 5 military officers, 4 aldermen, 2 priests and 1 noble (García de la Leña, 1792, pp. 151-154). On the other hand, their members regularly paid membership fees to finance organizational expenses, as well as extraordinary projects and contributions (Llordén and Souviron, 1969, p. 713; Pezzi Cristóbal, 2003, p. 201). For example, in the 1780s and 1790s the *Hermandad* disbursed 144,000 r.v. to finance the road that connected the cities of Malaga and Antequera (Heredia Flores, 1996, pp. 14-15), and in 1793 it offered 11,000 r.v. annually to the king to finance the war against France (*Gazeta de Madrid*, 36, 1793, p. 388). In the same line, in 1740 the *Hermandad* considered buying the monopoly right over the production of *aguardiente* from the king (De Mesa, 1740, pp. 7-18). Of course, this was not a peculiarity of agricultural corporations, since other organizations like the *Alto Comercio Marítimo* or the Malaga *consulado* also had their own funds. See Villar García (1981, pp. 254-255) and García España (1975, p. 57), respectively.

[75] According to the bylaw of the *Montepío de Cosecheros*, three of the five voting members of its board had to be members of the *Hermandad de Cosecheros de Viñas*. This circumstance would have benefited the wine producers of the city, who probably enjoyed privileged access to the funds of this institution. See *Reglamento para el Real Monte Pio de Socorro a los Cosecheros de vino, aguardiente, pasa, higos, almendra, y aceyte del Obispado de Málaga* (1776, pp. 6-8).

[76] In the case of those obligations that were paid in lemons, in fact most of them were not agricultural loans to farmers but contracts in which the debtor was an agent who had received money from the creditor to buy lemons for him.

[77] Furthermore, the fact that a high percentage of the wine producers were concentrated within the boundaries of the city of Malaga probably meant that most of the credit contracts with them were channelled through private deeds and oral agreements.

raisins.[78] In fact, probably an important share of the exported raisins were marketed through this mechanism (Table 2.18).

TABLE 2.18: Estimated percentage of exported raisins marketed through obligation contracts (1769-1780)

Year	Estimated value of the raisins exported from the port of Malaga (*reales de vellón*)*	Estimated percentage of exported raisins marketed through obligation contracts (%)**
1769	957,982	69.0
1770	1,409,082	44.0
1771	1,257,613	51.8
1772	792,519	85.8
1775	1,588,882	41.7
1776	1,269,248	52.3
1777	1,880,574	36.7
1778	2,124,485	31.8
1780	1,299,385	57.9

*****Note: these values have been obtained by multiplying the amount of raisins exported from the port of Malaga in one year by the wholesale price of the raisins in the city of Velez-Malaga that same year. The prices of raisins in the cities of Malaga and Velez-Malaga were practically the same in those years for which there are data for both cities (1792-1793), so it is reasonable to think that in the previous years the situation was similar. Specifically, I have taken the prices corresponding to the month of September, when the most amount of raisins were sold. For those years in which data for September are not available I have taken the data corresponding to the nearest month.

**Note: the estimated percentage of the production marketed through obligation contracts has been obtained using as reference all those obligation contracts written in 1784 in which the payment would be made exclusively in raisins (417 contracts by value of 712,407 r.v.). I have extrapolated the data from the 22 notaries of the database for all the notaries of the city (24 notaries). The amount obtained (778,177 r.v.) has been adjusted for inflation for each year between 1769 and 1780 using data for Andalusia, the Spanish region to which Malaga belongs. I have not included all those contracts in which the payment would be made in raisins along with other commodities because the contracts do not specify which percentage of the contract would be paid in raisins and which percentage would be paid in other commodities (46 contracts by value of 167,706 r.v.). These results have been obtained assuming that all the raisins produced by debtors were exported.

Source: for the amount of raisins exported from the port of Malaga and their prices, see Gámez Amián (1983, pp. 130-135); for the inflation data, see Hamilton (1947, p. 155); for obligation contracts in 1784, see footnote No. 24.

Altogether, the analysis for this area clearly shows that, far from being marginal, notarial credit markets were widely used, especially for riskier deals: large sums needed, impersonal exchanges and non-corporative activities. These transactions, given their characteristics, could not be financed through more ordinary means (philanthropic

[78] I find the same evidence in Peña-Mir (2016, pp. 138-139) for the period 1779-1794.

institutions and non-notarized contracts), while other options such as brokers,[79] banks[80] or local treasuries[81] were not widespread enough to constitute a real alternative.

2. 4 Why notarize a contract?

Notarization required both time and money, so people would not hire this service unless they expected to obtain certain benefits that offset those costs.[82] Certainly, the legal advice of notaries would be appreciated, especially in a society with high levels of illiteracy. [83] The main advantage of notarized contracts, however, was their legal superiority over non-notarized contracts in litigation. This does not mean that private deeds were not permitted as legal proof if a case came to trial. Furthermore, private deeds did not even have to pay a tax in order to be accepted by a court, as, for example, happened in France (Hoffman *et al.*, 2019, p. 17). Notarized contracts had a stronger value because they ensured faster trials in debt collection lawsuits (litigation involving a single creditor) and priority payments in meetings of creditors (litigation involving several creditors).

In debt collection lawsuits, the notarization of the contract did not prevent the debtor from opposing the execution and initiating a trial. Yet notarization guaranteed the creditors automatic access to the executory process (*juicio ejecutivo*). This judicial

[79] There were brokers (*corredores de lonja*/*corredores del número*) in the main commercial cities: Madrid, Valencia, Barcelona, Seville, Cadiz, Malaga, Zaragoza, Alicante, Sanlúcar de Barrameda, Bilbao or Santander. Although these public agents specialized in sophisticated financial instruments (insurances, bills of exchange, royal debt, etc.), they also formalized more generic loans (Carrasco, 1999). Unfortunately, the books of the brokers of the city of Malaga previous to 1861 have not been preserved (catalogue of AHPM).

[80] Since the mid-eighteenth century, some financial services started to be covered by the first banks: *Real Giro de España* (1748), *Compañía General y de Comercio de los Cinco Gremios Mayores de Madrid* (1764) and *Banco Nacional de San Carlos* (1782). These banks were focused on the State's needs (royal debt, the export of silver, military supply contracts, tax farming business, etc.), but they had some private functions too (Capella Martínez and Matilla Tascón, 1957; Tedde de Lorca, 1988).

[81] For example, in 1778 the city of Velez-Malaga offered loans at a 2% interest rate to their farmers in order to reduce their dependence on the merchants (Pezzi Cristóbal, 2003, p. 189).

[82] According to the official fees for notarial services established in 1782 and the price of the stamped paper, an obligation contract of 3,592 r.v (the average amount for obligation contracts recorded by Malaga's notaries in 1784) for a two-pages document with a copy and without special mortgage would have paid 45 r.v. and 6 mrvds. (36 r.v. in notarial fees and 9.r.v and 6 mrvds. in revenue stamp). This amount was equivalent to 16.5 day's wages of an unskilled rural labourer in Malaga. See Martínez Salazar (1789, p. 285), NR, *Libro X*, *Título XXIV*, *Ley X* (1805, p. 158), Villar García (1982, p. 152) and Moranchel Pocaterra (2012, p. 73).

[83] For example, in 58.4% of the obligation contracts recorded by the notaries of the city of Malaga in 1784, none of the debtors signed the document because they alleged illiteracy. In those cases one of the witnesses signed for them.

modality implied that the debtor's assets were prevently seized. Furthermore, the debtor had a very short period to prove that the debt had already been paid.[84] Since 1534 non-notarized contracts could also access this modality, but they required the debtor to acknowledge the debt before a judge.[85] If he refused to do so, the lawsuit was governed by a different procedure: the ordinary process (*juicio ordinario*). In this modality the debtor's assets were not immediately seized. Furthermore, it was the creditor – not the debtor – who had to prove that the debt was unpaid, and the period in which evidence could be provided was much longer, making litigation very slow. Regarding meetings of creditors, notarized contracts were immediately validated by the judges and had priority of payment with respect to non-notarized contracts in the same category. Non-notarized contracts, however, required the recognition of the debtor or the testimony of two witnesses to be validated by the judges, and the signature of the debtor and three witnesses to have the same legal force as a notarized contract (Table 2.19).[86]

[84] This fast-track legal procedure was first introduced for the city of Seville in 1360 and 1396. In 1480 its use was extended to the entire Crown of Castile (Fernández Castro, 2015, pp. 238-239).
[85] NR, *Libro XI*, *Título XXVIII*, *Ley IV* (1805, p. 272).
[86] In meetings of creditors involving merchants as debtors, however, the legal implications of both notarized and non-notarized instruments were somewhat different. These processes were ruled by bankruptcy trustees who, after examining the account books of the debtors and the (notarized and non-notarized) contracts of the creditors, decided the validity and categorization of the claims. Then the bankruptcy trustees tried to encourage an arrangement between the creditors. If they did not get it, the creditors were paid according to their category and seniority. This particularity is explained because these processes were not governed by Castilian statutory law, but by the Bilbao *consulado*'s 1737 ordinances. See *Ordenanzas de la Ilustre Universidad y Casa de Contratación de la M. N. y M. L. Villa de Bilbao* (1738, pp. 131-157).

TABLE 2.19: Legal effects of notarized and non-notarized contracts in debt collection lawsuits and meetings of creditors

<table>
<tr><th></th><th>Notarized contracts</th><th>Non-notarized contracts
(oral agreements and private deeds)</th></tr>
<tr><td rowspan="2">Debt collection lawsuits (a single creditor)</td><td rowspan="2">The creditor shows a copy of the contract to the judge, who immediately authorizes the executory process (juicio ejecutivo): automatic seizure of the assets of the debtor, and short period to provide evidence if the debtors opposes the execution (10 days).*</td><td>The debtor neither confesses (for oral agreements) nor recognizes (for private deeds) the debt before the judge. Then the judge authorizes the ordinary process (juicio ordinario): non-automatic seizure of the assets of the debtor, and long period to provide evidence (80-120 days in ordinary circumstances and 6 months-3 years in extraordinary circumstances).</td></tr>
<tr><td>The debtor confesses (for oral agreements) or recognizes (for private deeds) the debt before the judge. Then the judge authorizes the executory process (juicio ejecutivo).</td></tr>
<tr><td rowspan="2">Meeting of creditors (several creditors)</td><td rowspan="2">The judge immediately validates notarized contracts. Furthermore, they have priority of payment with respect non-notarized contracts in the same category (privileged creditors, mortgage creditors or personal creditors), since they are able to prove seniority.</td><td>To be validated by the judge, non-notarized contracts require the confession/recognition of the debt or the testimony of two witnesses.</td></tr>
<tr><td>To have the same legal force as a notarized contract, non-notarized contracts require the signature of the debtor and the signature of three witnesses.</td></tr>
</table>

*Note: a detailed outline of the executory process step by step is provided in Appendix 2.3.
Source: for debt collection lawsuits, see Fernández Castro (2015, pp. 237-241); for meetings of creditors, see Febrero (1786, pp. 623-738).

The legal superiority of notarized documents was explained by the fact that they were written by public officers. According to some authors, however, notarization alone was not enough to ensure the full effectiveness of the document. The instrument also required the introduction of the *guarentigia* clause by the notary.[87] By including this clause, the debtor recognized the debt and authorized the judges, after seeing the contract, to act against him and his assets as if a judgment had already been pronounced against him (Melgarejo Manrique de Lara, 1791, p. 6). Whether this clause was really

[87] Although there were variations, the formula of the *guarentigia* clause went as follows: "They empowered those judges and justices of His Majesty who are enabled to deal with these matters, regardless their place of residence, to urge them to comply (with the contract) as a sentence passed in the authority of *res judicata*." Own translation. Febrero, vol. 2 (1783, pp. 77-79) and Melgarejo Manrique de Lara (1791, p. 6).

necessary or not, it did not become a real problem since notaries started to include it systematically.[88]

Along with the *guarentigia* clause, notaries also included some legal expressions or formulas under the form of waiver clauses (*renuncias*). By including them, the debtor renounced certain legal prerogatives that favored him. These legal prerogatives could have delayed the trial and made it difficult for the creditor to recover his money. Thus, their introduction by notaries helped reduce transaction costs (Pérez-Prendes y Muñoz de Arraco, 1993-94; Peset, 2007, pp. 224-225; Planas Rossello, 2016, pp. 563-565). Table 2.20 lists the waiver clauses I have identified in obligations recorded by the notaries of the city of Malaga in 1784.[89]

Resignations to the *non numerata pecunia* exception and the *fueros* were the two commonest waiver clauses. In the former the debtor claimed that he had received the amount specified in the contract, and he renounced, in the case of a trial, any claim that he had not received it. In his analysis of the credit market in Buenos Aires during the seventeenth century, Wasserman (2014b, p. 23) suggests that this formula was used to hide credit sales operations of goods that were being illegally introduced into the city. Without discarding his hypothesis – especially in the spatial context that he analyzes – I suggest that this formula could have been used to avoid the usury laws. Using this legal mechanism, creditors could introduce higher interest rates than the legal ones in the amount supposedly given by the creditor and prevent the debtor from alleging this infraction in the case of a trial.[90] Resignation to the *fueros* was used to prevent the debtor using his territorial rights and privileges to avoid being prosecuted by the judicial authorities. This clause would be especially important for those contracts in which the debtor did not live where the contract had been notarized.

[88] For the legal debate on the need to include this clause to ensure the full effectiveness of the document, see Marchant Rivera (2020, pp. 163-186).
[89] Both the *guarantegia* and some waiver clauses are included in an obligation contract transcribed in Appendix 2.4.
[90] This hypothesis is shared by Fernández Castro (2015, p. 354).

TABLE 2.20: Waiver clauses in obligation contracts

Waiver clause	Meaning
1. Resignation to the *non numerata pecunia* exception, laws of the delivery and proofs of its receipt	The debtor renounces to claim that he had not received the amount of money specified in the contract (in case of trial).
2. Resignation to his present and future *fueros*, to the law *Sit Convenerit de Jurisdictione Omnium Judicum* and to the last law of submissions*	The debtor waives his territorial privileges or *fueros* (in case of trial).
3. Resignation to the laws of the Emperor Justinian *Senatus Consultus Veleyano*, laws of Toro, Madrid and *Partidas* and the rest of laws in favor of women	For contracts in which the debtor is a woman. She waives her specific privileges (in case of trial).
4. Resignation to the *capítulo oduardus suan el penis de solusionibus* and the rest of laws in favor of ecclesiastics**	For contracts in which the debtor is an ecclesiastical person. He waives his specific privileges (in case of trial).
5. Resignation to any moratorium granted to the farmers (*cosecheros*)***	For contracts in which the debtor is a farmer (*cosechero*). He waives to take advantage of any legal extension granted for the farmers not to pay their debts.
6. Resignation to the law that prohibits sending executors****	The debtor accepts that in case of default a commissioned judge will go to his house to claim the debt. This judge would receive a wage (set in the contract and paid by the debtor) for each day of travel and employment.
7. Resignation to the law of *duobus res debendi y el autentica presente cobdice hoc ita de fidejusoribus*	For contracts with two or more debtors. All the debtors are liable for the entire amount, and not only for the part that corresponds to each one (joint liability).*****
	For contracts that include a guarantor. The guarantor agrees to pay if the debtor fails to do so. The assets of the guarantor, however, cannot be seized and sold until the assets of the debtors have been seized and sold.
8. Resignation to the "benefits of excussion and division"	For contracts that include a guarantor. The guarantor agrees the seizure and the sale of his assets even if the assets of the debtor have not been seized and sold yet (in case of trial).

*Note: this refers to the law of February 20, 1573 (Febrero, vol. 2, 1783, p. 73). For the content of this law, see NR, *Libro XI, Título XXIX, Ley VII* (1805, pp. 278-279).
**Note: according to Febrero, vol. 2 (1783, pp.89-92), ecclesiastical persons could not waive this privilege.
***Note: this waiver clause does not refer to a single law, but to moratoriums that were granted periodically to the farmers (*cosecheros*). For example, in 1745, the holders of vineyards of the city of Malaga received a moratorium until the end of the current war (War of Jenkins' Ear, 1739-1748) and for an additional year (AHMM, *caja* 675: *expediente* 17). In 1776 the producers of wine, *aguardiente*, raisins, figs, almonds and oil of the Bishopric of Malaga were granted with a moratorium for the period 1776-1777 (*Reglamento para el Real Monte Pio de Socorro a los Cosecheros de vino, aguardiente, pasa, higos, almendra, y aceyte del Obispado de Málaga*, 1776, p. 19).
****Note: this refers to the law of February 11, 1623 (Febrero, vol. 2, 1783, p. 71). For the content of this law, see NR, *Libro XI, Título XXIX, Ley VIII* (1805, pp. 279-281).
*****Note: according to Febrero, vol. 2 (1783, pp. 150-151), this formula could be replaced by the expression: "debtors obliged themselves *in solidum*".
Source: for clause 1, see Pérez y López (1796, pp. 198-199); for clause 2, see Melgarejo Manrique de Lara (1791, p. 233); for clause 3, see Febrero, vol. 2 (1783, pp. 70-72); for clauses 4-5, 6 and 7, see Sigüenza (1767, pp. 104-113, 62-71 and 165-167, respectively). For obligation contracts that included these clauses, see footnote No. 24.

A second group of waiver clauses was included in contracts that involved members of certain groups as debtors, such as women, ecclesiastics and farmers. The law gave these groups some privileges in cases of default, so the creditors forced them to renounce these prerogatives in the contracts.

Lastly, the inclusion of waiver clauses was an indispensable requirement for the subsequent introduction of some additional guarantees in the contract. In particular, the executor, the joint liability and the guarantor – legal mechanisms explained below – specified that notaries should add waiver formulas.

Hence, the combination of the notarized document plus the *guarentigia* and the waiver clauses may have offered creditors a strong degree of security regarding the protection of their property rights. Judicial sources, although fragmented, seem to support this hypothesis. In her analysis of the *Audiencia de la Contratación* of Seville between 1583 and 1598, Fernández Castro shows that disputes governed by an executory process were characterized by rapid seizures and short lawsuits. Furthermore, their speed guaranteed lower judicial fees, increasing the potential to recover a high percentage of the loaned amounts (Fernández Castro, 2015, pp. 237-256).[91] In the case of Malaga, the evidence is much scarcer. Even so, among the notarial records recorded in 1784, I located a document that describes in detail a lawsuit derived from the breach of a notarized obligation contract, and that highlights the legal strength of these instruments. This document is transcribed in Appendix 2.5 and its content is analyzed in Appendix 2.6.

Yet even though the standard notarized obligation provided a high degree of security for creditors, sometimes they still considered it insufficient to ensure compliance with the contract. In these cases they could demand the introduction of additional guarantees. Obligation contracts recorded in 1784 by Malaga notaries included four types of additional clause: special mortgage clause, executor clause, joint liability clause and guarantor clause. The use of additional clauses was very extended, as is proved by the fact that 76.1% of the contracts and 78.7% of the amounts were covered by at least one of them. Table 2.21 gives the frequencies for each clause.

[91] Specifically, 82% of the seizures were carried out in less than a month once the lawsuit was filed, and 79% of the lawsuits were resolved in less than six months. Regarding judicial fees, in 76% of the lawsuits they did not exceed 3% of the value of the claimed assets. Although these percentages not only include lawsuits derived from executory processes, Fernández Castro stresses that they are mainly explained by them (Fernández Castro, 2015, pp. 237-256).

TABLE 2.21: Frequency of use of additional clauses in obligation contracts

Clause	% contracts	% amounts
Executor	54.8	34.8
Special mortgage	23.9	39.3
Joint liability	34.5	40.0
Guarantor	5.5	3.7

Source: see footnote No. 24.

The executor clause was the commonest additional clause, being included by more than half of the contracts (54.8%). By introducing this clause, the debtor accepted that, in case of default, a commissioned judge known as the "executor" (*ejecutor*/*diligenciero*) would move to his house to claim the debt and to ensure that the judicial proceedings were carried out. The executor was mainly employed against debtors who resided in other municipalities, probably to avoid the local authorities obstructing or delaying enforcement of the contract.[92] In exchange for his efforts this agent would receive a wage set in the contract for each day of travel and employment, to be paid by the debtor. In 1623 a law was passed that prohibited the contracting parties from using this clause.[93] To avoid this regulation, notaries started to include a clause in which debtors renounced their rights under that law (see Table 2.20).

All the obligations in the database were supported by a general mortgage that secured the contract with all the present and future assets of the debtor, but did not specify any particular property. In addition, almost a quarter of the obligation contracts included a special mortgage over a specific asset (23.9%).[94] The introduction of general mortgages, as well as the introduction of the special ones, was optional. Even so, it became increasingly common for all notarized contracts to include general mortgages (Serna Vallejo, 1995, p. 167).[95] This phenomenon is probably explained by the fact that mortgage contracts had priority over non-mortgage contracts in meetings of creditors (Febrero, 1786, pp. 652-716). Including general mortgage clauses, notaries avoided

[92] In this sense, the executors performed a similar role to that of those agents who were empowered in Spain – through notarized contracts called *poderes para cobrar en las Indias* – to collect debts in America (Cachero Vinuesa, 2015).
[93] NR, *Libro XI*, *Título XXIX*, *Ley VIII* (1805, pp. 279-281).
[94] The percentage of contracts supported by this guarantee is similar for other territories. In Madrid, 20% of the obligation contracts notarized between 1750 and 1808 included a special mortgage (Sola, 2000, p. 220). In Alcoi, between 1780 and 1789, 29.41% of the obligations and repurchases added a special mortgage (Cuevas, 1999, p. 197).
[95] For instance, in the meeting of creditors of the merchant Andrés del Pino (1807-1808), non-privileged creditors claimed mortgage debts valued at 555,052 r.v. and 30 mrvds. Non-mortgage debts, however, only accounted for 55,406 r.v. and 17 mrvds. AHPM, *protocolos notariales*, *libro* 3639, pp. 488r-495v.

their clients being relegated to a lower priority in case of default. The introduction of a special mortgage gave an additional guarantee to the creditor. The link between the contract and the assets used for a special mortgage was maintained until repayment. This meant that debtors could sell the properties used as special mortgages, but, in case of default, creditors had stronger rights over those properties than the new owners. In contrast, if the contract was supported by a general mortgage only, the properties could be sold without that lien, and creditors did not have any rights over them (Peña-Mir, 2020, p. 16). Among those contracts that added a special mortgage, most included real properties as an additional pledge (around 18% of them). To a lesser extent, some contracts included personal properties as special mortgages, mostly cattle (Table 2.22).

TABLE 2.22: Collateral in obligation contracts

Collateral	**Number of contracts**	**%**	**Amount (*reales de vellón*)**	**%**
General mortgage only	898	76.0	2,481,245	60.7
General mortgage + Real property (lands and real estate)	212	17.9	1,314,530	32.1
General mortgage + Personal property (cattle)	54	4.6	106,613	2.6
General mortgage + Personal property (others)	12	1.0	141,506	3.4
General mortgage + Personal property (cattle and others)	4	0.3	41,203	1.0
General mortgage + Real and personal properties	1	0.1	3,300	0.1
Total	**1,181**	**100.0**	**4,088,397**	**100.0**

Source: see footnote No. 24.

Joint liability was incorporated by a third of the contracts (34.5%).[96] This clause was optional for those contracts with two or more debtors, although practically all of them added it.[97] By including it, all debtors were liable for the entire amount, and not only for the part that corresponded to each one. Its introduction required resignation to the law of

[96] In Salta (Argentina) between 1788 and 1809, this clause had a lower incidence: only 14.37% of the obligation contracts included it (Anachuri, 2019, pp. 34-35).
[97] 408 of the 410 obligation contracts with two or more debtors included this clause.

duobus res debendi y el autentica presents hoc ita de fidejusoribus (see Table 2.20). Joint liability was useful for two reasons. First, it guaranteed that if one of the debtors could not pay his share of the debt, the others would have to cover the deficit. Second, it helped to encourage monitoring among the debtors. 26.0% of the contracts involved just two debtors, while 8.5% of the contracts involved more than two. Although many contracts that included this clause were restricted to debtors with family ties (couples or relatives), those involving non-relatives were more common. Among those that involved non-relatives, most were restricted to citizens of the same municipality.[98] This supports the idea that Castilian towns were communities based on strong identity links among their members.

The guarantor clause was the least common: only 5.5% of the contracts included it.[99] It meant that in case of default payment of the debt was assumed by a third party, the guarantor. Just like the joint liability clause its introduction required resignation to the law of *duobus res debendi y el autentica presents hoc ita de fidejusoribus*. Furthermore, the guarantor clause could be reinforced if the guarantor resigned the "benefits of excussion and division". By this resignation, the guarantor accepted the seizure and sale of his assets even if the assets of the debtor had not yet been seized and sold (see Table 2.20).[100] Most contracts included only one guarantor (5.2%), although some contracts added several (0.3%). The low incidence of this clause could be explained by the difficulties of debtors in finding someone willing to take on this role.

The decision to include one or several of these clauses was probably taken by the creditor after evaluating the potential risks of the transaction. Even so, he could rely on the advice of the notary regarding the legal repercussions of a specific clause, as well as its advantages and disadvantadges over the other potential guarantees. To identify those factors that led parties to introduce additional clauses in their contracts, I ran a probit

[98] Contracts with this clause can be divided into three different groups according to the family ties between debtors: those that only included a married couple (3.1%), those that only included relatives (7.8%) and those that included non-relatives (23.6%). Regarding the last group, in most cases all the debtors were citizens of the same municipality (22.1%). Even so, it is not possible to rule out the possibility that some of the individuals that I have identified as non-relatives were cousins, uncles/aunts or nephews/nieces, since contracts rarely mentioned these family links. Furthermore, most contracts did not include the second last name of the parties, which makes their identification difficult.

[99] This percentage was quite similar for the obligation contracts notarized in Madrid between 1750 and 1808 (5%), and in Salta between 1778 and 1809 (4%). See Sola (2000, pp. 219-220) and Anachuri (2019, pp. 35-37) respectively. Even in Lima in 1825-1865, only 5% of the notarized credit contracts included a guarantor (Zegarra, 2018, p. 224).

[100] 51 of the 65 obligation contracts that included a guarantor also added the resignation of the "benefits of excussion and division".

model for binary dependent variables. This model estimates the probability that a contract, in the presence of certain factors, included each of these clauses. The four additional clauses (*Executor*, *Special Mortgage*, *Joint Liability* and *Guarantor*) are the dependent variables. For special mortgages, I have created differentiated variables for contracts that secured the operation with *Personal Properties* and those others that secured it with *Real Properties*. All of these variables take a value of 1 if the contract included them, and equal zero otherwise.

Regarding the independent variables, I include five factors I consider that might influenced the decision to introduce these clauses:

Status is a dummy variable that takes value 1 if the contract includes the socioprofessional status of the debtor and equals zero otherwise. Usually, those debtors who mentioned their status in the contract were individuals of high and medium social rank like the military, priests, shipmasters and craftsmen (see Table 2.13). Because they generally enjoyed higher incomes than other debtors and also belonged to organizations that could support them in case of default, I assume that they mentioned their status in order to emphasize their capacity to fulfil their contractual obligations. If this was really the case, I would expect creditors to have given less importance to the requirement to introduce some additional clauses for these debtors.[101]

Capital denotes the size of the contract in r.v.[102] The coefficient associated with it measures the change in the predicted probability that an additional clause would be included in the contract due to an infinitesimal change in the amount of the capital. This therefore allows me to determine whether increases in the amounts gave rise to increases in the probability that one of these clauses would be included.

Residence identifies the area where the debtor resided. It equals 1 if the debtor resided in the inner city of Malaga; 2 if he resided in the suburbs of the city; 3 if he resided in other municipality in the judicial district of Malaga; and 4 if he resided in other judicial district.[103] Thus, this variable captures the effects of both geography (the

[101] The introduction of the status for emphasizing the ability to fulfil contractual obligations may not have been as important in transactions that involved well-known parties. Given that this chapter only analyzes a single year of credit activity, however, it is quite difficult to identify the existence of a previous relationship between the parties.
[102] The contracts that did not mention any amount have been removed from the dataset. Furthermore, given its large size I have also removed a contract for a value of 450,000 r.v.
[103] The contracts in which the debtors resided outside Spain have been removed from the dataset.

incidence of the distance between the inner city of Malaga, where practically all the creditors resided, and the residence of the debtor) and institutions (the incidence of the jurisdictional fragmentation). Combined, distance and jurisdictional fragmentation would have created barriers to contract enforcement and debtor monitoring, thus increasing the need for these guarantees.

Jurisdiction is a dummy variable that takes value 1 if the debtor resided in royal domains and equals zero otherwise. Derived from the lower presence of royal institutions in both lordships and independent municipalities and the higher degree of political and judicial autonomy of their authorities, creditors could have perceived greater risks for those contracts that involved debtors who resided there. In that case, they would have taken additional precautions through additional clauses.

Finally, *Purpose* is a dummy variable that takes value 1 if the contract is an agricultural loan and equals zero otherwise. Given the existence of two well-differentiated notarial credit markets, this variable helps us determine whether the relevance of a specific additional clause was the same in both of them, or if, on the contrary, each of these two markets supported different guarantees to ensure contract enforcement.

TABLE 2.23: Probit for additional clauses

Dependent Variable:	**Executor**	**Special Mortgage (Real Properties)**	**Special Mortgage (Personal Properties)**	**Joint Liability**	**Guarantor**
Status					
Included	-.0885616 (.1503299)	-.160444*** (.0183472)	-.0325414*** (.0074993)	-.0500173 (.0673828)	-.0031915 (.0235472)
Capital					
Reales de vellón	-.0000137** (6.36e-06)	.0000137*** (1.76e-06)	-3.71e-07 (7.10e-07)	4.03e-06* (2.28e-06)	-5.93e-07 (1.02e-06)
Residence					
Suburbs	.4653678*** (.0599134)	-.0333613 (.039122)	-.0218365 (.0207397)	.1338202** (.0607929)	.0071371 (.0219716)
Outside the city	.8919094*** (.018507)	.0496824* (.0296653)	-.0239556* (.0138002)	.1543801*** (.0376417)	.0214032 (.014178)
Outside the district	.8657031*** (.0257691)	.0501761 (.0353362)	-.0102658 (.0160178)	.1150471** (.0449015)	.0154123 (.0167575)
Jurisdiction					
Royal domain	-.1935797** (.0866117)	.0080005 (.035138)	-.004191 (.0200114)	.0508986 (.0450843)	.0369117*** (.0102709)
Purpose					
Agricultural loan	.343754*** (.0480469)	.006781 (.0256075)	-.0941364*** (.0164268)	.1997415*** (.0323445)	-.048128*** (.0143493)
N	1,132	1,132	1,132	1,132	1,132

Standard errors in parentheses
Significance levels: * p<0.1, ** p<0.05, *** p<0.01
Source: see footnote No. 24.

The results are reported in Table 2.23. Starting with the executor, there was a negative but small effect of the size of capital on the predictive probability of including this clause. This circumstance could be explained by the existence of high-risk debtors who received small amounts. Since creditors would anticipate problems in enforcing these contracts, they would demand the inclusion of an executor. Results confirm the relevance of the executor clause for those contracts that involved debtors from other municipalities. The probability of including it was 89% higher when the debtor lived in other municipality of the judicial district of Malaga than when he lived in the inner city of Malaga (the reference group). Likewise, the probability of including it was 86% greater when the debtor resided in other judicial district than when he resided in the inner city of Malaga. Creditors had no way of knowing if the local authorities would apply the judicial decisions impartially or not. By sending commissioned judges, they ensured the presence of agents without links with those communities and, consequently, more willing to apply the sentences of the courts of the judicial district. The executor clause, however, was widely used for contracts with debtors from the suburbs of the city of Malaga as well. The probability of including it was 46% higher when the debtor lived there than when he lived in the inner city. Since the debtors who lived in the suburbs fell under the same jurisdiction as the debtors from the inner city of Malaga, this proves that distance also motivated the introduction of the executor clause. Given the distance between the inner city and the suburbs, creditors would anticipate delays if they just trusted in the network of sheriffs (*alguaciles*), so they felt safer if they could also employ an executor hired *ad hoc*.

This clause had a stronger incidence for contracts with debtors who resided in lordships and independent municipalities. The probability of including it was 19% lower for debtors from royal domains than for debtors from those areas. This suggests that creditors found the enforcement of their contracts more difficult in those towns where the presence of the monarchy was weaker. Regarding the purpose, the executor clause was clearly oriented to agricultural loans, since the predicted probability of including it was 34% greater for them than for other contracts. In the case of agricultural loans, the creditors tended to be merchants, who, in many cases, had already agreed the sale of the agricultural commodities that they expected to receive from their debtors. For that reason, in case of default, they would be particularly interested in the immediate dispatch of an executor to claim the debt.

Regarding the special mortgage clause, its incidence was much lower for those contracts that involved debtors whose socioprofessional status was included in the document. The probability of introducing a special mortgage on real properties was 16% lower when the status of the debtor was mentioned than when it was not. The same effect is found for personal properties, although to a much lesser degree (3%). Given the higher payment capacity associated with these debtors, creditors would not consider as important the presence of this guarantee as they did for other debtors. The amount of the contract also determined their use. There was a positive but small effect of the amount of capital on the predictive probability that a special mortgage on a real property would be included. Hence, this requirement would be more common for contracts with larger amounts at stake. Finally, the special mortgage over personal properties performed a minor role for agricultural loans. The probability of including this guarantee was 9% lower for them than for the other contracts. This seems reasonable since a high percentage of the farmers from this area owned their land. Consequently, when creditors asked for a mortgage in an agricultural loan, the collateral was more likely to be a real property.

Although to a lesser extent than the executor clause, the incidence of the joint liability clause was also higher for debtors from both the suburbs of the city of Malaga and other municipalities. The probability of using this mechanism was 13% higher when debtors resided in the suburbs than when they resided in the inner city. Similar percentages apply for debtors from other municipalities of the judicial district of Malaga (15% greater than if they lived in the inner city), and from other judicial districts (11% higher than if they lived in the inner city). Since these debtors lived in rural and self-governing communities located far from inner city Malaga, creditors were taking greater risks in lending them money. Using joint liability clauses, however, creditors could rely on the previous existence of strong links between the citizens of these communities to stimulate cooperation, monitoring and solidarity between debtors. Thus, an intra-community mechanism (identity links among citizens from the same area) encouraged inter-community exchange (contracts between economic agents from different areas). Finally, as with the executor clause, joint liability performed a greater role in the agricultural credit market: the probability of this guarantee being introduced was around 20% greater for agricultural loans than for the other contracts. The city's merchants annually formalized several agricultural loans with debtors dispersed across multiple

towns. Monitoring each and every one of them would have been difficult, so the inclusion of joint liabilities would be an effective way to ease this process.

Lastly, the introduction of the guarantor clause seems to have been the least affected by these factors. The predicted probability of including it was only significative for the jurisdiction (3% higher when the debtor resided in royal domains than when he resided in a lordship or an independent munipality) and for the purpose (around 5% lower for agricultural loans than for the other contracts). With respect to the latter, this was probably explained by the greater suitability of the joint liability for agricultural loans.

These results clearly show that additional clauses were not introduced arbitrarily by notaries. Each of these clauses helped to face a specific risk, so creditors demanded their introduction in the contract depending on the particularities of the transaction.

2. 5 Conclusions

This chapter sheds light on the role played by notaries in the allocation of credit resources in early modern Spain. The creation of notary offices constituted one of the main measures developed by the states of continental Europe to ensure contract enforcement. Thus, the analysis of their performance is a good indicator to measure the ability of states to realize this task. Here, I have focused on those notaries who worked in the Crown of Castile, the most highly populated part of Spain. Castilian notaries have traditionally been considered an inefficient corporate body as a consequence of their poor instruction and organization. Had this been the case, one would expect that economic agents would have been reluctant to notarize their transactions in general and their credit operations in particular. The analysis of both legal and archival sources, however, tells a different story.

By relying on a database that includes all the deeds recorded in 1784 by the notaries of the city of Malaga – one of the most dynamic and populous Castilian cities at the end of the eighteenth century – I show that these agents performed a crucial role in credit markets. Credit contracts (particularly short-term credit contracts or *obligaciones*) constituted one of the main type of deeds certified by the city's notaries. Furthermore, comparison with other European municipalities suggests that the notaries of Malaga managed to maintain a higher level of recording activity than their counterparts from

other areas, not only for credit contracts, but also for other deeds. Analysis of the obligations of the database reveals that notarial credit markets mainly covered three financial segments: high-value contracts, operations not-sustained in personal relationships, and activities that lacked the support of professional corporations. Derived from this, two notarial credit markets emerged in this area. On the one hand, notaries recorded punctual, heterogeneous and high-value credit transactions between the citizens of inner city. On the other hand, they notarized periodical agricultural loans between inner-city merchants and farmers from the suburbs of the city and nearby municipalities (mainly raisin producers, who were not subject to a regime of corporation).

The preference for notarizing these segments is mainly explained with reference to its regulatory advantages. In Castile, notarized documents constituted strong legal evidence in the event of litigation. Specifically, they guaranteed faster trials in lawsuits that involved a single creditor, as well as priority in payment with respect non-notarized contracts of the same category in meetings of creditors. The strength of these instruments was ensured by the notarization itself, as well as by the systematic introduction by notaries of certain clauses that invalidated some of the legal prerogatives of the debtors and reinforced creditors' rights (*guarentigia* clause and waiver clauses). Certainly, the level of legal sophistication provided by notarization was not necessary for most credit transactions, which could be carried out through more ordinary means, such as philanthropic institutions or private deeds. Even so, this service was very useful in riskier deals, such as those mentioned above.

Finally, in addition to the legal benefits inherent in the notarized form, these documents also allowed potential risks to be faced by adding additional clauses. Specifically, creditors tailored contracts using four types of guarantee: executors, special mortgages, joint liabilities and guarantors. Far from being arbitrarily included, the econometric analysis for these clauses shows that they were employed to solve specific problems. Thus, the special mortgage was useful for larger contracts or for operations that involved low-status debtors, while the executor or the joint liability were helpful for transactions that involved debtors who resided outside the inner city of Malaga.

These findings show that notaries occupied an important position in Spanish credit markets. When trust was too fragile to ensure impersonal exchange, notarization would

be helpful in removing any hesitations on the part of the contracting parties. In this regard their proliferation in the early modern period, as well as their coordination with the courts, should have been crucial in reducing the transaction costs and promoting a broader range and extent in credit markets.

Chapter 3

Flexibility or rigidity? Legal adaptation in the notarial credit market in early modern Spain

This chapter evaluates the legal adaptive capacity of the notarial credit market in early modern Spain. According to scholars, spontaneous legal innovations are mainly restricted to bottom-up systems based on a high degree of discretion for courts (as in Britain and its former colonies). However, for top-down systems based on statutes or codes (as for countries in continental Europe and their respective former colonies), their diffusion is more complicated since they require new laws to be passed at the political level. By analyzing both documents recorded by the notaries of the city of Malaga at the end of the eighteenth century and contemporary jurists' opinions, I show that some legal adaptations could be implemented in Spain even in the absence of statutory law changes. More specifically, I focus on three laws that were spontaneously modified to improve the allocation of credit resources. For the consolidation of the legal adaptations it was crucial the attitude of royal judges, who, far from hindering these practices, supported them.

3. 1 Introduction

Researchers broadly agree that both the emergence of markets and their subsequent evolution depend heavily on the legal framework that regulates them. The establishment of a set of legal institutions and their performance are crucial in determining the existence of specific restrictions on resource allocation or the presence of obstacles that limit the unconditional enforcement of contracts (De Soto, 2000; Arruñada, 2017; Pistor, 2019).

The impact of the legal framework on financial markets has been a common topic since a group of scholars developed the "law and finance hypothesis" at the end of the

last century. According to these authors legal origins are the main determinants that explain the different degrees of financial development across countries today. Using creditors' and shareholders' rights indexes and cross-country regressions, they show that common-law countries (as in Britain and its former colonies) ensure a higher degree of protection for both creditors and outside investors than civil-law countries (such as countries in continental Europe and their respective former colonies).[1] This superiority, the argument goes, is based on two pillars. On the one hand, the common-law system relies on case law created by a myriad of decentralized courts, while the civil-law system follows the law that has been codified by a central legislative power. Consequently, it is easier for the civil law to fall prey to political interference and regulatory capture. On the other hand, since case law is continually being updated, common-law countries are more dynamic and better adapted to introducing business and technical changes. In civil-law countries, conversely, the introduction of legal innovations is slower since they require new laws to be passed. Thus, their legal codes frequently become outdated, offering rigid solutions when they face economic challenges (La Porta *et al.*, 1997, 1998 and 2008).

Most authors place the origin of this legal divergence in the Glorious Revolution (1688) and the French Revolution (1789). In the Glorious Revolution the English jurists opposed the Crown. Consequently, once the king had been defeated, Parliament benefited them by guaranteeing their independence and safeguarding jurisprudence as source of law. During the French Revolution, however, French jurists were aligned with the monarchy. As a result, the triumph of the revolutionaries meant the subordination of the judiciary to the legislature. Since then courts have become a mere transmission belt for the different legal codes that had previously been passed by legislators (civil, criminal, commercial, etc.). Codification was not limited to France, but it extended over the Continent due to Napoleon's conquests, a process that was maintained even after his defeat.[2]

[1] Civil-law countries are divided into three groups according to their legal origins: French, German and Scandinavian.

[2] Arruñada and Andonova (2005) offer an alternative interpretation. They argue that legislators in nineteenth-century continental Europe restricted judicial discretion in order to prevent judges' opposition to new legal reforms inspired by liberal economic principles. In Britain, conversely, where institutional, organizational and technical changes had been introduced earlier, the authorities can trust judges to respect private property, freedom of contract and market exchange.

Other authors stress instead that the basis for both systems dates back to medieval times. They place the origins of the common law in the judicial reforms introduced after the Norman conquest of England (1066), especially during the reign of Henry II (1154-1189). These reforms created common legal rules for the whole of England, as well as a system of juries and professional itinerant judges. The minor role of local customs made unnecessary the codification of laws. At the same time, it started to be common for judges to interpret legal ambiguities and elaborated on their rulings, thus themselves creating jurisprudence. Although the Crown tried to exert major control over judges, the strength of the English Parliament avoided it, and in 1688, as a consequence of the Glorious Revolution, judicial independence was fully implemented.

Civil law, developed in continental Europe, would follow a different pattern. Unlike in Britain, other European countries were unable to undermine local customs or to develop a unitary legal system. Even so, some standardization was achieved after the rediscovery of Roman law by Italian academics in the eleventh century, which later spread across Europe. Furthermore, continental monarchies were less constrained by political assemblies, which gave them more freedom to appoint judges or to sell legal positions. From 1789 French revolutionaries were particularly interested in definitively solving the problems of legal fragmentation, so they dedicated great efforts to creating national codifications. Be that as is may, the political trajectories of both areas determined the consolidation of different legal traditions: common law, based on unwritten laws and high degree of judicial discretion; and civil law, characterized by codification of laws and restrictions on judges' discretion (Glaeser and Shleifer, 2002, pp. 1197-1202; Dam, 2006; La Porta *et al.*, 2008, pp. 303-306).

This argument concerning the superiority of the common law, however, has been severely criticized by other authors.[3] Rajan and Zingales (2003), for instance, find that prior to 1913 stock market capitalization over GDP was, on average, higher in French civil-law countries than in common-law countries. Lamoreaux and Rosenthal (2005) show that corporate law was more flexible in France than in the United States during the late nineteenth and early twentieth centuries. Musacchio (2008 and 2010) finds that the level of protection of creditor rights ca. 1910 was similar in both common-law and civil-law countries. Spamann (2010), after recoding the shareholder protection indexes in La

[3] For a summary of some of these criticisms, see Musacchio and Turner (2013).

Porta *et al.*, shows that some of the alleged advantages of common-law countries during the 2003-2008 period must be revised or even rejected. Martínez-Rodríguez (2016) demonstrates that in Spain a particular form company, the private limited liability company, was widely used from the 1920s, despite lacking specif legislation until 1953. Lamoreaux (2016) argues that cross-country regressions are clearly insufficient for understanding the political and economic processes that led to legal differences across countries. Although most of these works focus on the late nineteenth, twentieth and early twenty-first centuries, some of them have analyzed previous periods too. For example, Sgard (2006), using a database of fifteen European countries between 1808 and 1914, finds that their bankruptcy laws followed a similar evolution regardless of their legal origins. In fact, only in were England creditors' rights somewhat less protected. Hoffman *et al.*, in their analysis of France's notarial credit market, identify the existence of an unregulated and widely used financial instrument (the notarized letter of exchange) in the south of the country from the 1820s until the end of the nineteenth century (Hoffman *et al.*, 2019, pp. 122-148). From a different perspective and for an earlier period, Gelderblom (2013) shows that between 1250 and 1650 Dutch cities were able to introduce legal innovations rapidly in order to attract trade, thanks to their high degree of political autonomy.

In this chapter I analyze the legal adaptive capacity of the notarial credit market in early modern Spain, and more particularly in the Crown of Castile.[4] This territory has traditionally been considered a paradigm of absolutism, where the estates (*cortes*) did not exert any formal constraint on the monarchy (North and Thomas, 1973; Acemoglu *et al.*, 2005). In fact, from 1665 *cortes* were rarely summoned in Castile, which would have significantly reduced the capacity of the cities to influence legal changes (Thompson, 1994, p. 195). Furthermore, the control that Spanish kings exercised over the judiciary was high even by the absolutist standards: unlike France, where judicial

[4] During the early modern period, Spain was a composite monarchy divided into three historic territories: the Crown of Castile, the Crown of Aragon and the Kingdom of Navarre. At the same time, the Crowns of Castile and Aragon were themselves composite monarchies. The Crown of Aragon included the Kingdom of Aragon, the Principality of Catalonia, the Kingdom of Valencia and the Kingdom of Mallorca. The Crown of Castile was also a conglomerate of kingdoms but, excluding the three Basque Provinces (Biscay, Gipuzkoa and Álava), their level of integration was greater than in Aragon. After approval of the *Nueva Planta* decrees (1707-1716), Aragonese territories were partially "Castilianized", their political assemblies being abolished and their administrative structures replaced by Castilian ones. However, the previous private law of Aragonese territories remained practically unchanged, save in the Kingdom of Valencia (Molas Ribalta, 1976). For this reason, the legal adaptations I analyze here are restricted to Castilian area.

positions were for sale, in Spain they were chosen by the king (Heras Santos, 1996, p. 106). The combination of these two elements (the weakness of representative assemblies and tight control of the judicial system by the king) may have resulted in the emergence of a rigid legal framework, incapable of incorporating bottom-up legal innovations and, consequently, less able to encourage market relationships.[5]

Here, however, I show that, far from being rigid, Castilian law was able to incorporate some legal adaptations in the absence of modifications to the statutory law. Specifically, I focus on the analysis of three institutions linked to credit markets: the executor clause, the bail bond of Toledo law and the census of population of the Kingdom of Granada. By comparing their official regulation with eighteenth-century legal handbooks, as well as with the notarial deeds recorded in the city of Malaga in 1784, I show that these institutions were spontaneously modified to remove those legal elements that obstructed the optimal allocation of credit resources. Thus, these legal practices were far ahead of the changes to statutory law, which were not undertaken until the mid-nineteenth century. For the consolidation of these adaptations the attitudes of both the judicial district courts and the high courts were crucial, which despite being ruled by royal officers, did not hinder them. Furthermore, when adaptations resulted in clashes between these judges and other royal officers (as resulted with the census of population of the Kingdom of Granada), the monarchy decided in favor of the former. Therefore, this chapter forms part of the literature that questions the unlimited absolutism of the Spanish monarchy and that contributes to a better understanding of its legal and constitutional bases.[6]

[5] Historians offer different assessments of the quality of Castilian law and its application by the courts. In his classic work, Kagan (1981) draws on on contemporary testimonies to argue that the administration of justice suffered important problems derived from the proliferation of laws, their ambiguity, and their arbitrary interpretation by judges. This negative view is shared by Owens (2005), who argues that the arbitrary intervention of the monarchs in favor of the territorial aristocracy weakened confidence in royal justice. Carvajal (2013) and Fernández Castro (2015), in their analyses on the lawsuits judged by the *Chancillería* of Valladolid (1480-1521) and the *Audiencia de la Contratación* of Seville (1583-1598) respectively, offer a more optimistic view, claiming that despite their problems the Castilian legal system ensured the enforcement of contracts.

[6] Several authors have identified the systematic adaptation of Castilian law in different contexts. Thus, in her analysis of the *Audiencia de la Contratación* of Seville between 1583 and 1598, Fernández Castro shows that judges applied "relaxed" versions of some laws, and they did so even if they damaged the interests of the king (for example, prioritizing the payment of private creditors over the Royal Treasury in meetings of creditors) (Fernández Castro, 2015, pp. 56-68). This "relaxation" in the observance of the law has also been identified by Herzog, who finds that Castilian communities granted citizenship (*vecindad*) through a mix of statutory law and local practices (Herzog, 2003, pp. 24-25); or by Cárceles de Gea (2006), who argues that the principle of free trade prevailed over the statutory law in the sentences passed by courts in seventeenth-century Castile. The introduction and consolidation of these adaptations was

The rest of the chapter is organized as follows. In the following section, I describe the statutory law and the organization of ordinary royal justice in early modern Spain. In section 3.3 I analyze the process of legal adaptation in the notarial credit market of the city of Malaga. Section 3.4 examines the degree of support of legal adaptations by different judicial institutions. Finally, section 3.5 presents the main conclusions.

3. 2 Statutory law and the organization of ordinary royal justice

3. 2. 1 Statutory law

If there is a word to qualify statutory law in early modern Castile, it is chaotic. Laws were not part of a single legal corpus, but they were dispersed among multiple and overlapping sources.[7] Many of them had their origins in medieval legal texts influenced by both Visigothic and Romano-Canon law, such as the *Fuero Juzgo*, the *Fuero Real* or the *Partidas*. Around 1800 these codices were partially revoked, although some other parts remained in force. Medieval texts were complemented by a wide range of laws (*autos*, *cédulas reales*, *decretos reales*, *instrucciones*, *leyes*, *ordenanzas*, *órdenes reales*, *peticiones*, *pragmáticas*, *provisiones*, *resoluciones*, etc.) passed individually or in compendiums.[8] Frequently, new laws were passed without clarifying the repeal of the old laws that ruled the same affairs. Thus, one of the main consequences of this legal tangle was the existence of many laws that partially or fully contradicted each other, creating confusion and increasing transaction costs (Yun, 2019, pp. 240-241).

The problem of the legal uncertainty was partially solved through the periodic publication of legal compilations collecting together those laws that remained in force: *Ordenamiento Real de Medina del Campo* (1433), *Ordenanzas Reales de Castilla* (1484), *Recopilación de Leyes de estos Reynos* (1567) and *Novísima Recopilación de*

made possible by two main factors. The first was the flexibility of the *ius commune*, which left a wide latitude to judges to rely on unwritten legal sources, such as customs or case law (Fernández Castro, 2015, pp. 78-79 and 224-225). The second was the possibility of individuals and corporate bodies to invoke a veto right (*pase foral*) that suspended those laws that infringed their traditional liberties, which constituted a permanent barrier to royal attempts to introduce legal changes (González Alonso, 1980; Coronas González, 1995, pp. 140-142; Cárceles de Gea, 2001; and Grafe, 2012, pp. 125-127).

[7] For an enumeration of the legal corpuses in force in early modern Castile, see NR, *Real Cédula sobre la formación y autoridad* (1805, pp. XLIII-XLIV), and Planas y Casals (1873, pp. 31-132).

[8] For instance, several compendia were passed in the meetings of *cortes* during the reign of the Catholic Monarchs (Laws of the *Cortes* of Toledo in1480, Laws of the *Cortes* of Madrid-Alcalá de Henares in 1502-1503 or Laws of the *Cortes* of Toro in 1505), or through the *escrituras de millones* agreed between the king and the *cortes* between 1590 and 1658. See Llamas y Molina (1827) and López-Juana Pinilla (1843), respectively.

las Leyes de España (1805). Even so, these compilations were far from being perfect since they neither included all the laws nor solved their ambiguity (Planas y Casals, 1873, pp. 32-33; María e Izquierdo, 2005, pp. XLV-XLVI; Riesco Terrero, 2007, p. 274).

Furthermore, the legal framework was even more convoluted given the existence of generic auxiliary sources of the *ius commune* like Justinian's Digest or Gratian's *Decretum* (Premo, 2017, p. 69); of local laws or privileges known as *fueros municipales* (Planas y Casals, 1873, pp. 66-81); and of specific laws for privileged estates (nobility and clergy), or even for some groups like the military, foreigners, merchants or the *Mesta* (Coronas González, 2010, p. 202).[9] This legal framework remained almost unaltered until well into the nineteenth century, when liberals replaced these compilations and dispersed laws by codes and general laws (Riesco Terrero, 2007, p. 274).[10]

This particular circumstance led legal agents (notaries, attorneys, lawyers, judges, etc.) to rely on legal handbooks. These sources had two main advantages. On the one hand, they offered an updated and orderly version of the laws in force. On the other hand, they were written by experienced jurists. Thus, these handbooks may have helped to solve legal doubts, remedying to a certain degree the deficiencies of the statutory law (Sánchez-Arcilla Bernal *et al.*, 2014; Rubio Hernández, 2016). Certainly, the proliferation of handbooks written by different authors could give rise to multiple interpretations of certain legal aspects, generating more confusion. Nevertheless, this problem was probably nuanced by the existence of reference handbooks with prominence over the rest, as happened with the *Curia Philipica* (1603) written by Juan de Hevia Bolaños or the *Librería de escribanos* (1769) written by José Febrero (Coronas González, 2007; Barco Cebrián and Marchant Rivera, 2015).

[9] Cases against the military were heard by the *Fuero militar*, while those against foreigners were regulated by a variant of this created in 1645, called *Fuero de extranjería* (Escosura, 1853, pp. 148-150 and 160-170). In those cities where a *consulado* had been established, commercial disputes against merchants used to be followed before this institution, which used its own ordinances. In the eighteenth century, however, most of the *consulados* started to follow the Bilbao *consulado*'s 1737 ordinances (Hernández Esteve, 2000, pp. 44-45). Complaints related to the activities of the *Mesta* were ruled by privileges granted by the monarchy, definitely collected in 1731 (Drelichman, 2009, p. 222).

[10] For example: Commercial Code (1829 and 1885), Criminal Code (1848-1850 and 1870), Civil Procedure Law (1855 and 1881), Mortgage Law (1861), Notarial Law (1862), Criminal Procedure Law (1882) or Civil Code (1889).

3. 2. 2 The organization of ordinary royal justice[11]

The foundations of the Castilian judicial system were laid during the reign of the Catholic Monarchs (1474-1516), who reorganized some existing institutions, arranging them on three levels.[12] At the base, the Castilian Crown was divided into judicial districts, called *corregimientos* or *partidos*. Each *partido* grouped several municipalities, and it was ruled by a *corregidor* who acted as the king's representative performing day-to-day justice, as well as some non-judicial functions.[13] In those districts where *corregidores* were military and, consequently, lacked legal skills and knowledge, one or several jurists called *alcaldes mayores* assisted them.[14] In some *partidos* the *alcaldes mayores* resided in the capital with the *corregidor*, while in others they were located in other populous towns in the district (Heras Santos, 1996, 126-133). On the second level, to appeal against the decisions of those judges, two high courts were erected on both sides of the Tagus river: the *Chancillería* of Valladolid in the north and the *Chancillería* of Ciudad Real in the south (moved to Granada after a few years) (Heras Santos, 1996, pp. 114-118). Finally, the Council of Castile was at the top of the system. The Council not only acted as a supreme court, it also passed sentences in first instance in some specific judicial matters, such as jurisdictional conflicts, litigation with royal officers or sales of entailed properties (Fayard, 1982, pp. 12-21).[15]

Castilian kings wanted to ensure strong control over justice. For this purpose, two main mechanisms were used. First, judges, like other royal officers, were made

[11] I exclude here not only those judges and local courts who sat in lordships and independent municipalities, but also those institutions that governed special or extraordinary jurisdictions: military courts, tax courts, *consulados*, the *Audiencia de la Contratación* of Seville, inquisitorial courts, itinerant judges of the *Mesta*, etc. I also restrict my analysis to civil litigation.

[12] Many of these institutions were created in the fourteenth century: *corregidores* (1348), *alcaldes mayores* (1348), *alcaldes de Rastro* (1351), *Chancillería* of Valladolid (1371), Council of Castile (1385) and *Juez Mayor* of Biscay (1385). See Martín Rodríguez (1968, pp. 642 and 644), González Alonso (1970), Fayard (1982) and Guardia Herrero (1994, p. 38).

[13] Along with their judicial functions, they also were responsible, for example, for presiding over the town council in the district capital, approving the election of mayors in the other municipalities of the *partido*, supervising of both tax collection and management of the public granaries (*pósitos*) and promoting infrastructure (González Alonso, 1970).

[14] There were three types of *partido*: *corregimientos/gobiernos politico-militares*, *corregimientos de capa y espada* and *corregimientos de letras*. While the first two were under the direction of the military, the *corregimientos de letras* were ruled by jurists (Álvarez y Cañas, 2012, pp. 26-72).

[15] Only the residents of the royal court and the Lordship of Biscay were left out of this judicial structure. On the one hand, those lawsuits concerning residents of the royal court were heard in the first instance by a specific institution, the *Sala de Alcaldes de Casa y Corte*, while their appeals were passed directly to the Council of Castile. On the other hand, the appeals concerning to the inhabitants of the Lordship of Biscay were not heard by the ordinary judges (*oidores*) of the *Chancillería* of Valladolid – this territory was located north of the Tagus river – but by a judge of this institution who exclusively heard Biscayan affairs (*Sala de Vizcaya*). See Heras Santos (1996, pp. 111-118).

accountable through a system of periodic inspections called *visitas* and *juicios de residencia* (Sánchez-Arcilla Bernal, 2017, pp. 9-19).[16] Second and most importantly, unlike what happened in other countries like France, posts as judges were not for sale, but were chosen by the king. This particularity is relevant since Spanish kings authorized the sale of many public offices like notaries, attorneys or aldermen, and even secondary judicial officers.[17] However, they rarely sold posts as judges (Heras Santos, 1996, p. 106).

Since its creation, the Castilian judicial system underwent certain modifications in its structure. On the one hand, new high courts called *audiencias* were created for both remote and/or litigious areas.[18] On the other hand, the monarchy transferred more judicial competences to the municipalities. At the lowest level, the monarchy authorized town mayors (*alcaldes pedáneos* and *alcaldes ordinarios*) to pass sentences in cases of first instance that involved very small amounts, thus dispensing parties from going to the judicial district courts (Table 3.1). *Corregidores* and *alcaldes mayores* retained first instance over all the affairs of the capitals of the *partidos* and also over those lawsuits that involved larger amounts in the other municipalities of their jurisdiction.[19] Furthermore, municipalities were allowed to rule over appeals in lawsuits that did not exceed a certain amount, thus dispensing parties from going to *chancillerías* and *audiencias* (Table 3.2). For this purpose a new institution was created: the *tribunal consistorial*. This court included the judge who had passed the sentence at first instance (an *alcalde pedáneo*, *alcalde ordinario*, *alcalde mayor* or *corregidor*) plus two aldermen of the municipality.[20] It is interesting to note that most of these transfers were made in the last decade of the sixteenth century and the first half of the seventeenth, in parallel with the most intense negotiations over the *millones* tax between the king and the *cortes*. The creation of this tax and its subsequent revisions increased the legislative

[16] These inspections, however, fell into disuse over the years (Álvarez y Cañas, 2012, p. 121).
[17] For an analysis of the sale of public offices in Castile, see Tomás y Valiente (1999). For a more specific analysis of the sale of the positions of secondary judicial officers, see Gómez González (2000).
[18] Three *audiencias* were created for the Kingdom of Galicia (1480), the city of Seville (1525) and the Canary Islands (1526). See Heras Santos (1996, pp. 118-122).
[19] However, it seems that this division did not apply in the Basque provinces, where the mayors, supported in the *fueros*, managed to retain a greater number of prerogatives over first-instance cases to the detriment of the *corregidores*, who mainly heard appeals against sentences passed by mayors (Orella Unzué, 2006).
[20] NR, *Libro XI*, *Título XX*, *Ley VIII* (1805, pp. 222-224). Aldermen could be replaced by *diputados del común* if one of the parties alleged that the other party had had a previous relationship with them (Elizondo, 1783, pp. 157-158).

capacity of Castilian cities, so they took advantage of this circumstance to achieve a greater decentralization of justice (Kagan, 1981, pp. 226-230).[21]

TABLE 3.1: Monetary limits on using mayors as judges (*alcaldes pedáneos* and *alcaldes ordinarios*) in first-instance lawsuits

Date	**Amount (*maravedís*)**
1539*	100
1601	600**

*Note: according to this law the previous limit was 60 mrvds.
**Note: in the city of Malaga, at the end of the eighteenth century, an unskilled rural labourer earned between 2.5 and 3 r.v. a day, giving an average of 2.75 r.v. per day or 93.5 mrvds. (Villar García, 1982, p. 152).
Source: *Tomo Primero de las Leyes de Recopilación*, *Libro III*, *Título IX*, *Leyes XII* and *XXV* (1772, pp. 490 and 493, respectively).

TABLE 3.2: Monetary limit for using *tribunales consistoriales* as courts in second-instance lawsuits

Date	**Amount (*maravedís*)**
1480	3,000
1523	6,000
1525, 1528, 1534, 1537, 1538, 1542, 1544, 1548, 1556 and 1558	10,000
1598	20,000
1604, 1617 and 1632	30,000
1649 and 1778	40,000

Source: *Escritura que el Reyno hizo del servicio de los 18 millones* (1619, p. 51v), *Escrituras, Acuerdos, Administraciones y Súplicas de los servicios de 24 millones* (1659, pp. 78r-78v), *Tomo Primero de las Leyes de Recopilación*, *Libro IV*, *Título XVIII*, *Ley VII* (1772, pp. 607-608), NR, *Libro XI*, *Título XX*, *Leyes VIII* and *X-XI* (1805, pp. 222-224), Kagan (1981, p. 227) and Aznar Vallejo (1983, p. 50).

With the arrival of the Bourbon dynasty in 1700 new changes were implemented. As a consequence of the approval of the *Nueva Planta* decrees (1707-1716), Castilian judicial institutions were transplanted into Aragonese territories. Thus, the Crown of Aragon was also divided into *corregimientos*, while the old high courts were replaced

[21] The *millones* was a consumption tax created in 1590, after the defeat of the Spanish Armada in 1588. Unlike what happened with other taxes, *millones* service was subject to strict parliamentary conditions, embodied through fiscal contracts agreed between the king and the Castilian cities represented in *cortes* (*escrituras de millones*). This allowed the *cortes* – at least initially – to exert a high degree of control over the collection of the tax and its use while at the same time strengthening the legislative capacity of the institution (Thompson, 1994, pp. 181-225; Stasavage, 2011, pp. 390-393).

by four Castilian *audiencias*.[22] The Bourbons also created new *audiencias* for the Crown of Castile.[23] Consequently, around 1790, the territorial jurisdiction of both *chancillerías* was significantly reduced, and network of high courts in Spain became more accessible (Figure 3.1). Furthermore, to ensure local justice performed better, two important reforms were passed in the eighteenth century. In 1749 an ordinance was published establishing that, among other things, *alcaldes mayores* would be chosen by the king, not by the *corregidores*.[24] Through this measure the monarchy tried to avoid arbitrary elections and illegal sales of public offices.[25] In 1783 a second important reform was approved clarifying important aspects of the careers of both *corregidores* and *alcaldes mayores*, such as access requirements, terms of office (fixed at six years), salaries and judicial promotion (Álvarez y Cañas, 2012, pp. 12 and 105-114).

A last Bourbon reform in the judicial sphere was the creation of the *intendentes*. Philip V imported this institution from France with the aim of reinforcing royal centralism in Spain. Their territorial scope was the *intendencia*, a large entity that grouped together several *corregimientos* and whose boundaries coincided with those of a historic territory.[26] *Intendentes* were mainly regulated by the ordinances of 1718 and 1749. These laws snatched *corregidores* their competences in fiscal and military matters (including judicial decisions over those first-instance cases) and gave them to the *intendentes*.[27] Furthermore, as a consequence of the ordinance of 1749, *intendentes* were also appointed *corregidores* of the *partidos* that included the capitals of the

[22] In the Kingdoms of Aragon and Valencia new *audiencias* were introduced in 1707, while in the Kingdom of Mallorca and the Principality of Catalonia they were introduced in 1716 (Molas Ribalta, 1976, pp. 74-77).
[23] In 1717 an *audiencia* was introduced for the Principality of Asturias. In 1790 the jurisdiction of the *audiencia* of the city of Seville was extended to the entire territory of the Kingdom of Seville, and another *audiencia* was created for Extremadura (Heras Santos, 1996, pp. 120 and 122-124)
[24] NR, *Libro VII*, *Título XI*, *Ley XXIV* (1805, pp. 340-343).
[25] *Título XI* of the *Libro VII* of the NR (1805, pp. 329-353) lists a number of laws focused on avoiding the problems created by the illegal sale of offices and nepotism, which suggests that these problems may have not been an isolated phenomenon.
[26] For example, the boundaries of the *Intendencia* of Galicia were the same as those of the Kingdom of Galicia, the boundaries of the *Intendencia* of Catalonia were the same as those of the Principality of Catalonia, etc.
[27] It is necessary to remark that appeals on fiscal and military matters were not ruled by *chancillerías* or *audiencias*, but by the Councils of the Treasury and War, respectively (Gutiérrez, 1807, p. 209). Thus, the transfer of the court of first instance from *corregidores* to *intendentes* meant the creation of a parallel judicial system for these matters.

intendencias, which gave them jurisdiction over the ordinary justice in those areas.[28] This second novelty, however, was revoked in 1766 (Heras Santos, 1996, pp. 133-134).

FIGURE 3.1: High courts of justice and date of creation in early modern Spain

*Note: neither the royal court nor the Kingdom of Navarre had high courts. Appeals in these two areas directly passed to their supreme courts, the Council of Castile and the Council of Navarre respectively (Heras Santos, 1996, pp. 111-114 and 124-126).
Source: author's elaboration, based on Martín Rodríguez (1968, p. 644), Molas Ribalta (1976, pp. 73-77), and Heras Santos (1996, pp. 111-126).

3. 3 Legal adaptation

3. 3. 1 Sources

In this section I analyze the capacity of legal adaptation in the notarial credit market in early modern Spain. For this purpose I focus on three institutions linked to this market: the executor clause, the bail bond of Toledo law and the census of population of the Kingdom of Granada. The particularity of these institutions was the existence in its

[28] For example, the officer responsible of the *Intendencia* of Granada, an area that included several *corregimientos*, was also the *corregidor* of the *Partido* of Granada.

regulation of certain rigidities that were detrimental to the normal functioning of the credit market. Naturally, these restrictions were not arbitrarily introduced by the legislator; rather, their design responded to the need to prioritize other goals (the protection of vulnerable groups, respect for jurisdictional competencies, etc.). Even so, since they constituted a barrier to the enforcement of contracts, economic agents – mainly creditors – would probably be more reluctant to agree credit contracts.

To carry out this analysis, I first explain how these three institutions worked according to the statutory law. I then consult the analysis of these laws and their application made by some jurists in several legal handbooks that were edited or re-edited in the second half of the eighteenth century.[29] As already noted, in the early modern period Spanish lawyers, notaries or judges resorted frequently to these texts to solve legal doubts. Consequently, handbooks may have contributed not only to solving the ambiguity of Castilian law, but also, to a certain degree, to the diffusion of legal adaptations across the territory. Finally, to check whether these institutions were legally adapted or not "on the ground", I examine the particular case of the city of Malaga.

The city of Malaga was the capital of a judicial district of the same name. At the end of the eighteenth century the city had 51,098 inhabitants and the entire district 91,254.[30] At the judicial level the district was ruled by a military *corregidor* and three *alcaldes mayores*, all of them resident in the capital.[31] During this period the economy of the city and its surrounding area was based on the exportation of agricultural commodities (wine, raisins, lemons, etc.) to the markets of northern Europe and Spanish America (Fisher, 1981; Nadal 2003, p. 34; García Fernández, 2006). The notarial credit market played a key role in this process, since merchants periodically financed farmers through this channel, receiving in return the agricultural commodities that they later exported

[29]Alcaraz y Castro (1762), Sigüenza (1767), Elizondo (1779), Febrero, vol, 2 (1783), Hevia Bolaños (1783), Cornejo (1784), Febrero (1786), Juan y Colom (1787), Martínez Salazar (1789), and Melgarejo Manrique de Lara (1791).

[30] For a list of the 22 municipalities that composed the *Corregimiento* of Malaga, see *España dividida en provincias e intendencias*, *Tomo I* (1789, p. 315). Population data are extracted from the Census of Floridablanca (1785-1789) and are available on the IECA website at https://www.juntadeandalucia.es/institutodeestadisticaycartografia/ehpa/ehpaTablas.htm (consulted October 4, 2020).

[31] According to the law, the city must have two *alcaldes mayores*. In addition, there was a third *alcalde mayor* who assisted the military *corregidor* (Álvarez y Cañas, 2012, pp. 47 and 59). This is confirmed by the information included in the notarial deeds of the AHPM for 1784, which mention three different names for this position (Antonio Francisco Freire de Cora, Cristóbal de Baeza y Ortiz and Francisco Javier Herrera y Vela), and also by the information about their appointments included in the AHMM, *provisiones*: *libro* 91, pp. 115r-118r and 228r-229v, and in Álvarez y Cañas (2012, p. 355).

(Peña-Mir, 2016). Hence, the existence of legal rigidities affecting the contracting institutions that ruled this market may have resulted in negative consequences for the entire economy.

In analyzing legal adaptation in the notarial credit market in Malaga, I rely on a database that contains all the deeds recorded by 22 of the 24 notaries of the city in 1784, a year of economic recovery due to the ending of the American Revolutionary War (1779-1783) and the normalization of trade relations.[32] I mainly use those notarized deeds that are linked to the afore-mentioned institutions, namely obligation contracts (a type of document mainly used for short-term credit operations) and bail bond documents. Given the absence of a specific judicial fond for litigation between private parties in both the AHMM and in the AHPM, it is not possible to produce a detailed analysis of the lawsuits carried out in the city in order to detect the presence of legal adaptations in the court papers. Even so, among the notarial records of 1784, I have been able to find a couple of deeds derived from lawsuits that include references to these institutions and their adaptations. In addition, in the AHMM I have located some judicial expedients related to the collection of public debts that also mention one of these adaptations.[33]

3. 3. 2 The executor clause

When a district court initiated a legal process against a debtor who resided in the same place where the court was located (the capital of the district), the legal process was relatively simple: the court sent a sheriff (*alguacil*) and a notary to the debtor's house, and they carried out the corresponding procedures (summons, payment claim, arrest of the debtor, etc.). When the debtor resided in other municipality, however, the capacity of the district court to ensure enforcement of the contract was significantly reduced, not only by distance, but also by jurisdictional fragmentation. Castilian law left important judicial functions in the hands of the local authorities. Thus, in cases involving non-local debtors, the district court could not employ its own officers but had to send a request (*requisitoria*) to the local authorities of the municipality in question asking for

[32]AHPM, *protocolos notariales de Málaga capital*, *libros* 2859, 2914, 3006, 3027, 3047, 3049, 3050, 3136, 3150, 3160, 3167, 3174, 3195, 3236, 3256, 3269, 3306, 3323, 3331, 3338, 3356, 3365, 3383, 3390 and 3392. The books written by the other two notaries were discarded because of their extreme deterioration. This database contains a total of 5,187 notarized deeds.
[33] AHMM, *caja* 635: *expediente* 15, *caja* 1597: *expediente* 1, and *caja* 1599: *expediente* 10.

their collaboration, and that of their officers, in performing the necessary judicial tasks. If the debtor resided in a municipality in the same judicial district, the request was sent to the mayors of that town (*alcaldes pedáneos* or *alcaldes ordinarios*). If the debtor resided in a municipality in other judicial district, the process became even more complicated, since the cooperation of the authorities in that district (the *corregidor* or the *alcaldes mayores*) was required too.[34]

Given this situation, in early modern Castile it started to be common for credit contracts that involved debtors from other municipalities to have a clause added providing that, in case of default, an agent known as the "executor" (*ejecutor*/*diligenciero*) would go to the debtor's house to enforce the contract. In exchange for its efforts, the executor would receive a fee set out in the contract and paid by the debtor for each day of travel and employment.[35]

On February 11, 1623 King Philip IV passed a law prohibiting the contracting parties to use the executor clause.[36] This law established that only the judicial authorities of each municipality could perform judicial tasks there. Only when the ordinary justice produced negligence and delays, left unspecified by the law, would the creditors be authorized to send an executor. The law was not retroactive, but it prohibited the executor from being accompanied by another salaried agent in the case of contracts that had already been signed in order to avoid increasing the defaulter's debt unreasonably.[37] The ban on sending executors meant that creditors should trust that, in those cases involving debtors from other municipalities, the local authorities would do their job properly and without interference. In some cases that was a hope rather than a reality

[34] NR, *Libro XI*, *Título XXIX*, *Leyes I-II*, *V*, *VII-VIII* and *XI* (1805, pp. 277-282).
[35] It can be stated that the executor belongs to the long list of agents employed in Castile and Spanish America to solve the problem of the distance in its different facets: attorneys (*procuradores*), business agents (*agentes de negocios*), agents empowered to collect debts in America (*apoderados*), visitors (*visitadores*), residence judges (*jueces de residencia*), or even the deputies of the cities in the *cortes* (*procuradores de cortes*). See Bermejo Cabrero (1993-94, pp. 186-196), Cachero Vinuesa (2015), Gaudin (2017), and Sánchez Arcilla Bernal, 2017, pp. 9-19).
[36] Previously, the monarchy had already prohibited executors to collect being used to collect private debts (in 1419, 1442, 1466, 1525, 1534 and 1537), but it later passed some laws accepting its use (in 1542, 1552, 1558, 1573). For those previous laws that prohibited using executors, see NR, *Libro XI*, *Título XXIX*, *Leyes I-II* (1805, p. 277). For those accepting its use, see NR, *Libro XI*, *Título XXIX*, *Leyes III* and *VI-VII* (1805, pp. 277-279).
[37] NR, *Libro XI*, *Título XXIX*, *Ley VIII* (1805, pp. 279-281).

given the lack of interjurisdictional support not only between the historic territories that composed the Spanish monarchy, but also within them.[38]

Nevertheless, despite this prohibition, several eighteenth-century legal handbooks include references to the validity of the executor clause (Table 3.3). The *Curia Philipica* of Hevia Bolaños (1783) accepts its use. However, since its first edition was published in 1603 – two decades before the formal abolition of the clause – and since that assertion remained unaltered in the subsequent editions, the reference might not reflect the post-1623 situation. Melgarejo (1797) introduces a reference to the clause in an example of a power of attorney, but he does not describe it in the main text. Fortunately, two other authors do explain the reasons for the survival of the executor clause despite its formal abolition: Sigüenza (1767) and Febrero, vol. 2 (1783). In their respective handbooks, they recognize the prohibition on sending executors in the 1623 law, while devising a legal formula to get around it: by including in the contract a formal commitment by the debtor to renounce the benefits of that law (*renuncia*).

In Castile, as in other parts of Europe, *renuncias* or waiver clauses were introduced immediately after the reception of the Roman law. This institution emerged spontaneously to remove certain legal obstacles that hindered the enforcement of contracts. These obstacles were specific rights that the *ius commune* granted to parties in contracting relationships, for example, giving additional protection to certain social groups (like women or ecclesiastics), limiting the responsibilities of co-debtors, or creating exceptions that defendants could claim in the event of a trial. Thus, when a debtor accepted the introduction of a waiver clause in the contract, he renounced a specific right that was favorable to him but harmful to the creditor's interests (Pérez-Prendes y Muñoz de Arraco, 1993-94; Peset, 2007, pp. 224-225; Planas Rossello, 2016, pp. 563-565). Castilian notaries used this mechanism to avoid the restrictions introduced by the 1623 law and to retain the figure of the executor, which shows the extent to which parties enjoyed freedom of contract.

[38] As Milhaud has shown, the enforcement of contracts involving parties resident in different historic territories of the Spanish monarchy was complicated given the lack of a clear legal framework that governed extraditions. This is what happened, for example, in the lawsuits involving creditors from the Kingdom of Navarre and debtors from the Kingdom of Aragon in 1580, or in those involving creditors from the Basque Province of Biscay and debtors from the Basque province of Gipuzkoa at the beginning of the eighteenth century (Milhaud, 2018b, pp. 6-7). These refusals to collaborate were frequent within their own historic territories as well. Thus, in Castile it was common for judges and mayors to disobey the petitions of requests sent from other places in Castile (Cárceles de Gea, 2006, p. 97).

TABLE 3.3: Legal opinions about the executor clause

Book and year	Author and position	Legal opinion*
Tratado de cláusulas instrumentales (1767)	Pedro de Sigüenza (lawyer in the town of Yevenes)	"Although certainly the new law of 1623 prohibits charging fees in debt collections, if the debtor has sworn to pay them, he will not only be forced to pay the loan, but also those fees (…) unless it is proved that this penalty constitutes an usury fraud" (pp. 169-170)
Curia Philipica (1783)	Juan de Hevia Bolaños	"It is valid that, in the event of default, a person is sent to collect the debt with a set fee paid by the debtor" (p. 354)**
Librería de escribanos e instrucción jurídica theórico práctica para principiantes part 1, vol. 2. 3 edn (1783)	José Febrero (Royal notary and business agent of the Royal Councils)	"He (the debtor) will authorize him (the creditor) to send an executor to claim the debt (…) with a set fee (…), for which reason he will waive the Law of February 11, 1623 (…) and, equally, he will waive the other laws and practices of courts that prohibit and moderate fees" (pp. 70-72)
Compendio de contratos públicos, autos de particiones, ejecutivos y de residencias (1791)	Pedro Melgarejo Manrique de Lara	"She will make deeds with all kinds of conditions, obligations, statements, special mortgages, submissions, executor wages, waivers of laws and *fueros*" (pp. 65-66)***

*Note: own translation.
**Note: the first edition of the *Curia Philipica* was published in 1603. Thus, this assertion describes the legal situation previous to the Law of February 11, 1623.
***Note: this assertion is not included in a legal description of the executor, but in a document of power of attorney included by the author.
Source: see footnote No. 29.

There is another factor that may explain the maintenance of this clause. The 1623 law prohibited the use of executors to collect not only private debts, but also public ones. In the early seventeenth century the financial needs of the monarchy led it to substantially increase the number of executors who were sent to collect back taxes. Municipalities strongly criticized the proliferation of these agents and asked for their suppression, which occurred in 1623. As a consequence of this measure, however, tax collection fell, so the monarchy introduced some modifications to the law (Marcos Martín, 2017, pp. 132-136). Between 1624 and 1647 new laws were passed that accepted the dispatch of executors under specific circumstances (authorizing their dispatch against municipal authorities instead of taxpayers, accepting their use by tax farmers and contractors,

etc.).[39] Finally, in 1689 and 1690 two laws allowed executors to be sent to collect public debts.[40] Both laws permitted the dispatch of a single executor per municipality and fixed a daily fee of 400 mrvds. (around 12 r.v.).[41] Even though these new laws affected exclusively the collection of public debts, their introduction probably legitimized the use of executors to collect private debts too.

Analysis of the obligation contracts notarized in the city of Malaga confirms that the executor clause was still in force at the end of the eighteenth century, despite its formal prohibition: 648 of the 1,181 obligations recorded in 1784 (54.8% of the total) were covered by this guarantee (Table 3.4).[42] This percentage, however, varied according to the residence of the debtor. Only 2.0% of those contracts in which the debtor lived in the inner city of Malaga included this clause. This seems logical, since the city's judges had full jurisdiction there, so creditors could trust city officers to claim their debts at low cost. Nevertheless, in those contracts in which the debtor lived in the suburbs of the city – an area that was theoretically also under the control of the city's judges – the percentage that had an executor clause added increased to 56.6%. This situation is probably explained by the low number of sheriffs who worked in the city: only twuelve for a municipality of around 50,000 inhabitants.[43] Creditors would suppose that this

[39] *Los Códigos Españoles Concordados y Anotados, Tomo XII, Libro III, Título IX, Autos II-IV* (1851, pp. 158-162).

[40] *Los Códigos Españoles Concordados y Anotados, Tomo XII, Libro IV, Título XXI, Auto III,* and *Libro III, Título IX, Auto X* (1851, pp. 192 and 163, respectively). It seems, however, that these two laws did not definitively clarify the problem of the executors, as is shown by the promulgation of a new law in 1692 and the continuous complaints and inquiries received by the Council of Castile (Marcos Martín, 2017, pp. 148-151).

[41] In 1643 the Council of Castile had already suggested the dispatch of a single executor and the fixing of a daily wage of 12 r.v. (Marcos Martín, 2017, pp. 139-141). Also in the conditions for the collection of *millones* of 1649, the monarchy and the cities agreed a daily wage of 400 mrvds. for those executors who were sent to other jurisdictions (*Escrituras, Acuerdos, Administraciones y Súplicas de los servicios de 24 millones*, 1659, pp. 27r-28r).

[42] For this purpose the notaries of Malaga used several expressions, for instance: "he renounces all the laws that prohibit sending executors and that moderate wages" or "he renounces the law that prohibits sending executors and the practices and styles of the courts that moderate wages" or "he renounces the *fueros* and laws of submissions and wages" or "he renounces the new laws and *fueros* of submissions" or "he renounces the last laws of submissions and wages". On other occasions they merely indicated that the debtor agreed to the dispatch of the executor and his remuneration. AHPM, *protocolos notariales de Málaga capital* (1784).

[43] According to the Census of 1771 there were only 12 ordinary sheriffs in the city of Malaga (Mairal Jiménez, 1999b, pp. 49-50). These 12 sheriffs were coordinated by a "high sheriff" elected annually from among the aldermen of the city (*Real Privilegio de la Vara de Alguacil Mayor, concedida a la M. I. Ciudad de Malaga por los Señores Reyes D. Felipe IV. y D. Carlos II*, 1795). In addition, two other high sheriffs were elected annually for the Hoya and the Harquía, two large areas located west and east of the city of Malaga respectively (Mairal Jiménez, 1999a, pp. 563-564). One of the aldermen of the city (Joaquín de Sisto y Rico de Rueda) is named in the notarial deeds of 1784 as "perpetual high sheriff of Olías and Totalán", two of Malaga's suburbs located in the Harquía. AHPM, *protocolos notariales de*

circumstance might lead sheriffs to pursue their activities mainly in inner Malaga, so they commonly asked for the inclusion of an executor clause when their debtors resided in more remote parts of the city. The high use of this clause in contracts involving debtors from the same municipality shows to what extent distance, and not only jurisdictional fragmentation, influenced the decision to add it. As expected, the percentage of contracts that included this clause when the debtor resided outside the city of Malaga was very high: 93.5% for those in which the debtor lived in other municipality of the judicial district of Malaga, and 87.7% for those in which the debtor lived outside the judicial district of Malaga. However, the effectiveness of this clause in these two areas might have been very different. Because the mayors of the towns in the judicial district of Malaga were, to a certain extent, under the authority of the *Corregidor* of the city of Malaga, it would have been difficult for them to refuse to cooperate with an executor who, presumably, carried a document signed by this authority.[44] However, the mayors of those municipalities that were located outside the judicial district of Malaga were under the authority of a different *corregidor*, so it would have been easier for them to block the executor's actions.

Finally, it should be noted that the introduction of the executor clause was not limited to the obligation contracts between private parties: I came across its inclusion in notarized tax-farming contracts between the Royal Treasury and a private administrator.[45]

Málaga capital, *libro* 3160, pp. 856r-856v. I have not been able to find any official reference to this position, so probably it corresponds to the own high sheriff of the Harquía.

[44] In the litigation initiated by the towns of Benamargosa and Casabermeja against the debtors of their respective public granaries, for instance, the executors sent from Malaga were enabled to perform their functions by official documents signed by the *Corregidor* of the city. In order to be recognized by the mayors of the towns, they probably carried copies of those documents. AHMM, *caja* 1597: *expediente* 1, and *caja* 1599: *expediente* 10.

[45] For example, an executor clause was included in the contract between the Royal Treasury and Pedro de Mena y Jurralde for the administration of the salt tax in the *Corregimiento* of Ronda, signed on April 14, 1784. AHPM, *protocolos notariales de Málaga capital*, *libro* 3136, pp. 267r-273r.

TABLE 3.4: Frequency of use of executor clause in obligation contracts drawn up in 1784 according to the debtor's residence

Residence of the debtor	% of the contracts covered by the executor clause	% of the loaned amounts covered by the executor clause
City of Malaga: inner	2.0	0.7
City of Malaga: suburbs*	56.6	46.5
Other municipalities in the judicial district of Malaga	93.5	87.6
Other judicial districts	87.7	75.5
Outside Spain	0.0	0.0
All	**54.8**	**34.8**

*Note: Arroyo del Cabrero, Benagalbón, Bezmiliana, Campanillas, Chilches, El Palo, Fontilla, Granadillas, Olías, Sancti Petri, Sandoval, Santo Pitar, Totalán, Tres Cruces and Vardel. These places are quoted in notarial deeds as *partidos* or *arrabales* of the city, and none of them is mentioned as a municipal form (*ciudad*, *villa*, *lugar* or *puebla*) in the list of municipalities of the *Corregimiento* of Malaga published in 1789 (*España dividida en provincias e intendencias*, *Tomo I*, 1789, p. 315).
Source: see footnote No. 32.

Regarding the structure of the clause, all these contracts specified the dispatch of a single executor, and nearly all of them (99.7%) fixed the same wage for its work: 12 r.v. per day.[46] Determining the identities of these agents is not possible since the contracts did not mention them, which suggests that they were appointed only after the debtor's default. Even so, I have been able to identify some of them through the information extracted from the judicial expedients referred to the collection of public debts, as well as a from a notarized deed derived from a private-transaction lawsuit. Furthermore, I have followed the trajectories of a few of them through other sources. Although the information is very fragmented, its analysis suggests that executors might have been selected from individuals with some previous legal skills, such as notarial witnesses (usually apprentices or officers of the own notaries) or law interns.

[46] Only two contracts did not mention this wage. One of them set a wage of 15 r.v. per day, while the other simply indicated that the debtor would pay "the common wage". It is interesting to remark that on checking those obligation contracts written by the notaries of the city of Malaga in 1764, it appears that they indistinctly mentioned 400 mrvds. or 12 r.v. as the wage of the executor. AHPM, *protocolos notariales de Málaga capital* (1764). In the lawsuit between the town of Benamargosa and the debtors of its public granary, the sum of 12 r.v. is also mentioned as the daily wage for the executor sent from the city of Malaga (AHMM, *caja* 1597: *expediente* 1).

TABLE 3.5: Identities and trajectories of some executors

Executor	Lawsuit	Trajectory
Luis Ramírez González	Town of Almachar vs. debtors of the public granary of the town (1771)	-
Luis Antonio de Olona	Town of Benamargosa vs. debtors of the public granary of the town (1771)	Law intern of the lawyer Francisco González Tenorio (1771) Main witness of the notary Manuel de Torres (1784) Notary of the city of Malaga (1790-1815) Notary of the town of Alora (1802) Notary of the town of Alozaina (1802)
Pedro Díaz de Perea	Town of Benamargosa vs. debtors of the public granary of the town (1771)	-
Juan de Villanueva Aparicio	Town of Casabermeja vs. debtors of the public granary of the town (1771)	Judge administrator of mayors of the royal mines of Taxco (1784)
Esteban Dueñas*	Matías Trujillo vs. José Molina (1780-1782)	Raisin, almond and orange merchant (1771)
Diego Angulo*	Matías Trujillo vs. José de Claros (1783)	Witness of the notaries José Jiménez Pérez and Francisco de León Uncibay (1784)
Juan Fernando García*	Matías Trujillo vs. José de Claros (1783)	-
Félix de Montes	Royal Treasury and two ecclesiastical institutions vs. Antonio Sánchez Villalba (1783)	-
José de Alcalá y Carvajal	Royal Treasury and two ecclesiastical institutions vs. Antonio Sánchez Villalba (1783)	-

*Note: these individuals are not identified as "executors" in the document in which they are mentioned. However, given the function they performed, I think that they can be considered as such.
Source: for Luis Ramírez González, AHMM, *caja* 1597: *expediente* 1; for Luis Antonio de Olona, AHMM, *caja* 1597: *expediente* 1, Mairal Jiménez (1999b, pp. 30-31), AHPM, *protocolos notariales de Málaga capital*, *libro* 3160, and catalogue of the AHPM; for Pedro Díaz de Perea, AHMM, *caja* 1597: *expediente* 1; for Juan de Villanueva Aparicio, AHMM, *caja* 1599: *expediente* 10, and AHPM, *protocolos notariales de Málaga capital*, *libro* 3306, pp. 6r-7v; for Esteban Dueñas, AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v, and Mairal Jiménez (1999b, p. 192); for Diego Angulo, AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v, *libro* 3150, and *libro* 3306; for Juan Fernando García, AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v; for Félix de Montes, AHMM, *caja* 635: *expediente* 15; for José de Alcalá y Carvajal, AHMM, *caja* 635: *expediente* 15.

It is not possible to know when executors stopped being sent to collect private debts. In 1788 the monarchy passed a new law that repeated its prohibition except in cases of delays by ordinary justice – again unspecified by the law – although there is no

guarantee that it was followed.[47] Executors probably disappeared in the mid-nineteenth century, when the Civil Guard was created as a national police force (1844) and mayors lost their judicial powers (1855).[48]

3. 3. 3 The bail bond of Toledo law

Castilian law distinguished several types of bail bonds (*fianzas*) according to their legal purpose.[49] One of them was the bail bond of Toledo law (*fianza de la ley de Toledo*), so called because it was approved by the Catholic Monarchs in the *Cortes* of Toledo of 1480. This bail bond was used exclusively in the executory process (*juicio ejecutivo*), a fast-track legal procedure for debt collection to which creditors had access if they had a notarized instrument that validated the debt or if, despite not having one, the debtor had either recognized or confessed to the debt.[50] According to the Toledo law, if the creditor had won the lawsuit in the first instance but later the sentence was revoked by an appeal court, then he would not only have to return the amount paid by the debtor, but also pay a penalty equivalent to twice the claimed amount. Conversely, if the appeal court did not revoke the sentence, then the debtor would have to pay a penalty equivalent to the claimed amount. Thus, after the sentence of first instance both creditors and debtors, together with their respective guarantors, had to notarize a document agreeing to pay those amounts in the event of an appeal (the bail bond of Toledo law). Half the amount received for the fine would go to the side winning the appeal, while the other half would be used to cover public or pious needs.[51]

This law was probably passed with the aim of dissuading parties from both committing fraud and making excessive use of appeals, as well as, to a lesser extent, to increase the public revenues. Even so, the bail bond of Toledo law could have created an important distortion for the optimal performance of credit markets since it obliged both creditors and debtors to assume high risks if they decided to start a lawsuit. Consequently, it could have led to credit rationing, especially for unknown debtors.

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[47] NR, *Libro XI*, *Título XXIX*, *Ley V* (1805, p. 278).
[48] The Civil Procedure Law of 1855 transferred judicial attributions from mayors to justices of the peace who were subordinated to judicial district courts (Díaz González and Calderon Ortega, 2013, pp. 315-323).
[49] *Fianza de carcel segura*, *fianza depositaria*, *fianza de estar a derecho*, *fianza de la haz*, *fianza de la ley de Toledo*, *fianza de saneamiento*, etc. (Cornejo, 1784, pp. 224-228).
[50] For a further analysis of this legal procedure, see Fernández Castro (2015, p. 239-241).
[51] NR, *Libro XI*, *Título XVIII*, *Leyes I* and *IV* and *XII* (1805, pp. 271-272 and 274-275).

However, an analysis of eighteenth-century legal handbooks shows that not all authors offer a common view whether there is an obligation to pay the fine or not (Table 3.6). Some of them limit themselves to mentioning the existence of the bail bond of Toledo law, without explaining how it works (Alcaraz y Castro, 1762; Sigüenza, 1767; Elizondo, 1779). Among those who explain it, there are some authors who mention the existence of the penalty for the creditor but not for the debtor (Cornejo, 1784; Melgarejo Manrique de Lara, 1791), while there are others who do not mention the fine for either the creditor or the debtor, explaining that, in the case of the former, he is only forced to return the amount obtained in the first instance (Hevia Bolaños, 1783; Juan y Colom 1787; Martínez Salazar, 1789). Thus, there are clear differences between the statutory law and the legal opinions of these jurists, especially regarding the debtor's fine and, to a lesser extent, the creditor's fine. The explanation provided by another author, José Febrero, probably accounts for these discrepancies. According to him the law laid down payment of the penalty for both creditors (always) and debtors (in some cases),[52] though the courts did not require it for either of them (Febrero, 1786, pp. 538-541). In other words, at some point, the courts adapted the bail bond of Toledo law suppressing its most harmful element, the penalty.

Although I have not found other handbooks from the eighteenth century that support Febrero's interpretation, I have located several nineteenth-century handbooks that share his opinion. For example, García Goyena (1842, p. 6) states that "the penalty to which the creditor is subject in the bail bond of Toledo law is not in use, nor is it (…) against the debtor in the very strange case in which, according that law, it must be used". Similarly, Sala (1844, pp. 68-69) claims that "the penalty of the double is not in use, nor it is for the debtor in any case". Lastly, the *Diccionario general del notariado de España y Ultramar*, written shortly after the suppression of the bail bond of Toledo law by the Instruction on Civil Proceedings in the Royal Ordinary Courts (1853), also agrees with this explanation: "the new law, more tolerant in this regard, eliminates the penalty, which was previously in disuse" (Gonzalo de las Casas, 1856, pp. 133-134).

[52] According to Febrero, the bail bond was required for debtors only in those cases in which they alleged that they could not present the testimony of their witnesses within ten days from the moment they opposed the execution, given that these witnesses resided outside the bishopric or archbishopric where the lawsuit was taking place (Febrero, 1786, pp. 538-540).

TABLE 3.6: Legal opinions about the bail bond of Toledo law

Book and year	Author and position	Legal opinion*
Breve introducción del método y práctica de los cuatro juicios (1762)	Isidoro Alcaraz y Castro (Lawyer of the Royal Councils employed in the courts of the city of Cartagena)	"The bail bond fixed by Toledo law" (pp. 82-83)
Tratado de cláusulas instrumentales (1767)	Pedro de Sigüenza (Lawyer in the town of Yevenes)	"According to Toledo law" (p. 267)
Practica universal forense de los tribunales superiores de España, y de las Indias vol. 1. 4 edn (1779)	Francisco Antonio de Elizondo (Lawyer of the College of Lawyers of Madrid)	"According to Toledo law" (pp. 25-26)
Curia Philipica (1783)	Juan de Hevia Bolaños	"If a higher court or other competent judge orders the return of the executed assets or the received amount, he (the creditor) will do it" (pp. 151-152)
Apéndice al diccionario histórico, y forense del derecho real de España vol. 2 (1784)	Andrés Cornejo (Judge of the *Sala de Alcaldes de Casa y Corte*)	"The creditor will commit himself to pay the received amount plus the double (…) in the event that the higher court reverses the sentence" (p. 227)
Librería de escribanos e instrucción jurídica theórico práctica para principiantes part 2, vol. 3 (1786)	José Febrero (Royal notary and business agent of the Royal Councils)	"If the debtor proves the payment (…) the creditor will return to him the received amount, plus double that amount as a penalty, and failing that his guarantor will do it. And the guarantor of the debtor will commit himself to pay a penalty equivalent to the paid amount if the debtor does not prove the payment (…) nevertheless this penalty in no case is practiced or required" (pp. 538-541)
Instrucción de escribanos en orden a lo judicial. 10 edn (1787)	José Juan y Colom (Royal notary)	"As long as the higher court reverses the sentence, the creditor will return to the debtor the received amount" (pp. 136-137)
Práctica de substanciar pleitos executivos, y ordinarios, conforme al estilo de las chancillerías, audiencias y demás tribunales del Reyno. 4 edn (1789)	Antonio Martínez Salazar (Notary of the Council of Castile)	"If the sentence is reversed by a higher court, the amount will be returned" (p. 67)
Compendio de contratos públicos, autos de particiones, ejecutivos y de residencias (1791)	Pedro Melgarejo Manrique de Lara	"If the sentence is reversed for any reason, the amount will be returned plus the double as penalty" (p. 179)*

*Note: own translation.
**Note: however, in the document of bail bond of Toledo law included by the author, no penalty is mentioned (Melgarejo Manrique de Lara, p. 180).
Source: see footnote No. 29.

In 1784 the notaries of the city of Malaga drew up 248 bail bonds, of which 57 (23.0%) were bail bonds of Toledo law. The analysis of these deeds shows three main findings. First, all bail bonds of Toledo law were referred to the creditor, and none to the debtor. Second, in all cases the guarantors were attorneys of the city (*procuradores del número*). Thus, the introduction of a guarantor in these documents was probably a mere formality, the creditor being solely responsible for returning the amount in the event of the reversion of the initial sentence. And third, all the documents mentioned the creditor's obligation to return the amount if the sentence was revoked, but none of them mentioned a fine.

Finally, the inexistence of the penalty for the debtor is also evidenced by litigation between Matías Trujillo, citizen and merchant of the city of Malaga, and José de Claros, citizen of the town of Iznate, carried out in 1783. In this lawsuit – the only two-instance trial for which I have located a document – the debtor (Claros) lost the appeal, though the notarized document, which meticulously describes all judicial and notarial costs, did not mention that specific fine for him.[53] This confirms that, at least in the city of Malaga, the bail bond of Toledo law was adapted by both the notaries and the courts.

3. 3. 4 The census of population of the Kingdom of Granada

After the rebellion of the Alpujarras (1568-1571), the *moriscos* of the Kingdom of Granada were deported to other territories of the Crown of Castile.[54] Since large areas of the Kingdom of Granada then became depopulated, the monarchy carried out a project to repopulate it.[55] For this purpose a new type of contract was created: the census of population (*censo de población*), an emphyteusis contract in which the new Christian settlers acted as tenants, the king as their landlord. Thus, the king would receive an annual rent paid by the settler until the moment the latter redeemed the census and obtained full ownership of the land. The census of population, however, had several peculiarities that differentiated it from an ordinary emphyteusis contract. For example, both payment of the rent and redemption of the census had to be made jointly by all the settlers in each town (Campos Daroca, 1984-85). Furthermore, from 1595

[53] AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v.
[54] *Morisco* is the word used to denote those Spanish Muslims who were forced to convert to Christianity.
[55] The Kingdom of Granada corresponded approximately to the modern provinces of Granada, Malaga and Almería.

some restrictions were introduced. On the one hand, properties under the census could be sold and inherited, but always completely, never in parcels. On the other hand, settlers were forbidden to entail these lands (in *memorias*, *capellanías*, etc.), to mortgage them, or to encumber them with annuities (Muñoz Buendía, 1993-94, pp. 500-506).

The main reason for the monarchy introducing these limitations was to avoid disrupting the project of creating a society of small owners in the Kingdom of Granada: excessive property fragmentation, the settlers' chronic indebtedness, transfers of land to privileged estates, etc. Nevertheless, in the absence of a wide range of alternative credit mechanisms, these rigidities – in particular those that prohibited mortgaging properties or encumbering them with annuities – could have had a pernicious effect on farmers seeking loans, especially on those who lacked additional collateral.

Unlike what happens with the executor clause and the bail bond of Toledo law, legal handbooks do not include any reference to the census of population, probably because this institution was geographically limited to the Kingdom of Granada. However, it is possible to explain the process of the legal adaptation of this institution through other sources. In 1570 Philip II created a new council to coordinate the process of repopulation of the Kingdom of Granada (*Consejo de Población*). This institution developed several functions, such as land distribution, rent collection and the administration of justice. Specifically, judicial tasks were performed by a court composed of three judges of the *Chancillería* of Granada who depended on the Council. This court was abolished in 1587, while the Council was suppressed in 1592. In 1593 an inspection detected many problems related to the process of repopulation, including the indebtedness of the settlers and the mortgaging of a large number of lands. For this reason, in 1595 the monarchy passed new laws that introduced the afore-mentioned restrictions. Additionally, in 1597 the Council was re-established, giving the monarchy direct control over the judges of the *Chancillería* of Granada in order to ensure strict compliance with these new laws. Although initially they were able to act accordingly, over time breaches became more frequents, and judges ended up accepting them, despite their periodically issuing documents that emphasized their prohibition. Because most settlers had no other assets than these lands, they had to mortgage them to receive credit. Throughout the seventeenth century the Council was again in abeyance, being restored and suppressed several times (García Latorre, 1980, pp. 183-185; Birriel

Salcedo, 1988; Muñoz Buendía 1993-94, pp. 509-513). The permissiveness of the judges of the *Chancillería* must have been crucial in establishing this practice of legal adaptation. Since this institution was also the high court of the area, its acceptance should have generated certainty for economic agents, encouraging them to use or to accept these properties as guarantees.

It should be noted that breaches of the census of population were probably also caused by the plurality of regional emphyteutic property rights that characterized early modern Spain (Figure 3.2). Each one of them had emerged independently and was governed by different laws and customs, which complicated the ability of the monarchy to know them and to ensure that they worked according to the statutory law. This situation was perfectly described in 1840 by a senator, Manuel de Pezuela y Ceballos, precisely in a debate on the abolition of the census of population for all those properties that still maintained it, something that finally occurred five years later:[56]

"Here, there is a contract between parties, and attempts are being made to conclude it with severe damages, and also to set a precedent with fatal consequences, because all those who are in a similar situation would come tomorrow asking for the same arrangement. And it cannot be said that similar cases will not be found, because this cannot be ensured in a Nation like ours, which is an aggregation of several monarchies where property rights coexist in different ways, it being complicated to know them in all their ramifications, not only for individuals but also for the actual Government."[57]

[56] The census of population was definitively abolished in 1845 as a result of the Mon-Santillán tax reform (Bravo Caro, 1993, p. 183).
[57] Own translation. *Diario de las Sesiones del Senado. Legislatura de 1840, Tomo II*, 54, (1840, p. 158).

FIGURE 3.2: Regional emphyteutic property rights in early modern Spain

Source: author's elaboration, based on Sánchez de Ocaña (1892, pp. 29-60 and 159), Campos Daroca (1984-85), Gil Olcina (1988), Giménez López (1993, p. 152), and Usunáriz (2004).

Once again, notarial data confirm the legal adaptation: 52 of the 283 mortgage obligation contracts recorded by the notaries of the city of Malaga in 1784 (18.4% of the total) used properties encumbered with the census of population as collateral (Table 3.7).[58] For those contracts with debtors who were residents of the inner city of Malaga, the existence of this guarantee was null. Nevertheless, it was very common for those contracts that involved debtors from other municipalities, around a third of which introduced properties encumbered with the census. On a much smaller scale I also found breaches regarding the prohibition on encumbering these lands with annuities.[59]

[58] The contract identifies this type of property when it mentions the amount of money annually paid under this concept, for example: "Juan de Arias mortgages 11 *obradas* of vineyards (…) that he owns (…) for which he pays 10 r.v. of *Censo a la Población*." AHPM, *protocolos notariales de Málaga capital*, *libro* 3331, pp. 265r-266v.

[59] I have found a couple of cases of this. On November 3, 1784, José Alarcón Quintero, Juan Pineda and Antonio Pineda, citizens of the town of Iznate, received a loan of 11,000 r.v. from Andrés del Pino, citizen of the city of Malaga. Alarcón Quintero mortgaged 20 *obradas* of vineyards. These lands paid 6 r.v. annually of census of population, but also 12 r.v. annually for an annuity in favor of Pedro Rengel,

Finally, although scarce, the available judicial sources corroborate the acceptance of the adaptation. Thus, in the litigation between Manuel Gordon and Alonso García – both citizens of the city of Malaga – carried out in 1784, the former asked the judge to auction García's lands – which were encumbered with the census – claiming that this was common practice:

"And he requested (…) the auction (…) of those mortgaged *obradas* of vineyards (…) as had been done with others encumbered with the *Real Población*."[60]

TABLE 3.7: Frequency of use of properties encumbered with the census of population in mortgage obligation contracts drawn up in 1784 according to the debtor's residence

Residence of the debtor	**% of the contracts supported with properties encumbered with the census of population**	**% of the loaned amounts supported with properties encumbered with the census of population**
City of Malaga: inner	0.0	0.0
City of Malaga: suburbs*	18.2	10.3
Other municipalities in the judicial district of Malaga	34.7	25.3
Other judicial districts	32.1	62.6
Outside Spain	0.0	0.0
All	**18.4**	**16.5**

*Note: Arroyo del Cabrero, Benagalbón, Bezmiliana, Campanillas, Chilches, El Palo, Fontilla, Granadillas, Olías, Sancti Petri, Sandoval, Santo Pitar, Totalán, Tres Cruces and Vardel. These places are quoted in notarial deeds as *partidos* or *arrabales* of the city, and none of them is mentioned as a municipal form (*ciudad*, *villa*, *lugar* or *puebla*) in the list of municipalities of the *Corregimiento* of Malaga published in 1789 (*España dividida en provincias e intendencias, Tomo I*, 1789, p. 315).
Source: see footnote No. 32

3. 4 Attitudes of judicial institutions towards legal adaptations

Obviously none of these legal adaptations would have been introduced without being supported generally by the judges. However, one question arises: was the degree of support at the different judicial levels the same, or, on the contrary, there were some levels more willing than others to accept these adaptations?

alderman of Malaga. AHPM, *protocolos notariales de Málaga capital*, *libro* 3331, pp. 263r-264v. On November 5, 1784, Antonio López Sánchez, citizen of the town of Benamocarra, received a loan of 15,000 r.v. from the trading house Lambrecht, Schnackenburg and Co. López Sánchez used 100 *obradas* of vineyards as collateral. These lands paid 300 r.v. annually of census of population, but also 30 r.v. annually for an annuity in favor of the parish of Benamocarra. AHPM, *protocolos notariales de Málaga capital*, *libro* 3383, pp. 1730r-1732r.

[60] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3136, pp. 214r-222v.

In his analysis of lawsuits judged by the *Chancillería* of Valladolid during the 1500-1700 period, Kagan showed that, after a wave of litigation in the sixteenth century, the activity of this high court registered a sharp decline in the following century. And although he did not examine its work for the eighteenth century, he argued that during this period the level of judicial activity never reached the peak it had achieved two centuries earlier.[61] He explained this decline mainly as the result of the economic stagnation (in the seventeenth century) and the triumph of a new legal culture that was less prone to litigation (in the eighteenth century). Nevertheless, along with these reasons, Kagan also emphasized the increasing relevance of local justice as a consequence of both the transfer of appeal competences – derived from the negotiations over the *millones* tax – and the progressive fragmentation of the Castilian economy (Kagan, 1981, pp. 210-246).

Intuitively, it seems reasonable to think that mayors (*alcaldes pedáneos* and *alcaldes ordinarios*) and district courts (*alcaldes mayores*, *corregidores* and *tribunales consistoriales*) might have enjoyed greater leeway to introduce these changes than high courts of justice (*audiencias* and *chancillerías*), which were under greater control by the monarchy.[62] If this was the case, creditors would have tried to solve their suits locally, avoiding the higher courts.[63]

To estimate how important each of these two judicial levels was in late eighteenth-century Malaga, I have accounted all the powers of attorney that were notarized in 1784 and employed attorneys of the *número* of Malaga and attorneys of the *Real Chancillería* of Granada (the high court on which the city of Malaga depended). In early modern Castile, hiring an attorney (*procurador del número*) was a compulsory prerequisite to starting a judicial process. The attorney represented his client before the court and was delegated to carry out legal proceedings on his behalf (Gayol, 2002, pp. 119-120). The

[61] Although with nuance, this intuition has been confirmed by Premo (2017, pp. 248-250).

[62] Certainly, both *corregidores* and *alcaldes mayores* were royal officers too, but several circumstances conditioned their ability to reinforce the position of the monarchy in the towns, to the detriment of the municipal elites. On the one hand, their power was severely limited, to the point that they lacked voting rights at town hall meetings (save in cases of a tie). Furthermore, their wages were paid by the municipal budget (Heras Santos, 1996, p. 126). On the other hand, their short terms (three years, extended to six since 1783) were not an incentive to change this situation (Álvarez y Cañas, 2012, p. 12).

[63] It should be noted that, according to the disposable information, the high courts reversed or modified an important percentage of the decisions taken by the inferior courts. Thus, between 1540 and 1680 the *Chancillería* of Valladolid reversed 25.6% of the sentences and modified 5.5% of them (Kagan, 1981, p. 100). The Council of the Indies, which acted as the appeal court of the *Audiencia de la Contratación* of Seville in those lawsuits that involved more than 600,000 mrvds., reversed 23.7% of the sentences and modified 54.4% of them (Fernández Castro, 2015, pp. 53 and 60).

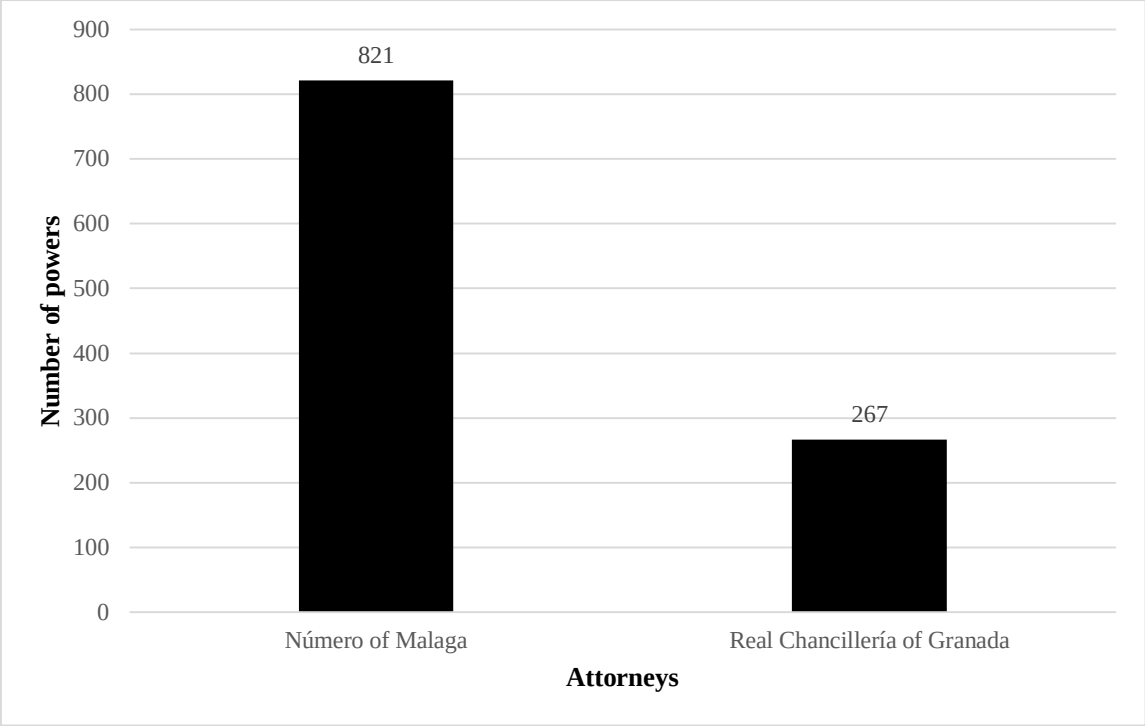
scope of action of each attorney was limited to a single jurisdiction. Thus, initiating diligences before the district court of Malaga required the plaintiff to hire an attorney of the *número* of Malaga. Nevertheless, performing these procedures before the *Chancillería* of Granada required the hiring of an attorney of the *Chancillería*.[64] The law only gave validity to those powers of attorney that had previously been notarized (Febrero, vol. 3, 1783, pp. 226-227), which facilitates their count and classification.

Figure 3.3 shows the number of powers given to both groups. As expected attorneys of the *número* of Malaga clearly surpassed those of the *Chancillería* of Granada – something logical since only a fraction of the lawsuits would be appealed. Specifically, attorneys of the *número* of Malaga were involved in three times as many powers as attorneys of the *Chancillería* of Granada. Even so, this methodology presents several limitations that should lead us to qualify these results. First, this figure does not distinguish between those powers that were restricted to a specific case (*poder especial*) and those that were granted for all cases that might arise (*poder general*).[65] Second, the powers to hire attorneys of the *número* of Malaga do not distinguish between those granted for the first instance, and those that were granted for appeal by the *tribunal consistorial*, although probably the same document was valid for both cases unless a new attorney was engaged for the appeal. Third, it is possible that this database does not include all those powers of attorney granted by citizens of Malaga to attorneys of the *Chancillería*, since some of them could have been directly hired in the city of Granada. In those cases the powers would not have been written by the notaries of Malaga, but by their opposite numbers in Granada.

[64] Those lawsuits that were heard by the mayors of the towns (*alcaldes ordinarios* and *alcaldes pedáneos*) did not require the use of attorneys. These agents were only attached to specific courts, such as *corregimientos*, *audiencias* or *chancillerías* (Gandasegui Aparicio, 1999, p. 328). Their absence in these lawsuits seems logical given the small amounts involved (see Table 3.1).

[65] Among those that were given for all the issues that may arise, it was very common to include attorneys from both jurisdictions.

FIGURE 3.3: Attorneys of the *número* of Malaga and the *Real Chancillería* of Granada involved in powers of attorney recorded in 1784



Source: see footnote No. 32.

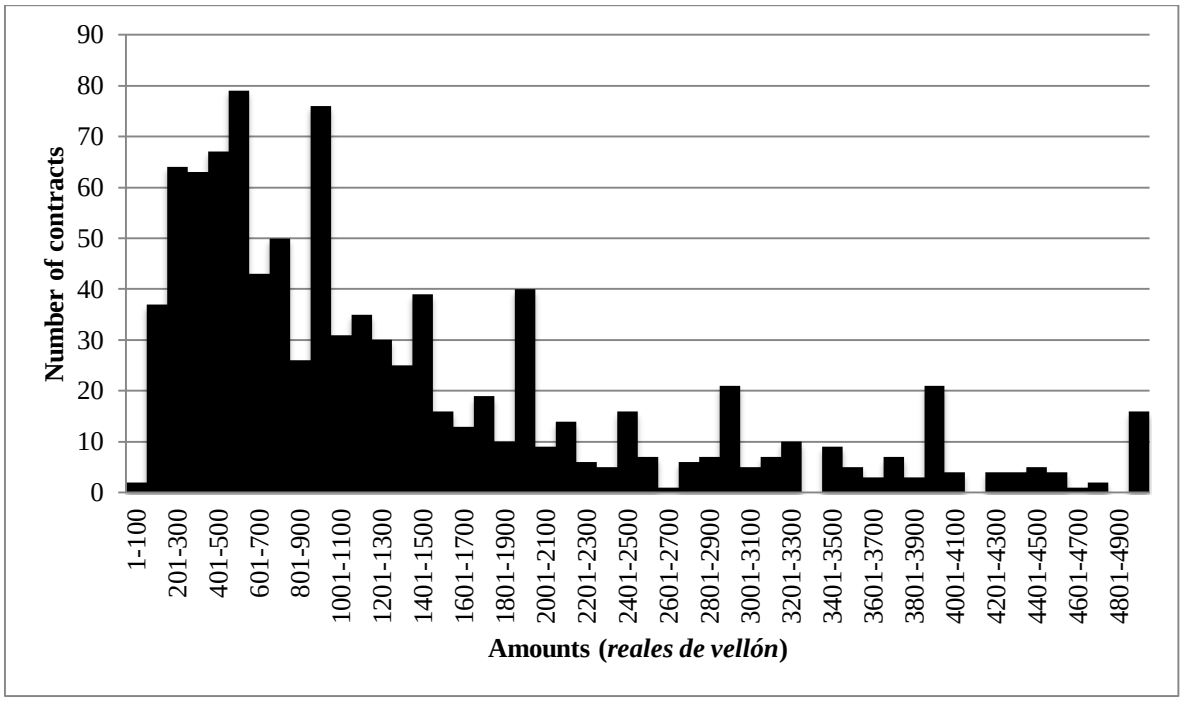
In any case, if creditors from Malaga wanted to avoid that *Chancillería* hearing their lawsuits, the only way to do so was to lend amounts that did not exceed the monetary limit that allowed appeals to fall under the jurisdiction of a local *tribunal consitorial* (Table 3.2).[66] From 1778 this monetary limit was 40,000 mrvds. (1,176.5 r.v. approx.).[67] If creditors had followed this strategy, it would be reasonable to find many contracts for amounts just below that limit, and only a few of them just above. Figure 3.4 shows the distribution of the obligation contracts in tranches of 100 r.v. There is a constant increase in the number of contracts up to 600 r.v. Once this amount was reached, the number of contracts starts to decrease, with periodic peaks in round numbers (1,000, 1,500, 2,000, etc.). Hence, there is no "wall" near to the monetary limit. In fact, 50.4%

[66] In sixteenth-century Seville, some litigants of the *Audiencia de la Contratación* renounced parts of the sued amounts in order to avoid their appeals falling under the jurisdiction of the Council of the Indies, since they considered this institution to be opposed to their interests (Fernández Castro, 2015, pp. 67-68).

[67] If the amount of the contract exceeded that monetary limit but had been partially paid and the remaining debt was below the limit, then the appeal fell under the jurisdiction of the *tribunal consistorial*. This is what happened, for example, in the lawsuit between Matías Trujillo and José de Claros that I mentioned above. On March 4, 1782 Claros had obliged himself to pay 1,756 r.v. to Trujillo on November 1, 1782. A few months later Claros only paid 810.5 r.v., so he still owed 945.5 r.v. Since the remaining amount was under the monetary limit, both the hearing of first instance and the appeal were judged by the local justice. AHPM, *protocolos notariales de Málaga capital, libro* 3236, pp. 28r-52v.

of these contracts exceeded it. This suggests that, even if creditors preferred appeals to be heard by a *tribunal consistorial* – not only due to its more tolerant attitude towards legal adaptations, but also for reasons of distance – they did not feel absolute distrust of the *Chancillería*.

FIGURE 3.4: Frequency of obligation contracts by amounts in 1784 (until 5,000 r.v.)



Source: see footnote No. 32.

As shown in the previous section, although the *Chancillería* of Granada initially tried to stop those breaches that were linked to the census of population, it ended up accepting them. Probably the *Chancillería* and, ultimately, the monarchy prioritized widespread compliance with the law in exchange for accepting the "relaxation" of some rules. Nevertheless, after the replacement of the Habsburgs by the Bourbons in the eighteenth century the new dynasty made significant changes to increase royal control of the judicial system and a stronger compliance with the law, such as the creation of smaller but more manageable high courts, the direct election of the *alcaldes mayores* and the introduction of *intendentes*. Precisely *intendentes* performed a key role in relation to the census of population during the eighteenth century, threatening to end those legal adaptations that had governed this institution for two centuries.

The *intendentes* had had judicial powers over fiscal affairs since 1718, although initially this did not affect the census of population in any way. Since 1687 collection of this rent was given to a tax farmer. The contract between the king and the tax farmer gave to the latter the right to choose certain judges for both the first-instance stage and the appeal of those lawsuits that were linked to the collection of the rent, being the judges of the *Chancillería* of Granada elected for this purpose. In 1760 the Bourbons reincorporated the rent of the census of population into the Royal Treasury. The *Chancillería* managed to retain its powers over such lawsuits for a few more years, but the *Intendente* of Granada finally established its control (Campos Daroca, 1986-87, pp. 358-359). Legally, the *Intendente* received jurisdiction only over matters of a fiscal nature (the collection of the rent), but it seems that he exceeded his functions.

This is revealed by the litigation between Manuel Gordon and Alonso García, already mentioned.[68] On January 8, 1783 García received a loan of 13,000 r.v. from Gordon. As collateral, García mortgaged thirteen *obradas* of vineyards. A few months later García had not repaid the debt, so Gordon initiated an executory process against him. The *obradas* were confiscated, but, before they were auctioned, García delivered a document to the judge in an attempt to avoid the loss of his lands:

"In this expedient, the afore-mentioned García presented a dispatch from the *Intendente* of the city of Granada, judge of the *Real Población*, that warned that those *obradas* of vineyards mortgaged on that loan could not be auctioned since they were encumbered with the *Censo de Población*." [69]

This text is the clearest proof of the problem involved in transferring the jurisdiction to an exogenous agent, the *Intendente* of Granada. Although he was just following the law, his actions changed the norms that traditionally ruled the credit markets of this area. Yet, the *Intendente* was perfectly aware of the importance of ensuring the enforcement of the contracts, so he proposed an alternative to the auctioning of the lands:

[68] AHPM, *protocolos notariales de Málaga capital*, *libro* 3136, pp. 214r-217v and 218r-222v.
[69] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3136, pp. 214r-222v.

"He turned to the *Intendencia* of the *Real Chancillería* of the city of Granada, and he got a dispatch from the court of the *Real Población*, that warned that those *obradas* of vineyards were not auctioned, but were given in pledge (*prenda*) to Don Manuel." [70]

Both parties reached an agreement on March 14, 1784. The *obradas* were not given in pledge to Gordon, but to another citizen of Malaga, Francisco Bermúdez. In return, Bermúdez would take care of García's debt, paying it over the next four Christmases. Bermúdez would retain the *obradas* discounting 1,100 r.v. of García's debt annually. Finally, if García wanted to sell the *obradas*, Bermúdez would be given first refusal. It seems that the operation was a success and the contract was finally cancelled on June 2, 1796.

A second example of this problem arising is litigation between Matías Trujillo and José de Claros, also mentioned when I analyzed the bail bond of Toledo law. Although in this case there was no serious problem with the census of population, the document included a brief reference to the damages arising from the new situation:

"He (the creditor) was tired of the infinite evasions of the debtor, either from pleas, either from use of the *Población* to avoid the sale of his lands, or from other evasions frequently alleged by debtors." [71]

Probably, the *Intendente* would not always intervene, but only in those cases in which one of the parties requested to do so. Even so, this situation would give rise to uncertainty that was detrimental to economic activity. Consequently, the monarchy was forced to intervene to solve this jurisdictional problem, just as it did with the ambiguities generated by other emphyteutic property rights.[72] The ultimate reason for the intervention was a dispute between the *Intendente* of Granada and the *Alcalde Mayor* of the town of Uxijar. Both agents had claimed jurisdiction over a lawsuit relating to the possession of an entail state composed of properties encumbered with the census of population. This conflict went to the Council of the Treasury and from there to the King, who took the final decision:

"By Royal resolution after a consultation of the Council of the Treasury of November 26, 1787, on the occasion of the competence between the *Intendente Juez Protector* of

[70] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3136, pp. 214r-222v.
[71] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v.
[72] Such was the case of the *foro* in northwest Spain, or the *rabassa morta* in Catalonia. See Jove y Bravo (1876) and Giralt (1965) respectively.

the *Renta de Población* of the Kingdom of Granada and the *Alcalde Mayor* of the town of Uxijar, on the possession of an entail estate composed of properties encumbered with the *Real censo de población*; it was stated that this affair should fall under the authority of the afore-mentioned *Juez Protector*, while the *Alcalde Mayor* should be restricted; and the former was told to limit his jurisdiction to those cases that the law enabled him to judge, in order to avoid the weakening of the ordinary justice."[73]

Thus, although the King sided with the *Intendente* in that affair – probably to avoid the authority of his highest royal officer in the Kingdom of Granada being questioned – this agent was warned to refrain from judging lawsuits that were not strictly related to the collection of rent in the future. Hence, the "absolutist" Bourbon monarchy implicitly recognized the validity of the adaptations to the census of population, and sanctioned the superiority of the judgements of the local authorities on this matter.

3. 5 Conclusions

In this chapter I have analyzed the capacity of the legal adaptation of notarial credit markets in early modern Spain, particularly in the Crown of Castile. Works on legal systems have traditionally emphasized the inability of those countries that rely on statutory law to introduce financial innovations spontaneously. Since they largely depend on the initiatives of a central legislative power, they lack the dynamism of those other countries that empower judges to incorporate these novelties from the bottom up. Hence, it might be expected that early modern Castile, a prototype of an absolutist monarchy with a weak representative assembly and tight control of the courts by the king, was unable to develop flexible credit legislation. Here, however, I show that, far of being rigid, Castilian law was perfectly able to incorporate legal adaptations in the absence of changes to the statutory law, which encouraged credit relationships.

For this purpose, I have focused on the analysis of three institutions: the executor clause, the bail bond of Toledo law and the census of population of the Kingdom of Granada. These institutions were linked to central elements of the legal framework that governed credit transactions, like the mechanisms to ensure the enforcement of contracts that involved parties from different places (executor clause), the guarantees

[73] NR, *Libro VI*, *Título IX*, *Ley VI*, Footnote No. 6 (1805, p. 140).

required from both creditors and debtors in the event that an appeal court reversed or confirmed a sentence (bail bond of Toledo law) and mortgage guarantees (census of population). The statutory laws regulating these institutions did not prioritize the dynamism of credit markets, but introduced some restrictions that, under normal conditions, would have reduced the incentives of parties – mainly creditors – to subscribe contracts.

To assess to what extent these institutions worked as the law required I have compared their official regulation with jurists' opinions contained in several eighteenth-century legal handbooks – a source frequently used by legal professionals to solve legal ambiguities – and with information in a database of deeds recorded in 1784 by the notaries of the city of Malaga, an area whose economy depended heavily on credit and, consequently, was very sensitive to regulation on this matter. Comparing these sources reveals that legal agents did not fully comply with the laws that ruled these institutions, but applied a soft version of them to nuance some of the barriers that hampered the allocation of credit funds. Thus, they were able to improve the functioning of the market in the absence of official legal changes, which were not carried out until the mid-nineteenth century.

These adaptations were consolidated thanks to the support they received from the different judicial levels. The high degree of judicial decentralization left large attributions in the hands of the district courts, which were aligned with the interests of the local elites and therefore in favor to these adaptations. Nevertheless, the supposed guardians of legal orthodoxy, the high courts, also played a crucial role in adopting a pragmatic attitude and not blocking the adaptations. Finally, the monarchy, which was theoretically the most interested in ensuring scrupulous compliance with its own legislation, also ended up accepting some deviations.

Therefore, this chapter ultimately shows that the degree of legal flexibility and freedom of contract in absolutist Castile was greater than is traditionally assumed. Certainly, further research on notarial and judicial sources needs to be conducted to determine whether these adaptations were effectively applied in other Castilian locations. Since legal handbooks were widely used across the entire territory, it could be concluded that references to these adaptations were not unknown to most jurists. Even so, it is possible that in those places with lower credit activities, their introduction was

less necessary. If so, legal adaptations could have increased transaction costs at the "national" level while reducing them locally. Equally, it will be necessary to carry out an analysis of previous years in order to determine whether these adaptations were introduced immediately, or if, on the contrary, this was a more gradual process.

Chapter 4

How well were creditors' rights protected in early modern Spain? The case of the public mortgage registry in Malaga

New Institutional Economics treats early modern Spain as an example of a state whose political and contracting institutions hindered economic growth. However, the assumption that Spanish political institutions were predatory in this respect has been called into question. This chapter challenges the idea that Spain was unable to develop sufficiently good contracting institutions, of which we know relatively little. Using data from Malaga's notarial credit market, I show that legal institutions facilitated contractual compliance in private financial transactions. Specifically, public mortgage registries, which had improved the registration of properties used as collateral since their creation in 1768, favored the subscription of larger contracts. Furthermore, results suggest that registries could have contributed to the development of a more impersonal credit market.[1]

4. 1 Introduction

The association between economic performance and the quality of institutions has been stressed by New Institutional Economics (hereafter NIE). According to NIE, institutions work as "the rules of the game in a society", altering individual incentives and the process of economic decision-making, which, in turn, leads to the development or stagnation of markets (North, 1990). Sustained economic growth results from the creation of an efficient economic organization that protects ordinary people from both predatory rulers and the unilateral alteration of contracts (North, 1981).

[1] An adapted version of this chapter has been accepted for its publication in *Revista de Historia Económica/Journal of Iberian and Latin American Economic History*, 2020. https://www.cambridge.org/core/journals/revista-de-historia-economica-journal-of-iberian-and-latin-american-economic-history/article/how-well-were-creditors-rights-protected-in-early-modern-spain-the-case-of-the-public-mortgage-registry-in-malaga/DF17F0F84C519D3E54EC1605DFF225FA

Early modern Spain has traditionally been portrayed as the stereotype of a country that suffered economic backwardness due to its inefficient economic organization. Spain, the argument goes, was unable to create either a political framework that limited the arbitrariness of the royal powers or an effective legal system that avoided breaches of contracts (North and Thomas, 1973; North, 1981; Acemoglu *et al.*, 2005). Some authors have dismissed the notion that Spanish rulers were politically unconstrained.[2] Yet research on the capacity of the state to guarantee contractual compliance between private parties is much less developed.[3]

Certainly, some economists consider that the influence of formal contracting institutions on long-term economic growth is less important than the role played by those institutions that constrain government.[4] However, the impact of the legal system on the development of markets through the emergence of a low transaction cost environment has been widely recognized by many scholars.[5]

Public registries – land, companies and credit registries – are among the most important contracting institutions. Well-designed public registries support impersonal exchanges by reducing transaction costs and reinforcing property rights (Arruñada, 2012). As for land registries, they provide creditors with information about a debtor's collateral (*ex ante*) and accelerate the judicial process after a default (*ex post*). Recently, some economic historians have tried to measure the effects of registration systems in mortgage markets during the medieval and early modern periods. Van Zanden *et al.* (2012) and Van Bochove *et al.* (2015) show that the early registration of real estate and land transactions was crucial for the Low Countries' ability to create efficient credit

[2] Some authors consider jurisdictional fragmentation, rather than predatory rule, to be the main institutional barrier to the development of markets and the transition to modern economic growth in Spain. See Yun (1998) and Grafe (2012). For a general approach to jurisdictional fragmentation in Europe, see Elliott (1992) and Epstein (2000).

[3] On the legal and judicial changes that led to the emergence of credit markets in Castile in the transition between the medieval and early modern periods, see Carvajal (2013). On the incidence of the law on commercial practices in Castile in the seventeenth century, see Cárceles de Gea (2006). On the functioning of the Castilian judiciary between 1500 and 1700, see Kagan (1981). On the role played by the *Audiencia de la Contratación* of Seville, see Fernández Castro (2015). On the functions performed by the *Mesta*, see Drelichman (2009). On the relevance of the merchant guilds of Burgos and Bilbao, see González Arce (2010) and Lamikiz (2016), respectively. On the role of notaries, see Extremera Extremera (2009).

[4] See Acemoglu and Johnson (2005). For a critique, see Greif (2015).

[5] The implications of legal origins over financial development, contract enforcement and organizational forms have been stressed by La Porta *et al.* (1998), Spamann (2010), Musacchio and Turner (2013) and Lamoreaux (2016); the importance of contract design to solve information asymmetries by Hart (1995); the interaction of formal and informal institutions by Greif *et al.* (1994); the need to create institutions which provide useful information about contractual partners by De Soto (2000), Djankov *et al.* (2002) and Arruñada (2007 and 2012).

markets earlier than other countries such as England. In addition, they claim that the success of these institutions can only be explained by their interaction with the legal system – mainly mortgage law – the diffusion of collateral and the role of financial intermediaries.

Building on this literature, this chapter analyzes the impact of a specific public registry – the public mortgage registry – on Spanish notarial credit markets at the end of the early modern period. During this period, in the absence of modern banks, other financial actors emerged. Short-term credit was mainly provided by philanthropic institutions (*pósitos*, *montes de piedad* or *montes píos*) and merchants, whereas ecclesiastical institutions dominated the long-term credit market.[6] With respect to non-philanthropic loans, although these transactions could be agreed orally or through private documents, their notarization provided a higher level of security.[7] In Spain, from 1768, this system was reinforced through the establishment of a network of public mortgage registries around the country.[8] Private parties were theoretically obliged to register those notarial contracts that included some specific assets as collateral, thereby clarifying property rights and reducing and expediting litigation.

Although public mortgage registries have been dismissed as insufficient for their purposes – due to non-observance of the law and their poor design –, this chapter claims that this institution favored the development of Spanish credit markets.[9] To test this

[6] The first private banking network in Spain was not created until the middle of the nineteenth century (Sudrià and Blasco Martel, 2016). Two syntheses on credit markets in early modern Spain are provided by Ruíz Martín (1970) and Plaza Prieto (1976). On the role of philanthropic institutions, see Anes (1969), Gómez Díaz and Fernández-Revuelta Pérez (1998) and Carbonell-Esteller (2000). On the role of ecclesiastical institutions in credit markets, see Milhaud (2019).

[7] Notarized debt instruments had legal advantages over private debt instruments and oral agreements in both debt collection lawsuits (only one creditor) and meetings of creditors (several creditors). In debt collection lawsuits notarized contracts guaranteed automatic access to the executory process (*juicio ejecutivo*). This legal variant ensured the immediate seizure of the assets of the debtor in case of default and a faster trial than the usual procedure (*juicio ordinario*). In meetings of creditors notarized contracts had priority of payment with respect to non-notarized contracts of the same category. Detailed expositions of the executory process prior to the Spanish Liberal Revolution are provided by Alcaraz y Castro (1762, pp. 58-92) and Martínez Salazar (1789, pp. 3-136). For a complete exposition of meetings of creditors, see Febrero (1786, pp. 623-738).

[8] Some economic historians have used this source for several purposes. Congost (1988) analyzes the evolution of land property in Girona between 1768 and 1862. Fernández de Pinedo (1985), Castañeda (1991), De la Torre (1994) and Díaz López (2001) study the replacement of annuities by obligations in Biscay, Barcelona, Navarre and Almería respectively during the eighteenth and nineteenth centuries. Cebreiro Ares (2016) describes this source for Santiago de Compostela. Congost and García Orallo (2018) study the circulation of land in nineteenth-century Spain. Milhaud (2018a) analyzes the existence of a crowding-out process in Spain at the end of the eighteenth century.

[9] Most legal historians question the effectiveness of this institution. Some of them consider public mortgage registries incapable of protecting creditors' rights during this period (Roca Sastre, 1954;

hypothesis, I draw on a database of almost 2,500 short-term credit contracts (*obligaciones*) recorded by notaries in the city of Malaga before and after the creation of the public mortgage registry in 1768. By examining special mortgage and general mortgage contracts in Malaga in 1764 and 1784, I show that the creation of public mortgage registries had important consequences for the allocation of credit resources.[10] After 1768 special mortgage contracts started receiving much higher amounts than general mortgage contracts, whereas before the creation of public mortgage registries both types had received similar amounts. Furthermore, this institution could have contributed to the development of more impersonal credit markets. Before the creation of the registry, some debtors were able to obtain larger loans thanks to their status, but other debtors lacked the alternatives allowing them to arrive at similar arrangements. After the creation of the registry, debtors could partially solve this problem and obtain more capital in the absence of such a signalling mechanism.

The rest of the chapter is organized as follows. In the following section, I describe the creation of public mortgage registries in Spain, focusing on their objectives, their problems, and their fees. In section 4.3, I describe my sources. In section 4.4, I analyze the impact of public mortgage registries on Malaga's notarial credit market. Finally, section 4.5 presents the main conclusions.

4. 2 Public mortgage registries in early modern Spain

In 1768 King Charles III promulgated a law that mandated the creation of public mortgage registries (*oficios de hipotecas*) across Spain (except in Navarre).[11] This law made it compulsory to register those new notarial contracts that incorporated a

Menchén, 1974; Serna, 1995). Lacruz (2003) and Ribalta Haro (2007) also criticize them, but they recognize the difficulties involved in creating a more sophisticated institution in a period characterized by strong economic and legal limitations. Finally, authors such as Rivas Pala (1978) and Chico (1981) consider public mortgage registries a modern institution in an *Ancien Régime* economic context. A synthesis of arguments both for and against the role of the mortgage registries is available in Villalón Barragán (2008, pp. 241-243).

[10] Special mortgages were those that guaranteed the contract with a specific asset of the debtor. By contrast, general mortgages were those that guaranteed the contract with all present and future assets of the debtor, but did not specify any particular property. For a discussion of the advantages of special mortgages over general mortgages, see section 4.4.

[11] The public mortgage registry was not established in Navarre until 1817 and it required the approval of the Navarrese estates, the *cortes* (De Pablo Contreras, 1991). Some years later mortgage registries were also created in Spanish America and the Philippines. They had other names (*anotadurías de hipotecas*), as well as some differences with respect to the metropolis (Serna Vallejo, 1995, pp. 309-313).

mortgage on a specific piece of land or real estate, an office or an annuity.[12] Mortgage registries were created mainly to avoid *stellionatus*, the fraudulent selling or mortgaging of encumbered and mortgaged properties as if they were free (Porras Arboledas, 2004). The authorities wanted to create a network of local registries that gathered together all the information about mortgaged and encumbered properties. With this aim, a registry was created in each judicial district (*partido*/*corregimiento*). The registry was located in the town hall of the capital of the district, and the oldest town hall notary in the city controlled it. In addition, the high courts of justice (*chancillerías* and *audiencias*) were authorized to create new registries in other municipalities. After formalizing a contract, private parties had to go to the registry where the mortgaged property was located and show a copy of the original document. The registrar would then annotate the mortgage. In the event of a default and a judicial process, this annotation would constitute proof of the property. Furthermore, unregistered mortgages did not have legal validity.[13]

The creation and diffusion of mortgage registries in early modern Spain was not an easy process. In fact, prior to 1768, the Habsburg and Bourbon dynasties had both tried unsuccessfully to create similar institutions in the Crown of Castile, initially for annuity contracts, and later for all the contracts that included special mortgages (Table 4.1). The explanation for this failure is twofold. First, the ambiguity of these laws created many problems related to terms, sanctions, the organization of the registry, and procedures (Serna Vallejo, 1995, pp. 229-233). Second, these laws were systematically broken by the courts of justice accepting non-registered contracts as proof; by private parties hiding annuity contracts in order to avoid the payment of taxes, and also because they refused to give information about their debts;[14] by notaries who feared the loss of attributions; and especially by municipalities, as control of the registries generated constant friction when the monarchy started to privatize the offices of registrars instead

[12] Some modifications were introduced later. For instance, in 1774 it became mandatory to register pre-1768 mortgages too (NR, *Libro X*, *Título XVI*, *Ley III*, Footnote No. 3, 1805, p. 109). Furthermore, in Catalonia, since 1774, the registration of contracts with general mortgages was also compulsory (Serna Vallejo, 1995, pp. 283-286).

[13] NR, *Libro X*, *Título XVI*, *Ley III* (1805, pp. 106-109).

[14] Although there was no tax on real estate transfers in early modern Castile – in Spain a real estate transfer tax was not implemented until 1829 – annuity contracts had to pay a sales tax (*alcabala*). Regarding seigneurial rights, Castile had only an annual payment and a commission over emphyteutic property transfers (*laudemio*). In early modern France, for example, there were both several royal taxes (*insinuation*, *droit de contrôle*, *centième denier*) and multiple seigneurial rights (*lods et ventes*, *quint et requint*, *relief*, *rachant*, *ensaisinement*) over real estate transfers (Serna Vallejo, 1995, pp. 23, 47, 129, 240-241 and 292).

of retaining them in the hands of the town hall notaries, who were under the rule of the aldermen (Serna Vallejo, 1995, pp. 229-243; Fiestas Loza, 1998, pp. 31-56).

TABLE 4.1: Important events in mortgage registration legislation before 1768

Year	Event
1528	The Castilian estates (*cortes*) asked King Charles I to make the registration of new annuities compulsory in order to avoid the accumulation of annuities for a given property.
1539	After a new proposal of the Castilian *cortes* in 1538, King Charles I ordered the creation of annuity registries (*registros de censos y tributos*) in every Castilian judicial district. Nevertheless, only a few cities and villages created this institution.
1542-1598	The Castilian *cortes* submitted new requests in 1542, 1548, 1555, 1558, 1586 and 1598, but the law remained unfulfilled.
1589	King Philip II started to sell the offices of annuity registrars, until now controlled by town hall notaries. Municipalities did not provide all the information necessary to establish the price of these offices in order to hinder the impact of this measure.
1646	King Philip IV created a new institution in Castile, the private mortgage registries (*contadurías de hipotecas*), and started to sell the offices of these registrars. Private mortgage registries had to register all new contracts with special mortgages, including annuities. However, annuity registries remained active, and some cities, such as Madrid, Seville or Cádiz, had both institutions.
1713	King Philip V reorganized annuity registries. The new law ordered their establishment in each municipality, established official fees, clarified the attributions of judges, established a deadline to register old contracts, and returned control of the registries to town hall notaries. Once again, the municipalities did not comply with the law.
1745	King Philip V ordered the registration of all past contracts written in Madrid that included special mortgages in the private mortgage registry there. The aldermen of Madrid claimed that the monarchy could not give those attributions to the private mortgage registry and refused to comply. In 1746 the monarchy accepted the registration of new contracts only.
1756	The person in charge of the private mortgage registry of Madrid submitted a report in which he declared that in the last 21 years, on average, only six deeds had been recorded annually. In 1757 the Council of Castile began the work that would give rise to the public mortgage offices.

Source: NR, *Libro X, Título XVI, Leyes I-II* (1805, pp. 105-106), Serna Vallejo (1995, pp. 224-262 and 270-283), and Fiestas Loza (1998, pp. 31-56).

What, then, explains the relative success of the 1768 reform?[15] Certainly, this law was less ambiguous than its predecessors.[16] Nevertheless, I suggest that at least two other

[15] Both Spanish archives and the *Registros de la Propiedad* of Madrid and Barcelona contain books from public mortgage registries created in the last third of the eighteenth century for 43 of the 50 current Spanish provinces. This proves that – even though they were not used widely at first – a network of registries emerged rapidly across the Spanish territory. The list of archive catalogs I have consulted is provided in the section "Sources and Official Publications". Archive catalogs are available on their respective websites and on the *Censo-Guía de Archivos de España e Iberoamérica* website at http://censoarchivos.mcu.es/CensoGuia/directorioarchivosInicial.htm (consulted October 4, 2020). The information about the *Registros de la Propiedad* of Barcelona and Madrid is taken from López and Tatjer (1985) and Milhaud (2018a), respectively.

[16] Both the law of 1539 and that of 1713 to a lesser extent, failed to regulate many crucial aspects, such as procedures, terms and, above all, the organization of mortgage books. This ambiguity generated uncertainty and was used by many municipalities to avoid applying the law effectively. In order to fill

reasons were relevant. On the one hand, the monarchy finally accepted the transfer of all register attributions for annuities as well as for the rest of special mortgage contracts to a single public institution ruled by the oldest town hall notaries, and ultimately by the aldermen of the municipalities.[17] With this change, the political elites of the main cities not only gained control of the offices, but also prevented – or at least obstructed – the creation of a property tax. This made economic agents more willing to register their mortgages. On the other hand, since the middle of the eighteenth century, in a context of economic recovery (Álvarez-Nogal and Prados de la Escosura, 2013), the authorities understood that accelerating the circulation of the properties required that buyers and creditors could easily obtain information on their liens (Serna Vallejo, 1995, p. 217). Authors such as Vizcaíno Pérez, who worked as Lawyer of the Royal Councils, remarked on the legal problems caused by the huge number of properties encumbered with annuities.[18] In meetings of creditors, annuities' unpaid interest had preference of payment over other credit modalities (Vízcaino Pérez, 1766, pp. 71-74).[19] This reduced the ability of other creditors to recover their capital, which made them particularly interested in knowing the situation of their potential debtors to avoid *stellionatus*. With this aim, the monarchy introduced several reforms, including the redemption of annuities or the creation of the public mortgage registries (Peset, 1982). This need was also perceived by the municipalities, and in fact, from the middle of the eighteenth century until the 1768 law, increasing numbers of them created mortgages registries (Appendix 4.1).

Nevertheless, although the creation of public mortgage registries was crucial to strengthening the property rights of owners of both land and capital in Spain, this institution still had many problems. Some courts continued to accept non-registered special mortgages as proof (Serna Vallejo, 1995, pp. 364-365), many individuals did not register their mortgages, so the terms for doing so were extended (Serna Vallejo, 1995, p. 279), and the organization of the registry's book was still problematic (Villalón

these gaps and to ensure compliance with the law, the Council of Castile began to collect reports from municipalities and high courts of justice from 1756 (Serna Vallejo, 1995, pp. 275-280).

[17] Some private *Contadurías* were maintained, but they gradually disappeared (Serna Vallejo, 1995, p. 272).

[18] For example, according to my sample, 56.0% and 69.5% of the mortgage obligation contracts written in the city of Malaga in 1764 and 1784, respectively, included collateral encumbered with public and private annuities. See footnote No. 30.

[19] For instance, in the meeting of creditors of the merchant Andrés del Pino (1807-1808), annuity creditors were paid in full, while lenders whose capital had been loaned through other modalities suffered partial debt relief. AHPM, *protocolos notariales de Málaga capital, libro* 3639, pp. 488r-495v.

Barragán, 2008, p 242). However, probably the most important problem was that the law did not introduce any of the principles of modern mortgage law: publicity, speciality and priority (Ribalta Haro, 2007, pp. 304-342). In line with Roman legal tradition, private titling prevailed (Arruñada, 2012, p. 45), general mortgages were maintained (Ribalta Haro, 2007, pp. 304-342), and the reform did not alter the antiquity principle: except in the case of privileged mortgages, old mortgages always had priority over new ones regardless of whether they were general or special mortgages (Febrero, 1786, p. 665).[20] These problems have led many legal historians to argue that mortgage registries were clearly insufficient to guarantee the protection of property rights.[21] According to them, legal conditions did not favor the development of credit markets until the enactment of the Spanish Mortgage Law in 1861 and a later reform in 1869 (Serna Vallejo, 1995, pp. 436-524).[22]

Before measuring the effects of mortgage registries on early modern Spanish credit markets, a last legal aspect must be analyzed: the cost of registering a mortgage. Registry fees have been considered a key factor in the success or failure of public registries. If they are high, they create an entry barrier, and, consequently, the role of the registry is severely damaged (Djankov *et al.*, 2002). However, this position has been criticized by other authors such as Arruñada (2007), for whom this approach only takes into account the initial costs and compulsory formalities, while disregards *ex post* costs – such as court fees or the time needed to foreclose a mortgage – voluntary but common formalities and the quality of the information provided by the institution.

I have calculated the amount of notarial and registration fees for several mortgage contracts worth between 100 and 50,000 r.v.[23] These prices are calculated for a two-page mortgage obligation contract, the commonest mortgage credit contract in Malaga at the time (Table 4.2). Although notarial fees were high for small contracts, registry

[20] Privileged mortgages were credits with priority of payment in cases of default. Some privileged mortgages were dowry credits, fixed-assets loans or debts with the Royal Treasury, the Church or landlords (Febrero, 1786, pp. 652-716).
[21] See footnote No. 9.
[22] This law replaced mortgage registries with land registries, and register attributions were transferred from notaries to independent registrars. General mortgages were eliminated, the number of privileged mortgages fell, and it became compulsory to register all of them. Finally, the date of inscription in the registry was the date on which the deed was presented in the registry (*Ley Hipotecaria*, 1861).
[23] An unskilled urban labourer in Madrid earned 4 r.v. per day in the eighteenth century (Pinto Crespo and Madrazo Madrazo, 1995, p. 203). An unskilled rural labourer in Malaga earned between 2.5 and 3 r.v. per day at the end of the eighteenth century (Villar García, 1982, p. 152).

fees were always low, including those of small contracts.[24] I have also compared the costs of the Spanish public mortgage registries with the costs of similar institutions in England (deed registries) and in the Low Countries (real estate transaction registries) in the eighteenth century.[25] I use the number of daily wages of an unskilled urban labourer as a reference: data for England and the Low Countries are taken from Van Bochove *et al.* (2015), and I have included data on the wages of unskilled urban labourers (*peones*) in Madrid and unskilled rural labourers (*jornaleros*) in Malaga during the same period (Table 4.3).[26] This shows that the costs of registration in Spain, in terms of daily wages, were quite similar to real tariffs in Dutch municipalities – especially for reduced deeds – and were much cheaper than in England.

Two caveats must be made here, however. First, notaries might have not complied with the law, charging higher tariffs to their customers. Second, registration required additional costs that are difficult to estimate. Before accepting a property as a guarantee, the lender probably asked the notary to examine the debtor's property titles. Although the 1782 official fees fixed a fee for that work (Martínez Salazar, 1789, p.285), it is possible that some lenders demanded additional work from the notaries, especially in the earlier stages of the registries, in return for higher and non-regulated payments.

TABLE 4.2: Legal costs and taxes associated with a two-page mortgage obligation contract

Amount of the contract (*reales de vellón*)	**Absolute costs (*maravedís*)**	**Relative costs (%)**	**Relative costs: notary's fees (%)**	**Relative costs: registry's fees (%)**	**Relative costs: revenue stamp (%)**
100	1,392	40.94	36.00	2.00	2.94
500	1,392	8.19	7.20	0.40	0.59
1,000	1,392	4.09	3.60	0.20	0.29
5,000	1,624	0.95	0.72	0.04	0.19
10,000	1,624	0.48	0.36	0.02	0.10
50,000	2,440	0.14	0.07	0.01	0.06

Source: Febrero, vol. 3 (1783, p. 410), Martínez Salazar (1789, p. 285), NR, *Libro X*, *Título XVI*, *Ley III*, and *Título XXIV*, *Ley X* (1805, pp. 108 and 158), and Moranchel Pocaterra (2012, p. 737).

[24] I have calculated registry fees by estimating one page per operation because the registration of the mortgage rarely occupied more space.
[25] For a detailed analysis of the English case, see Nogueroles Peiró (2007) and Van Bochove *et al.* (2015). For a detailed analysis of the Dutch case, see Van Bochove *et al.* (2015).
[26] I have not found out the wages for unskilled urban labourers in Malaga during this period.

TABLE 4.3: Registration fees in different European municipalities in the eighteenth century. Equivalent value: number of days' wages of an unskilled worker

Number of words	Holland (Amstelveen in 1700)	Holland (De Zijpe in 1717)	England (West Riding of Yorkshire in 1703)	Spain (Madrid in 1700s)*	Spain (Malaga in 1784)*
200	1.3	0.7-1	1	0.64	0.94
500	1.3	0.7-1	2.5	0.64	0.94
1,000	1.3	0.7-1	5	0.79	1.15
2,500	1.3	0.7-1	12.5	1.23	1.79
5,000	1.3	0.7-1	25	1.97	2.86

*Note: the Spanish registries did not use the number of words to establish fees, but the number of pages. As each page included approximately 500 words, I have used this as a reference.
Source: for Spanish municipalities, author's elaboration based on NR, *Libro X*, *Título XVI*, *Ley III* (1805, p. 108), Villar García (1982, p. 152), Pinto Crespo and Madrazo Madrazo (1995, p. 203), and Moranchel Pocaterra (2012, p. 737); for Dutch and English municipalities, see Van Bochove *et al.* (2015, pp. 16 and 26, respectively).

4. 3 Analysis of the database

To check whether or not the 1768 reform improved the quality of the legal framework, it is necessary to measure its impact on the credit market. With this aim, I have taken notarial credit data from the city of Malaga. In early modern Spain, as in other contemporary countries, notaries had important functions. They drew up contracts and other legal documents that could be enforced by courts, provided legal advice and recognized documents. They developed an important role in credit markets, certifying loan contracts.[27] In some countries, such as France, notaries even worked as financial intermediaries, providing information to help their clients mitigate the effects of information asymmetries (Hoffman *et al.*, 2000). Although the number of notarized loans was probably lower than those that were agreed in the informal market, the notary's participation was essential for larger contracts and transactions with foreigners and non-relatives (Dermineur, 2019).[28]

[27] See Hoffman *et al.* (2000 and 2019) and Dermineur (2018 and 2019) for France; Sola (2000), Peña-Mir (2016) and Carvajal (2018) for Spain; De Luca (2013) and Lorenzini (2015) for Italy; Costa *et al.* (2014a) for Portugal; Levy (2012) for Mexico; Zegarra (2017a, and 2017b) for Peru; and Wasserman (2018) for Argentina. In the Low Countries, although notaries were not so relevant, they nonetheless had an important role too. See Gelderblom *et al*. (2018).
[28] Here, I understand as informal market or informal credit those transactions that were non-certified by legal agents, such as notaries (Dermineur, 2019). Nevertheless, this is not the only definition of this concept. For example, Coffman *et al.* (2018, p. 2) considered that "informal credit refers to transactions

My selection of the city of Malaga as an example is mainly explained by the important role that credit played in its economy. At the end of the eighteenth century the city and its surrounding area were among the main Spanish producers of several agricultural commodities, such as wine, raisins, almonds, figs, lemons and oranges. Most of this production was later exported to the markets of northern Europe and Spanish America (Fisher, 1981; Nadal 2003, p. 34; García Fernández, 2006). Commercial dynamism favored an increase in population and the accumulation of capital in the city, helping to make Malaga one of the first industrialized areas of Spain during the nineteenth century (Morilla, 1978).[29] This agro-export pattern was sustained by the city's trading houses and merchants who bought the commodities produced by the farmers and financed them periodically, receiving agricultural commodities in return. As a consequence of this situation, the city's notaries drew up a huge number of agricultural credit contracts (Peña-Mir, 2016). The primacy of small properties in this area may also have determined the relevance of credit transactions (Bernal, 1981, p.283; Gámez Amián, 1995, p. 152). On the one hand, the small size of the plots made it difficult for the owners to accumulate capital or to exploit economies of scale, so they needed periodic loans in order to survive. On the other hand, as many farmers had land that could be offered as collateral, creditors had a greater incentive to lend them money.

I use notarial records for the years 1764 and 1784, that is, before and after the creation of public mortgage registries in 1768. These were years of peace and economic recovery after the Spanish participation in the Seven Years' War (1762-1763) and the American Revolutionary War (1779-1783), respectively. Furthermore, both conlicts pitted Spain against England, the main destination of exports from Malaga. I have recorded two similar samples of obligation contracts (*obligaciones*) signed in Malaga in 1764 (1,307 contracts) and 1784 (1,181 contracts).[30]

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that are not intermediated by operators specialized in matching demand and supply, namely professionals whose specialization was other than this, like for instance notaries, scriveners, merchants and even religious institutions". Following this definition, notarial credit would not be formal, but informal.

[29] According to the Census of Floridablanca, conducted between 1785 and 1789, Malaga had 51,098 inhabitants and was the seventh most populated Spanish city. Malaga population data are available on the IECA website at https://www.juntadeandalucia.es/institutodeestadisticaycartografia/ehpa/ehpaTablas.htm (consulted October 4, 2020).

[30] The 1784 sample includes all notarial records written by 22 of the 24 notaries who worked in the city that year, discarding only those books that were almost destroyed. The 1764 sample includes all notarial records written by 15 of the 24 notaries. I used the information from the 1784 sample to select these 15 notaries, choosing those with both high and low credit-recording activity. AHPM, *protocolos notariales de Málaga capital*. For 1764, see l*ibros* 2472, 2492, 2626, 2709, 2773, 2854, 2872, 2895, 2908, 2950,

Obligations were contracts that "recorded a generic agreement in which a person recognized the mandatory nature of paying a debt or carrying out a future work" (Carvajal, 2018, pp. 216-217). They were used mainly as short-term loans: 82.5% of obligation contracts drawn up in Malaga in 1784 had a duration of one year or less, the average lifetime being 10.3 months. Here, they were used mostly to finance agricultural activities, but they also served other purposes such as the recognition of debts, credit sales, and payment of urgent expenses.[31]

Two main reasons explain the selection of obligations – short-term credit – instead of annuities (*censos consignativos* and *censos reservativos*) – long-term credit.[32] First and foremost, in Castile annuities were always supported by special mortgages, whereas obligations were not always supported by specific assets. As I want to measure the impact of special mortgages on credit conditions before and after the 1768 reform, I need to compare general mortgage and special mortgage contracts of the same kind. Second, the number of obligation contracts is much higher. For example, obligations constituted 22.8% of the notarial deeds written in Malaga in 1784, whereas annuities accounted for only 1.4% (Table 4.4). This is not a particularity of Malaga: from the mid-eighteenth century obligations replaced annuities as the main credit contract in many areas of Spain including Murcia (Pérez Picazo, 1987), León (Rubio, 1989), Alicante (Cuevas, 1999), Madrid (Sola, 2000) or Almería (Díaz López, 2001), and the same process also occurred in other countries, such as France (Hoffman *et al.*, 2019, pp. 62-66). Of course, even in these areas obligations would only appear more frequent in terms of flow. Because annuities had much longer lifetimes and the loaned amounts were usually larger, they were superior in terms of stock until well into the nineteenth century (Milhaud, 2018a, pp. 20-23).[33]

2953, 2997, 3009, 3032 and 3081. For 1784, see *libros* 2859, 2914, 3006, 3027, 3047, 3049, 3050, 3136, 3150, 3160, 3167, 3174, 3195, 3236, 3256, 3269, 3306, 3323, 3331, 3338, 3356, 3365, 3383, 3390 and 3392.

[31] 51.1% of obligations contracts drawn up by notaries of Malaga in 1784 and 30.4% of the total amount were used to finance agricultural activities.

[32] The other credit modalities drawn up by notaries in Malaga in 1784 were insignificant: debt transfers (9), protests (2) and repurchases (1).

[33] Several reasons have been put forward to explain this: the reduction of the cap on annuities' interest from 5 to 3% in the Crown of Castile in 1705 and in the Crown of Aragon in 1750 (Peset, 1982; Fernández de Pinedo, 1985); the incompability of annuities in the new capitalist context (Fernández de Pinedo, 1985); recurrent defaults of municipal debts financed via annuities in the first half of eighteenth century (Andrés Robres, 1987); the strike against tithes, land rents and perpetual mortgages rents during the crises of the *Ancien Régime* (Robledo, 1991; Tello, 1994); and the crowding-out effects generated by the war period initiated in 1779 (Milhaud, 2018a). Of course, there were other areas where annuities

Ideally, I would like to verify whether special mortgage contracts were effectively registered. However, the mortgage registry books for the judicial district of Malaga were destroyed during the Spanish Civil War (1936-1939) (Cabrillana, 1984, p. 84). Nonetheless there is evidence that a public mortgage registry was indeed created. On December 2, 1774, Lorenzo Ramírez, the oldest town hall notary in the city, paid a bail bond to rule the registry in the city. He mortgaged his office, valued at 16,500 r.v. and three houses valued at 30,500 r.v. This is a very large amount, taking into account the fact that the Council of Castile had only requested the mortgage of the office and additional assets valued at 11,000 r.v. (AHMM, *caja* 343: *expediente* 2). There is also evidence that the information in the registry was used by tribunals to solve litigation. For example, in 1784, in a court case between Manuel Gordon and Alonso García, Gregorio Martínez de la Ribera, the oldest town hall notary and the person responsible for the mortgage registry, was summoned to provide evidence about the property García had included as a special mortgage in the contract that the two parties had signed one year earlier (AHPM, *libro* 3136, pp. 214r-217v). Finally, in 1784, all those contracts that incorporated a mortgage on lands, real estate, offices or annuities included a clause that forced the contracting parties to go to the registry and register the mortgage.

TABLE 4.4: Notarial records drawn up by notaries of Malaga in 1784

Categories	**Number**	**%**
Annuities	74	1.4
Annuity redemptions	27	0.5
Apprenticeship contracts	34	0.6
Bail bonds	248	4.8
Debt and land transfers	24	0.5
Dowries	50	1.0
Leases	798	15.4
Obligations (credit)	1,181	22.8
Obligations (others)*	184	3.5
Payments	375	7.2
Powers of attorney	1,438	27.8
Sales	202	3.9
Wills	180	3.5
Other	372	7.2
Total	**5,187**	**100.0**

*Note: this category includes marriage and alimony obligations, concession and tax-farming contracts, recognitions of tax and ecclesiastical debts and smugglers' pardons.
Source: see footnote No. 30.

maintained an important role during the second half of the eighteenth century and even the first half of the nineteenth century (Tello, 2007).

4. 4 Impact of public mortgage registries on notarial credit markets

In order to evaluate the effects of public mortgage registries on Malaga's notarial credit market, I compare obligation contracts that secured the capital with all present and future assets of the debtor (general mortgages) and contracts that added specific property as collateral (special mortgages) in 1764 and 1784. Before 1768 neither general nor special mortgage contracts written in the city of Malaga were recorded in a mortgage registry.[34] As a result of the 1768 law, a public mortgage registry was created in the city, and it became compulsory to register contracts with special mortgages on certain assets (lands, real state, offices and annuities). If the registry enhanced the legal protection of creditors' property rights, I should observe improved conditions for debtors in special mortgage contracts after the creation of the registry but not earlier. In other words, contracts with special mortgages should have similar conditions to contracts with general mortgages in 1764, but they should have significantly better conditions in 1784.

To assess whether public mortgage registries had an impact on contracts, I estimate the following model, using ordinary least squares (OLS):

$$CAPITAL_i = \alpha + \beta_1 Year_i + \beta_2 Mortgage_i + \beta_3 Year_i \; x \; Mortgage_i + \beta_4 Status_i + \epsilon_i$$

$CAPITAL_i$ denotes the size of the contract in r.v. I have removed contracts that did not mention any amount and I have adjusted contracts written in 1784 for the inflation accumulated since 1764.[35] Why is the size of the contract chosen as the dependent variable instead of using the interest rate? It has certainly been suggested that interest rates in capital markets are the best measure to evaluate the efficiency of the institutional framework (North, 1990, p. 69).[36] However, variations in interest rates were insignificant in credit markets characterized by a high degree of information

[34] There is no evidence of any registry in Malaga before 1768. Furthermore, none of the special mortgage contracts written in 1764 included a clause making their registration compulsory.
[35] I used data on prices for Andalusia, the Spanish region to which Malaga belongs, estimated by Hamilton (1947, p. 155).
[36] For an application of this model, see Reis (2010).

asymmetries, for example, urban credit markets during the Middle Ages and in the early modern period. As price measurement was costly, lenders would not change interest rates but would discriminate among potential borrowers using other variables instead, such as the quality of the collateral or the reputation of the borrower (Hoffman *et al.*, 2000, p. 300; Van Zanden *et al.*, 2012, p. 19). This point is crucial for early modern Spain, where obligation contracts rarely included interest rates.[37] Most contracts stated that the amount was being provided "at the mercy of the lender". As has been suggested, lenders may have included the interest in the amount supposedly given by the creditor to avoid the usury laws (Tello, 1994, p. 14; Zegarra, 2017b, p. 81).[38] For this reason, I estimate the impact of special mortgages by looking at changes in loaned amounts.

$\boldsymbol{Year_i}$ is a dummy variable that takes value 1 if the contract is from 1784, and equals zero otherwise, to account for temporal trends. $\boldsymbol{Mortgage_i}$ is a dummy variable that takes value 1 if the contract includes a special mortgage and equals zero otherwise. Contracts rarely mentioned the value of the mortgaged assets – which does not mean that lenders had no knowledge of it – so the effect of special mortgages on capital is measured in accordance with whether or not this guarantee was present. I have removed contracts that included non-registrable collateral according to the 1768 law (cattle, harvest, tools, devices, boats and cargoes). Thus, the regression includes only general mortgage contracts and registrable special mortgage contracts. It should be noted, however, that general mortgage and special mortgage clauses were complementary: contracts could include both clauses, only one, or neither of them. In early modern Spain it became increasingly common for all notarized contracts to include general mortgages, so negotiations revolved around the inclusion of an additional special mortgage over a specific property (Serna Vallejo, 1995, p. 167).[39] The main advantage of special mortgages was that they linked contracts to specific assets. This link was maintained until repayment. Thus, a debtor could sell the properties used as special

[37] Only 0.8% of the obligation contracts written in 1784 included the interest rate.
[38] Official laws established interest rate ceilings for credit contracts. For example, at the end of the eighteenth century the legal maximum interest rate was 3% for annuities and 6% for obligations. These laws are included in the *Libro X* of the NR (1805): *Título XV*, *Leyes VIII-IX* (for annuities); and *Título VIII*, *Ley V*; *Título XI*, *Leyes XII-XIII*; *Título XIII*, *Leyes XIV*, *XVII-XVIII* and *XXI* (for obligations). This regulation did not apply to all credit modalities: in sea loans, for example, contracting parties could set interest rates freely (Bustos Rodríguez, 2005, pp. 425-427).
[39] In meetings of creditors, mortgage contracts had preference of payment over non-mortgage contracts, so notaries included general mortgages as prevention clauses (Febrero, 1786, pp. 652-716).

mortgages, but, in case of default, the creditor had stronger rights over those properties than the new owner. In contrast, if the contract was supported with a general mortgage only, the properties of the debtor could be sold without that lien and the creditor did not have any rights over them (Sigüenza, 1767, pp. 40-41; *Diario de México*, 1808, pp. 126-127 and 133-136). All the contracts in my database included a general mortgage, but just over half of them added a special mortgage. The percentage of contracts supported by special mortgages differs widely in these two years: 84.1% in 1764 and 23.9% in 1784. In 1764 the majority of contracts included this clause, while in 1784 its presence appears to be correlated with the amount loaned: the larger the capital, the higher the chance of a contract including a special mortgage (Table 4.5).

TABLE 4.5: Percentage of contracts and amounts supported with special mortgages in 1764 and 1784

	1764		**1784**	
Range (*reales de vellón*)	**Contracts (%)**	**Amounts (%)**	**Contracts (%)**	**Amounts (%)**
Up to 500	76.5	77.6	5.9	7.3
500-999	86.1	85.5	12.2	12.3
1,000-4,999	88.7	89.2	27.9	29.8
5,000-9,999	86.1	86.7	36.2	37.4
10,000-49,999	82.1	84.9	58.2	59.4
50,000-99,999*	50.0	51.3	100.0	100.0
Over 100,000**	-	-	0.0	0.0
Unspecified	26.0	-	30.2	-
Total	**84.1**	**85.3**	**23.9**	**39.3**

*Note: this range only includes two contracts in 1764 and three contracts in 1784.
**Note: this range does not include any contract in 1764 and only two contracts in 1784.
Source: see footnote No. 30.

$\boldsymbol{Year_i \; x \; Mortgage_i}$ is an interaction variable that appears only when the year is 1784 and a special mortgage is included, in order to measure the incidence of special mortgages in the presence of a public mortgage registry. If my hypothesis is correct, neither the year nor the inclusion of a special mortgage should be significant by themselves. It is only their interaction that should be statistically significant, as it is only after the creation of a public mortgage registry that special mortgages should have an effect on amounts loaned.

$\boldsymbol{Status_i}$ is a dummy variable that takes value 1 if the contract includes the status of the debtor and equals zero otherwise. As noted above, Hoffman *et al.* (2000) and Van

Zanden *et al.* (2012) consider reputation to be – along with collateral – the main variable used by lenders to discriminate between potential debtors. The reputation of debtors cannot be established from contracts directly, but its impact can be approached by looking at whether the status of the borrower was mentioned or not. Only 5.2% of the contracts in my database included such a mention.[40] This could be motivated by the need of some groups, such as the military or the Church, to confirm or renounce their corporate privileges. Alternatively, debtors might have wanted to emphasize their material capacity to repay the loan, in which case mentioning their status could serve as a signalling mechanism. The majority of debtors who mentioned their status were of high or medium social rank and had regular rents from lands, real estate, annuities or tithes (priests, ecclesiastical institutions and aldermen), high public salaries (army and royal officers) or large trading profits (merchants and trading houses). Additionally, many of them belonged to organizations and corporations that could support them in case of default (the army, guilds, professional associations, etc). Having the means to repay a loan is obviously not the same as having the intention to do so, but there was an indisputable element of prestige in both cases. Therefore, I expect status to have a significant effect on the amount of the contract. Finally, epsilon is the error term.

Table 4.6 shows the main results. As I expected, the year variable and the special mortgage variable are not significant by themselves. However, the interaction term that combines both variables has a significant impact on the size of capital. This suggests that the mere introduction of a special mortgage did not have noticeable effects over loaned amounts. It was only when the effectiveness of this clause became guaranteed by a well-performing registry that debtors received larger amounts. Thus, special mortgage contracts drawn up after the creation of the public mortgage registries received, on average, around 3,000 r.v. more than general mortgage contracts (drawn up in 1764 or 1784) and special mortgage contracts drawn up before 1768. In fact, in 1784, contracts with special mortgages on registrable assets were more than twice the size of contracts with a general mortgage only.[41] In 1764, in contrast, there were no significant

[40] The next statuses are quoted: military (30), clergy (24), craftsmen (23), shipmasters (18), aldermen (7), attorneys (4), merchants (4), carters (3), farmers (3), municipal officers (3), notaries (3), royal officers (3), trading houses (2), grocers (1), managers (1), mayors (1) and nobles (1).

[41] Similar results are obtained in the analysis of agricultural obligation contracts notarized in Malaga between 1779 and 1794 (Peña-Mir, 2016, p. 136). Contracts supported with a general mortgage only – 87.9% of the sample – received an average amount of 1,685 r.v. and contracts supported with a special mortgage – 12.1% of the sample – received an average amount of 4,012 r.v.

differences in the amounts loaned through different type of contract (see Appendix 4.2). This is consistent with the hypothesis that the reform of 1768 had a positive impact on the allocation of credit resources.

TABLE 4.6: OLS regression results: impact of the mortgage regime and the status of the borrower on the capital

Dependent variable:	**Capital**
Year	151.4 (0.28)
Mortgage	124.7 (0.30)
Year x Mortgage	3,090.6*** (4.16)
Status	6,321.5* (1.88)
Constant	1,675.6*** (3.83)
R^2	0.03
N	2,250

t-statistics in parentheses
Significance levels: * p<0.1, ** p<0.05, *** p<0.01
Source: see footnote No. 30.

Before 1768 the absence of public mortgage registries made it difficult to determine whether the collateral had already been mortgaged or not. Consequently, although creditors demanded the introduction of this clause as a preventive mechanism, it had no impact on loaned amounts. After 1768 new special mortgages began to be registered and trust in their effectiveness increased. This new institution helped clarify the seniority of lenders, improving the functioning of the market. The creation of a public mortgage registry did not increase the number of contracts with special mortgages in the short term, but rather the opposite, as evidenced by the fact that they decreased from 84.1% of all contracts in 1764 to 23.9% in 1784.[42] However, public mortgage registries ensured a better use of special mortgages. Debtors who wanted large amounts were required to include them, whereas general mortgages were enough for those who borrowed smaller amounts. Probably one of the main consequences of the creation of

[42] Data for the city of Alcoi support this hypothesis. There, the creation of the registry did not lead to an immediate proliferation of special mortgage contracts. In the 1770s, immediately after the creation of the public mortgage registry, only 7.01% of the credit contracts included special mortgages. By the 1780s, this share had increased to 29.41% and in the 1810s almost half of all contracts included them (45.30%). After two decades of stagnation, the share of contracts that included special mortgages rose to 59.78 in 1840s and, finally, to 96.25% in the 1880s (Cuevas, 1999, p. 197).

the public mortgage registry in the short term was a major segmentation of the notarial credit market. A huge number of debtors would become indebted through several small and medium-value general mortgage contracts. A small percentage would continue using special mortgage contracts, but in smaller numbers and for larger amounts.[43] These results suggest that, contrary to traditional historiography, public mortgage registries helped to improve the protection of property rights in early modern Spain.[44]

Finally, the status dummy has a large positive effect on the capital of the contract. Contracts that mentioned the status of the borrower were 6,300 r.v. larger than those that did not. Since this variable includes both 1764 and 1784 contracts, it shows that high and medium ranked members of the community could rely on their status to obtain larger amounts during the entire period.[45] This emphasizes the importance that these types of mechanisms played in the absence of more sophisticated institutions, such as registries. It also suggests that the creation of the public mortgage registry helped to encourage more impersonal financial transactions. Once the debtors were able to strengthen their position as property owners, they could sustain their credit relationships on the basis of the quality of their collateral, becoming less dependent on their status. This would be especially helpful for low-status debtors. In this regard, registries were surely not enough to create a purely impersonal credit market, but they were probably a step forward in this direction. Notwithstanding the above, the number of observations is low and the statistical effect is not highly significant, so further research is needed to confirm this hypothesis.

[43] The decrease in the number of obligation contracts with special mortgages cannot be explained by an increase in the notarial fees paid for them. According to the official fees laid down in 1722, in 1764 the fee for an obligation contract with a special mortgage was 30 r.v. and 12 r.v. without it (*Los Códigos Españoles Concordados y Anotados*, *Tomo XII*, *Libro II*, *Título VIII*, *Auto XIV*, 1851, p. 53). According to the official fees laid down in 1782, in 1784 each "sheet of paper" in an obligation contract with a special mortgage generated a fee of 30 r.v., while that for an obligation contract without a special mortgage was also 30 r.v. (Martínez Salazar, 1789, p. 285). Of course, as noted above, it is possible that, after the creation of the registry, notaries started to demand higher fees for recognizing property titles. The quality of their services would be higher but too expensive for small-value contracts.

[44] It could be alleged that the subscription of larger contracts in 1784 is explained by the incidence of the so-called "decree of free trade" of 1778, which authorized several Spanish ports (like Malaga) to trade directly with American domains. Certainly, this legislation had dynamic effects on the city's exports. Even so, it should be noted that this reform mostly benefited wine exports (Fisher, 1981, p. 38; Gámez Amián, 1994, p. 67), a commodity whose commercialization through notarized obligation contracts seems to have been minor (see chapter 2).

[45] The same effect is present for those contracts that were supported by non-registrable assets (excluded of the OLS model): non-status contracts received, on average, 1,737 r.v., whereas those that included it received 14,912 r.v.

4. 5 Conclusions

This chapter has examined the degree of protection given to creditors' rights in Spanish notarial credit markets at the end of the early modern period. I have focused on the role played by public mortgage registries in order to explore the extent to which formal institutions fostered a high level of contractual compliance in these markets. The creation of mortgage registries was a long and contested process that began in the sixteenth century and was characterized by constant breaches of the law and clashes between the monarchy and the municipalities over their control. Ultimately, in 1768 a network of accessible public registries was created in many Spanish areas. This change was favored by better organization of the registries, greater awareness of their importance, and the fact that the monarchy renounced its control of the institution. Although these registries experienced many problems until they were replaced by public land registries in the second half of the nineteenth century, their creation in the late eighteenth century improved the allocation of credit resources.

To test this hypothesis, I have relied on a sample of almost 2,500 obligation contracts drawn up in the city of Malaga, before and after the creation of these registries. My analysis shows that, before the creation of public mortgage registries, contracts that included special mortgages on lands, real estate, offices and annuities received the same amounts as contracts that only included general mortgages –whose guarantees were theoretically weaker. After the creation of the public mortgage registries, however, contracts with special mortgages on those assets received more than twice as much as those that only included a general mortgage. Once special mortgages began to be registered regularly, they started to have real effects on credit conditions. Although initially the creation of a public mortgage registry did not increase the number of contracts with special mortgages, from that moment this clause helped debtors to obtain larger loans.

The results also suggest that public mortgage registries could have helped to create more impersonal markets. Debtors whose status was included in the contract – usually individuals of high and medium social rank who enjoyed regular incomes and/or who belonged to large organizations – received higher amounts than non-status debtors both before and after the creation of the mortgage registry. For these individuals the creation of the registry was not so important because their social position helped them mitigate

the reluctance of creditors to give them larger loans. For other debtors, however, other institutional arrangements were required, and the creation of the registry could have been one of them. Nevertheless, since the sample of observations that mention the status is small and the statistical effect is not highly significant, further research is needed in order to confirm or discard this hypothesis.

As my results refer to a single city, they must be interpreted with caution. This is especially relevant in a context of jurisdictional fragmentation characterized by a high degree of political autonomy on the part of the municipalities. Thus, the introduction and impact of public mortgage registries could have been conditioned by the economic needs of each judicial district, as well as by the degree of support for them among the elites, the notaries and the judges.

Chapter 5

Concluding remarks

The creation and the development of markets both require the parallel implementation of institutional arrangements that provide certainty to economic agents regarding the enforcement of the contracts in which they are involved. One of the main functions of the states therefore is the creation of a set of formal mechanisms that reduce transaction costs and encourage impersonal exchange. Based on this statement, this thesis has attempted to contribute to the analysis of contract enforcement institutions in early modern Spain. Specifically, I have assessed the effectiveness of the formal institutions linked to the notarial credit market in ensuring the creation of a framework favorable to the development of financial relationships. For this purpose, I have focused on the analysis of the short-term notarial credit market in the second half of the eighteenth century in the city of Malaga, a place in which the periodic credit flows were essential for the maintenance of a dynamic agro-export base on which the prosperity of one's own city and the generation of an important source of tax revenue for the monarchy both depended. The analysis has shown how, even with some deficiencies, the notarial credit market contributed to the protection of creditors' rights and the consolidation of the productive specialization of the city and its surrounding areas.

Chapter 2 has emphasized the legal advantages of notarized credit contracts in the Crown of Castile and has identified those segments that benefited most from them. Despite historiographical criticism of Castilian notary regulation, these agents were widely employed in the city of Malaga to record credit contracts, to the point of surpassing the levels of activity identified for their counterparts in other parts of Europe. This did not mean that the notarial credit market was hegemonic there, since there were other alternatives whose use was much more extended, such as the loans channelled by philanthropic institutions or the contracts between private parties that were not notarized. Even so, notarial credit was a major option in riskier transactions: contracts

for large sums, deals not sustained by personal relationships and activities not subject to a regime of corporation. The preference for the notarized form in these operations was explained by the additional security it provided, ensuring faster trials in debt collection lawsuits and priority of payment in meetings of creditors. In addition, notarized contracts were highly versatile when faced specific risks, disposing of a menu of additional clauses to deal with them (executor, special mortgage, joint liability and guarantor).

Chapter 3 has assessed the degree of flexibility this market had to incorporate legal adaptations that improved the allocation of credit resources. One of the key elements in the development of financial markets is the possibility of introducing modifications that nuance the rigidities created by the original legislation. At least theoretically, however, this possibility was severely limited in early modern Castile, where the judges were subjected to tight control by the monarchy, and the states were rarely called. Derived from this, some laws that introduced important distortions to the proper functioning of the notarial credit market remained unaltered until the triumph of the liberal revolution in the nineteenth century. However, the study of both contemporary legal handbooks and notarized documents from Malaga shows that some of these laws could be adapted even in the absence of statutory law changes. This is what happened with the executor clause, the bail bond of Toledo law and the census of population of the Kingdom of Granada. Far from scrupulously complying with the legislation established in relation to these three institutions, the courts – both those of first instance and the appeal courts – had considerable leeway in organizing contractual practice to meet the demands of economic agents.

Finally, chapter 4 has analyzed the impact on the notarial credit market of the public mortgage registry. This institution, introduced in 1768, pretended to encourage impersonal exchanges by ensuring the registration of properties used as collateral. This would help potential creditors assess the real strength of the guarantees, and, at the same time, would favor faster trials in the event of a default. After almost two centuries and a half of unsuccessful attempts to create a network of registries that gathered, – at least partially –, information on property liens in the Crown of Castile, the monarchy achieved its constitution for the whole Spain – apart from Navarre. However, the contribution of this institution to the growing sophistication of credit markets has been questioned by legal historians given its organizational problems, breaches of the law

and the fact that the legislation did not introduce the principles of modern mortgage law. Nevertheless, by comparing data from 1764 and 1784 – that is, before and after the creation of the registries – it appears that the mortgage credit market functioned better in the latter year. Thus, before the creation of the registry, a high proportion of the obligation contracts recorded by the notaries of the city of Malaga included special mortgages on specific assets. On average, however, the amounts received were no higher than those others that did not incorporate any specific property as collateral. In 1784 the situation was the opposite, the percentage of contracts supported by special mortgages being much lower, but receiving on average much larger amounts. Hence, the creation of the registry allowed mortgages to be used more efficiently by reinforcing their effectiveness and guaranteeing better protection of creditors' rights.

While these contributions are limited to the case of Malaga, they urge to question the simplistic notion about the inability of the Spanish monarchy to create institutions that enhanced the emergence of markets. Even if the state, given its political economy, was not able to introduce some of the contracting innovations and organizational forms that were present in northern Europe, it designed a legal framework that provided a reasonable degree of security for private property rights.

Of course, there are still many questions that remain open and that need to be addressed further in future research. First, a broader analysis at both the temporal and spatial levels is required. Regarding the former, identification of those notaries who were most heavily involved in credit-recording activity for 1784 – and to a lesser extent for 1764 – will be helpful in alaborating future research collecting data for other years corresponding to the second half of the eighteenth century. However, I suggest that is even more relevant to extend the analysis to more distant periods in order to uncover both differences and similarities in this market under varied institutional frameworks. For example, did *Morisco* rural communities make great use of notarized agricultural credit contracts before their expulsion in 1571? Or, on the contrary, did this market occupy a marginal position until new Christian settlers replaced them? Along the same lines, it would be interesting to know how financial needs were covered during the Muslim period: what kinds of mechanisms enabled Genoese merchants to ensure the supply of agricultural commodities? Of course, analyzing samples from earlier years will also be also helpful in identifying the moment at which the three legal adaptations studied in chapter 3 were introduced. Finally, we also need to understand how the

institutional and organizational changes introduced in the nineteenth century affected this market: did the liberal reforms that removed barriers to the allocation of resources and clarified the legal framework encourage the wider use of these contracts? How did the creation of the Bank of Malaga in 1856 affect the city's notarial credit market?

Equally, a deeper study of notarial credit markets in early modern Spain necessarily requires comparison with other municipalities. Certainly, a number of studies of this market exist for other Spanish areas – many of which have been quoted in this thesis –, but no work including a sample of contracts recorded in several cities during the same years has yet been produced.[1] Any such study should include data not only for other Castilian localities, but also for Navarrese and – especially – Aragonese municipalities, in order to determine whether the regulation of notaries in these areas was more encouraging for the emergence and expansion of these credit markets than in Castile. This work would also allow us to determine, for example, to what extent legal adaptations – those analyzed in this thesis, but also others – were common in other territories, or whether the dynamic effects introduced by the public mortgage registries I have identified for Malaga are also extendable to other areas.

Second, I also consider it necessary to carry out a more detailed analysis of the corporations to explore to what extent these organizations created "intracommunity" financial mechanisms that ensured their independence from other corporations. Thus, for the specific case of the city of Malaga, the links between the wine producers (*Hermandad de Cosecheros de Viñas*) and the *Montepío de Cosecheros* seems to indicate that this latter institution was mainly created to guarantee access to cheap credit for the former, thus reducing their dependence on merchants and trading houses. This interpretation is supported by data corresponding to the agricultural loans notarized in 1784. In that year, Andrés del Pino and Manuel Orozco, the two creditors who subscribed the largest number of contracts – most of which would be paid in raisins –, concentrated their activities as lenders on citizens from different towns. This, coupled with the fact that during the 1780s they received credit from the same trading houses of the *Alto Comercio Marítimo* (Table 1.4), suggests that mercantile groups could have

[1] In this regard, see Gelderblom *et al.* (2018), in which these authors use data corresponding to six cities of the Low countries: Amsterdam, Antwerp, Den Bosch, Ghent, Leiden and Utrecht; also Lorenzini (2018), who compares the notarial credit market in the Italian municipalities of Trento and Rovereto; and Hoffman *et al.* (2019), who present data for 99 French localities.

adopted collusive practices for ensuring the supply of agricultural commodities in the best possible condition.

To conclude, future research should focus on one aspect that has been left out of the present research: the role of Spanish notaries as financial intermediaries. This function has not only been detected for French notaries (Hoffman *et al.*, 2000 and 2019), but also for their counterparts from other areas.[2] A superficial analysis of my own data suggests that this role could have been existed, since creditors seem to have had high loyalty rates to their notaries. In other words, a high percentage of their credit contracts passed through the hands of a single notary. Even so, I suggest that, in order to be able to confirm or disprove this hypothesis, further research based on network analysis is needed.

[2] See Levy (2012) for Mexico; De Luca (2013) and Lorenzini (2015 and 2018) for Italy; and Zegarra (2018) for Peru.

Appendices

APPENDIX 2.1: Notaries of the number and their witnesses in obligations (credit) written in 1784

Notary of the number (office number)	N of obligation contracts	N of witnesses	N of witnesses who appears in at least 25.0% of the contracts	Witness and number of contracts	Observations
Ambrosio Cuartero y Llanos (Office number 5)	82	12	4	José Tomás Martínez (75)	Last name of a notary
				Miguel José Morales (75)	-
				Lorenzo de Queiro (44)	Attorney
				Juan Ruíz de la Herrán (35)	Attorney, future notary (office number 22) and last name of a notary
Antonio del Castillo Quevedo (Office number 1)	73	16	4	Pedro Fernández de la Rosa (72)	Last name of a notary
				José Somoza (38)	-
				Francisco José Negro (29)	Attorney
				Felipe Jiménez Cobos (28)	Royal notary and last name of a notary
Blas de Mesa (Office number 11)	118	14	4	Salvador Coso y Estrada (115)	-
				José Buzo y Silva (104)	Attorney
				Andrés Suárez y Navas (68)	-
				José Ruíz Cobos (58)	Attorney
Francisco de León Uncibay (Office number 17)	77	17	4	Manuel del Castillo y Fragua (57)	Last name of a notary
				Miguel Lupide (55)	-
				Antonio Ferrer de Gonzaga (46)	Last name of a notary
				Félix Montenegro y Ahumada (43)	-
Francisco Ferrer (Office number 19)	64	31	3	Antonio María Ruíz del Castillo (61)	Last name of a notary
				Luis Antonio Muñoz (24)	-
				Miguel de Molina Martel (16)	Neighborhood mayor (*alcalde de barrio*) and last name of a notary
Francisco Jiménez Saavedra (Office number 10)	55	24	4	Pedro Cornejo (36)	-
				Félix de Avendaño y Relosillas (26)	Last name of a notary
				Antonio del Castillo y Fragua (22)	Future notary (office number 1) and last name of a notary
				Bartolomé Crespo (13)	-

Notary of the number (office number)	N of obligation contracts	N of witnesses	N of witnesses who appears in at least 25.0% of the contracts	Witness and number of contracts	Observations
Gaspar Márquez Cabrera (Office number 15)	26	13	4	Miguel del Castillo y Porras (21)	Royal notary and last name of a notary
				Rafael Quevedo y Márquez (17)	Attorney and last name of a notary (both of them)
				Félix Montenegro y Ahumada (14)	-
				José de Tarria (12)	-
Gregorio Martínez de la Ribera (Office number 20)	54	9	4	Juan de Ribera (51)	Royal notary, future notary (office number 20) and last name of a notary
				Andrés de Albelda (42)	-
				Luis de Soto y Monroy (29)	-
				Juan de Mérida (18)	-
José Anastasio de Sistos (Office number 14)	17	16	5	Francisco José de Sistos (17)	Future notary (office number 14) and last name of a notary
				Pedro de Reyes (7)	-
				Miguel Coso (6)	Attorney and future notary (office number 4)
				Carlos de Lara (4)	Last name of a notary
				Juan de Molina (4)	Last name of a notary
José Antonio Sanmillán (Office number 18)	14	17	5	Francisco de Paula Noriega (8)	-
				José Carlos de Arraga (7)	-
				Salvador Muñoz y Castañeda (6)	-
				Juan Luis Canela (5)	-
				Manuel Fernández (5)	Last name of a notary
José de Avendaño y Relosillas (Office number 6)	76	14	5	Antonio Muñoz de la Chica (61)	Attorney
				Antonio del Pino y González (49)	Last name of a notary
				Cristóbal del Pino (43)	Last name of a notary
				José de Oz y Montenegro (29)	-
				Pedro Vázquez (23)	-
José Jiménez Pérez (Office number 9)	29	24	3	Salvador de Queiro (260)	-
				Antonio Molina Sopeña (20)	Last name of a notary
				Francisco Hurtado (7)	-
José López Bueno (Office number 22)	3	6	2	José del Castillo y Estrada (3)	Last name of a notary
				Antonio Bueno (2)	Last name of a notary

Notary of the number (office number)	N of obligation contracts	N of witnesses	N of witnesses who appears in at least 25.0% of the contracts	Witness and number of contracts	Observations
Juan de Lara y León (Office number 2)	5	9	3	Luis de Godoy (3)	-
				José de Lara (3)	Future notary (office number 10) and last name of a notary
				Juan Bautista Zenestroni (3)	-
Juan Jerónimo de Molina (Office number 3)	95	17	4	Antonio del Barco y Mata (90)	-
				José Joaquín Gordon y Gómez (88)	Future notary (office number 2)
				Luis de Soto y Monroy (28)	-
				Miguel de Ponima (27)	-
Manuel de Torres (Office number 4)	64	33	3	Luis Antonio de Olona (59)	Future notary (office number 9)
				Rafael de Torres y Cuartero (45)	Last name of a notary (both of them)
				Salvador Márquez y Rojas (35)	Last name of a notary
Manuel del Pino (Office number 12)	16	10	3	Manuel de Arriola (16)	-
				Francisco de Paula Estebanez (13)	-
				José del Pino (8)	Last name of a notary
Miguel Fernández de la Herrán (Office number 16)	41	15	3	José de Arias y Espinosa (41)	-
				José Fernández (36)	Last name of a notary
				José Miguel de Molina (24)	Last name of a notary
Rafael del Castillo Sánchez (Office number 24)	177	43	4	Francisco de Paula Pome (150)	-
				Fancisco de Arcas y Muñoz (127)	-
				Juan Faria (57)	-
				Francisco Javier Ramón de Fatta (44)	-
Salvador de Cea Bermúdez (Office number 21)	50	27	3	Lorenzo García (43)	Future notary (office number 21)
				Francisco del Castillo (30)	Last name of a notary
				Ciriaco Ruíz de Cobos (21)	-
Tomás del Valle (Office number 8)	44	7	4	Miguel Bazo Berry (42)	-
				Antonio Carrillo (33)	-
				Francisco de Paula Carrillo (26)	-
				Juan de Cea Lacosta (26)	Last name of a notary

Source: see footnote No. 24 of the chapter 2, and *Libro en el que se hallan los escribanos que ha habido en la Ciudad de Málaga, sus entradas, salidas y los oficios que expresamente han usado y así mismo los reformados* (1808).

APPENDIX 2.2: Notarial records written by each notary of the number of Malaga in 1784

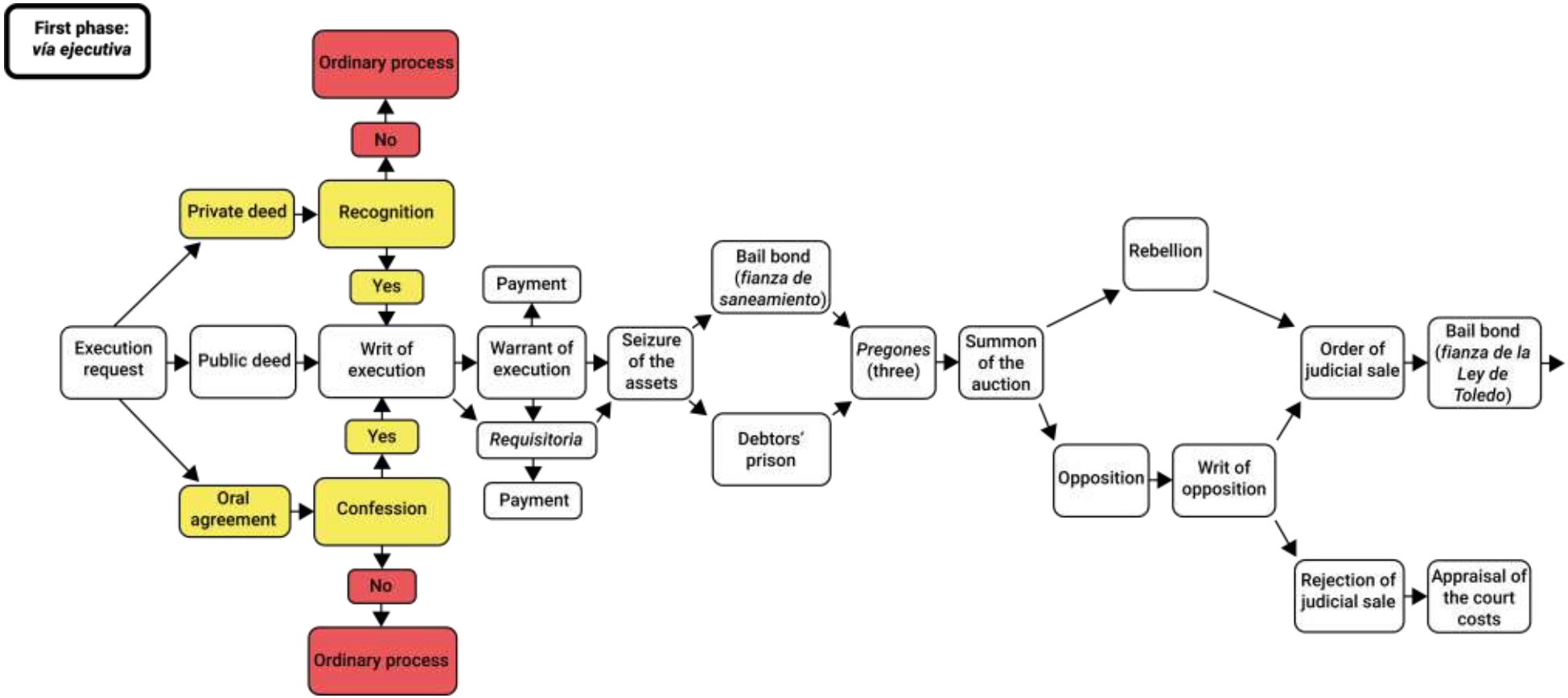
Notary of the number	Special notaries	Years of experience as notaries accumulated in 1784*	Previous positions	Annuities	Annuity redemptions	Apprenticeship contracts	Bail bonds	Debt and land transfers	Dowries	Leases	Obligations (credit)	Obligation (others)	Payments	Powers of attorney	Sales	Wills	Others	Total
Ambrosio Cuartero y Llanos	Marine notary	9	Officer of a notary in 1771	1	0	5	19	2	4	50	82	11	22	124	18	5	23	366
Antonio del Castillo Quevedo	-	4	-	1	0	1	9	0	1	40	73	0	21	21	4	2	8	181
Blas de Mesa	-	7	Officer of a notary in 1771	3	1	4	20	7	2	52	118	29	25	69	8	14	23	375
Francisco de León Uncibay	-	5	-	10	5	3	22	4	3	52	77	13	36	151	19	17	32	444
Francisco Ferrer	Town hall notary	5	Attorney in 1771	1	0	1	4	1	3	72	64	7	24	73	7	13	26	296
Francisco Jiménez Saavedra	-	1	-	2	0	4	19	2	3	31	55	6	20	139	5	11	21	318
Gaspar Márquez Cabrera	-	38	-	2	0	3	14	1	3	16	27	0	8	44	2	5	8	133

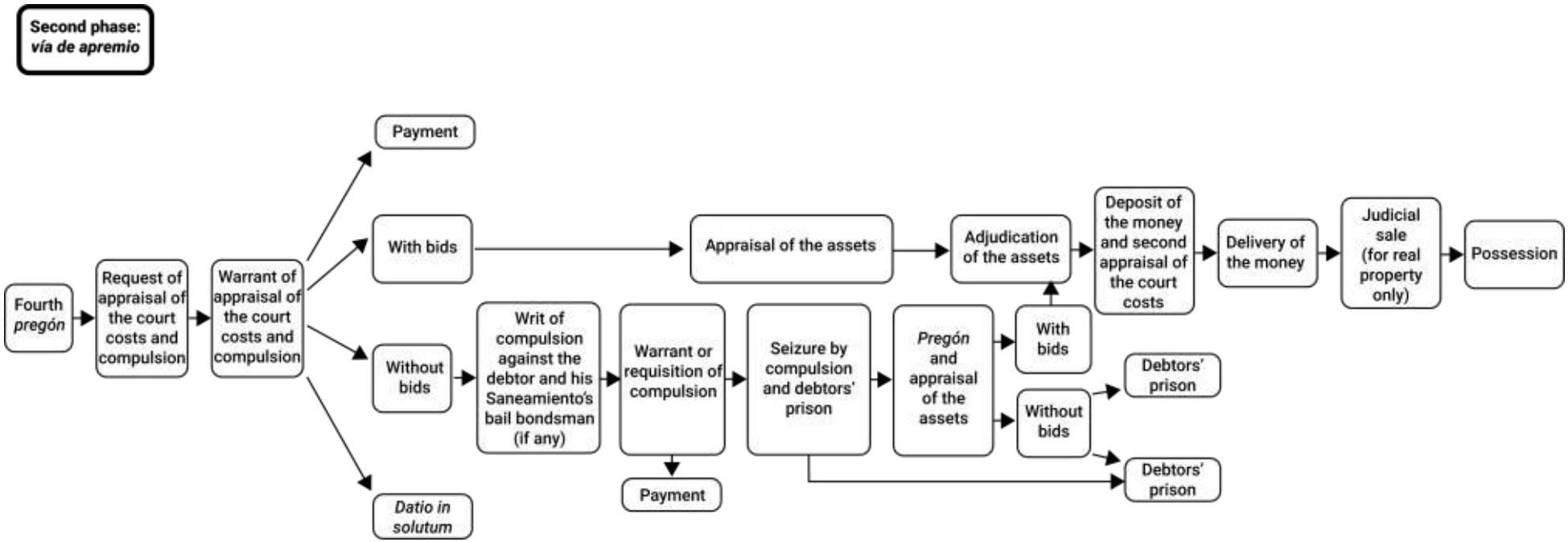
Notary of the number	Special notaries	Years of experience as notaries accumulated in 1784*	Previous Positions	Annuities	Annuity redemptions	Apprenticeship contracts	Bail bonds	Debt and land transfers	Dowries	Leases	Obligations (credit)	Obligation (others)	Payments	Powers of attorney	Sales	Wills	Others	Total
Gregorio Martínez de la Ribera	Oldest town hall notary Public mortgage registry notary *Montepío de Cosecheros* notary *Consulado* notary (since 1785)	16	-	4	1	2	11	1	1	45	54	20	19	48	20	10	17	253
José Anastasio de Sistos	-	25	-	1	14	0	1	0	2	32	17	0	10	32	10	8	21	148
José Antonio Sanmillán	-	4	Attorney in 1771	2	0	0	8	2	2	4	14	2	10	32	8	4	10	98
José de Avendaño y Relosillas	-	5	Law intern in 1771	1	0	0	10	0	4	38	76	2	10	73	5	10	9	238
José Jiménez Pérez	Rent of the salt notary	19	-	2	0	2	2	0	2	22	29	1	18	44	6	3	5	136
José López Bueno	Treasury notary *Millones* and *cientos* notary	5	-	0	0	0	16	0	0	21	3	60	0	18	1	0	1	120

Notary of the number	Special notaries	Years of experience as notaries accumulated in 1784*	Previous positions	Annuities	Annuity redemptions	Apprenticeship contracts	Bail bonds	Debt and land transfers	Dowries	Leases	Obligations (credit)	Obligation (others)	Payments	Powers of attorney	Sales	Wills	Others	Total
Juan de Lara y León	-	10	Attorney in 1771	1	0	0	21	0	1	8	5	0	1	47	0	3	3	90
Juan Jerónimo de Molina	-	2	Officer of a notary in 1771	21	3	3	8	0	5	95	95	2	38	98	22	10	31	431
Manuel de Torres	-	16	Attorney in 1753	3	2	2	9	2	9	50	64	5	17	109	17	25	42	356
Manuel del Pino	-	11	Attorney in 1771	2	0	0	2	0	0	18	16	5	11	39	9	8	18	128
Manuel José Romero	-	8	-	1	0	0	1	0	0	1	0	0	0	2	1	0	2	8
Miguel Fernández de la Herrán	War notary	26	Royal notary in 1753	0	0	0	16	1	0	20	41	0	11	58	8	10	10	175
Rafael del Castillo Sánchez	-	1	-	11	0	1	20	1	2	46	177	7	34	117	18	13	38	485
Salvador de Cea Bermúdez	-	43	-	0	0	2	6	0	0	9	50	1	14	21	2	0	5	110
Tomás del Valle	Treasury notary	5	-	5	1	1	10	0	3	76	44	13	26	79	12	9	19	298
Total	-	-	-	**74**	**27**	**34**	**248**	**24**	**50**	**798**	**1,181**	**184**	**375**	**1,438**	**202**	**180**	**372**	**5,187**

*Note: as notaries of the office that they occupied in 1784.
Source: see footnote No. 24 of the chapter 2, Cadastre of Ensenada: Malaga (1753, pp. 122r and 250r) available on the PARES website at http://pares.mcu.es/Catastro/servlets/ServletController?accion=4&opcionV=3&orden=1&loc=1539&pageNum=7 (consulted October 4, 2020), *Gazeta de Madrid*, 30 (1789, p. 263), NR, *Libro X*, *Título XVI*, *Ley III* (1805, pp. 106-109), *Libro en el que se hallan los escribanos que ha habido en la Ciudad de Málaga, sus entradas, salidas y los oficios que expresamente han usado y así mismo los reformados* (1808), García España (1975, p. 55), and Mairal Jiménez (1999b, pp. 29, 210 and 372-373).

APPENDIX 2.3: Executory process





Source: author's elaboration, based on Alcaraz y Castro (1762, pp. 58-92), Juan y Colom (1787, pp. 111-170), and Peláez Portales (2000).

APPENDIX 2.4: Example of obligation contract

En la Ciudad de Málaga en 11 días de mes de Noviembre de 1784 años, ante mi el Escribano público y Testigos parecieron Francisco Agustín Fernández y Miguel Bermúdez, vecinos de la Villa del Borge a quienes doy fe conozco, juntos y de mancomún a voz de uno y cada uno de por si y por el todo insolidum renunciando como expresamente renuncian las leyes de duobus res debendi y el autentica presente cobdice hoc ita de fidejusoribus y demás de la mancomunidad su division como en todas y cada una de ellas se contiene, bajo de la cual otorgan que se obligan de pagar llanamente y sin pleito alguno a Don Andrés del Pino de esta Vecindad o quien le represente 2.200 reales de vellón que por hacerle merced y buena obra les ha prestado para las labores de sus haciendas en lo que han recibido especial beneficio, y por estar en poder del otorgante realmente y con efecto de ellos se dan por contentos y entregados a su voluntad sobre que renuncian a la excepción de la non numerata pecunia prueba de paga, excepción del recibo y demás del caso como en todas y en cada una de ellas se contiene, y como legítimos y verdaderos deudores que se confiesan ser de dichos 2.200 reales de vellón los darán y pagarán a el referido Don Andrés el día 15 de Agosto que vendrá en el presente año de 1785, en especie de pasa larga de sol enjuta de recibo conducida en seras, capachos y no en fardos que se les ha de abonar al precio que tenga dicho día por la entrada del Postigo de los Abades, y, habiendo tres, al del medio, puesto y pagado en esta Ciudad casa y poder del referido Don Andrés por ejecución apremio y costas de su cobranza que se ha de conseguir en virtud de esta escritura y el juramento de parte legítima sin otra prueba de que le releva en bastante y debida forma = Y si cumplido dicho plazo no habiendo dado pronta satisfacción, tienen a bien y consienten se les envíe persona a dicha Villa y otras partes a la que fuere pagarán 12 reales de vellón de sueldo en cada un día de su ocupación más los del camino de ida y vuelta a esta Ciudad porque se harán las mismas diligencias que por el principal diferido en dicho juramento, y al cumplimiento, firmeza y paga de todo se obligaron con sus personas y bienes habidos y por haber y sin que la obligación general vicie, derogue ni perjudique a la especial ni por el contrario obligan e hipotecan expresa y especialmente el Francisco Agustín Fernández 6 obradas de viña que dijo poseía a el pozo de Gaitán Jurisdicción de dicha Villa lindando con Francisco Bautista, Juan Moreno y Luis del Campo gravada con 11 reales de vellón a la Real Población de dicha Villa y libre de otros y el dicho Miguel Bermúdez 4 obradas de viña que dijo poseía a el Partido de la

Fuensanta lindando con Salvador de Campos y Francisco Agustín gravada digo libre de todo censo y pensión y quieren que con sus frutos, rentas y mejoramientos queden gravadas y sujetamente hipotecadas a la seguridad y paga de este contrato con pacto absoluto prohibitivo de toda enajenación de cuyas hipotecas previne yo el escribano a los otorgantes saquen copia de esta escritura y la registren en el Oficio de Hipotecas de esta Ciudad dentro del término y en la conformidad prevenida en la Real Pragmática que habla de este asunto de cuyo contexto los enteré y ofrecieron cumplir con su tenor doy fe, dieron poder cumplido a los Señores Jueces y Justicias de Su Majestad de cualesquier partes que sean y que sus causas puedan y deban conocer para que les apremien a lo que derecho es como por sentencia pasada en autoridad de cosa juzgada, renunciaron todas las leyes, fueros y derechos de sus defensa y favor y la que prohíbe la general renunciación de ellas, y así lo dijeron, otorgaron y no firmaron porque dijeron no saber escribir a su ruego lo hizo un testigo que lo fueron Don José Ruiz de Cobos, Don José Buzo y Don Salvador Coso vecinos de esta dicha Ciudad =

(Signatures of Blas de Mesa and Salvador Coso y Estrada)

Source: AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 853r-853v.

APPENDIX 2.5: Deed of payment, power, debt transfer and transfer of rights

(Left margin of the first sheet of paper): Diose copia de esta escritura en el papel correspondiente a instancia de José de Claros. Málaga, Enero, 28 de 1784. Mesa. (signature of Blas de Mesa)

En la Ciudad de Málaga a 26 días del mes de enero de 1784, ante mi el Escribano Público, testigos infrascriptos, pareció Matías Trujillo, vecino del Comercio de esta Ciudad, a quien doy fe conozco, y dijo que en el juzgado del señor Don Cristóbal de Baeza y Ortiz, Abogado de los Reales Consejos, Alcalde Mayor y Corregidor Regente de esta Ciudad y por ante mi como tal su Escribano, autos ejecutivos tuvieron principio a 13 de enero del año último pasado a solicitud del relacionante y contra José de Claros, vecino de la Villa de Iznate, Jurisdicción de la Ciudad de Vélez, sometido a este fuero, con copia de una escritura de obligación guarentigia que el susodicho había otorgado ante mí y competente número de testigos el día 4 del mes de marzo de 1782, por la cual se obligó pagarle 3.512 reales de vellón que se confesó deudor por habérselos prestado y con ellos socorrido sus urgencias dándose por entregado en forma y con renuncia de las leyes de la cosa no vista demás del caso: capitulando su pago en dos plazos de a 1.756 reales de vellón cada uno que habían de ser efectivos y paga de los dos primeros días del mes de noviembre de los años pasados de 1782 y 1783 con más las costas de su cobranza a las del ejecutor que se despachase a que se obligó en toda forma renunciando su propio fuero y sometiéndose expresamente a el de esta Ciudad.

Con cuya copia y suficiente poder del relacionante ante Joaquín de Aguilera, Procurador de este Número, pidió ejecución por los 1.756 reales de vellón de principal y plazo vencido y por más la de suma causada y que se causase hasta su real y efectiva paga, librándose para ello exhorto a las Justicias de dicha Ciudad de Vélez y Villa de Iznate, siendo extensiva para que sin perjuicio del término de pregones se le citase de remate y protesto recibir en cuenta legítimos pagos. En vista de lo cual por dicho señor se mandó expedir el requisitorio de ejecución y citación de remate que con efecto se libró contra la persona y bienes del referido obligado que fue cumplimentado por el señor Don Pedro Pablo de Pereda, Corregidor y Capitán de Guerra de dicha Ciudad y su Partido, a 21 de dicho mes de enero, y a su virtud se trabó en ciertos bienes, en cuyo estado permaneció el procedimiento hasta que a instancias del relacionante y a 27 de junio de dicho año de 1783 se mandó llevar a efecto, y con él salió nuevo a

cumplimentar por el mismo señor Pedro Pablo de Pereda, y evacuadas sus diligencias anduvieron al pregón el término de derecho.

Y habiéndose hecho oposición por el mismo José de Claros, se pidió y mandaron entregársele los autos encargadas las partes en el término legal, y estándolo a solicitud del mismo Claros se mandó que el Don Matías hiciese cierta declaración al tenor de los particulares que se reservo presentar en el acto, que el Escribano de Cabildo Don Gregorio Martínez certificase los precios de la pasa en ciertos días, y que Don José de Avendaño diese testimonio de los autos que José Molina, vecino de la propia Villa, principió con el Don Matías a principiados en 27 de noviembre de 1782, entendiéndose con citación contraria y pidiendo se suspendiese el término del encargado, y habiéndose así mandado se presentaron los particulares a cuyo tenor había de declarar el dicho Don Matías que se contienen en el pedimento siguiente.

Antonio Muñoz de la Chica en nombre de José de Claros, vecino de la Villa de Iznate, en los autos ejecutivos que contra mi parte sigue Matías Trujillo sobre la cobranza de maravedís que supone deberle mi defendido como mejor proceda por dicho derecho, digo que en mi anterior escrito solicité que por suspensión del término del encargado se formalizasen ciertas diligencias necesarias e indispensables para oponerme en forma a la ejecución despachada, siendo una de ellas que se recibiese declaración al expresado Matías al tenor de sus particulares que ofrecí presentar bajo juramento indecisorio y al que protestó estar solo en lo favorable conforme a la ley y su pena los cuales desde luego expongo y son en la forma siguiente:

= Primeramente como es cierto que siguiendo el declarante autos ejecutivos contra José Molina, vecino de la Villa de Iznate, por los años de 1781 y 1782 sobre cobranza de ciertas cantidades, estando fugitivo el dicho Molina para que no se le prendiese, rogó (…) y el declarante se convino en que saliese mi defendido a pagar lo que resultase deberle el Molina.

= Como es cierto (...) que su cumplimiento salió mi parte como fiador (...) a pagar cualesquiera alcance que el José Molina ausente restase deber al declarante, y en su virtud se obligó a ello por escritura de 4 de marzo de 1782.

= Como es cierto que en este concepto, y no en otro, mi parte otorgó la referida escritura fide y jusoria, obligando a satisfacer al declarante lo que el Molina le restase, cuando falso y contra toda verdad que a mi parte le hubiese dado el declarante

efectivamente cantidad alguna antes al tiempo ni después de dicha escritura, y del mismo modo lo es falso que el declarante le hubiese prestado a mi defendido la cantidad de los 3.500 reales de vellón que se comprenden en dicha escritura con que principian los autos ni con ellos haberle socorrido para sus urgencias, pues no hubo otra cosa más que haber ni defendido salido lisa y llanamente de lo que le debiese el José Molina. Y si dijese que esto no es así expresará el declarante en que ocasión, en que día, en que moneda, con que motivo y a presencia de que personas entregó a mi parte los 3.500 reales de vellón que se enuncian en la citada escritura del 4 de marzo.

= Como es cierto que mi parte jamás ha tenido cuentas con el declarante ni otorgado escritura a su favor sino únicamente la fide y jusoria con que salió a pagar lo que José Molina le restase deber, y si lo negase el declarante expresará cual sea ante que Escribano con que motivo en que año y día y de que cantidades.

= Como es cierto que el día 26 de noviembre de 1782 se entregó y pagó por mi parte al declarante en dinero efectivo la cantidad de 810,5 reales de vellón.

= Como es cierto que el crédito que repetía el otorgante contra José Molina provenía en la mayor parte de haber este salido a pagar lo que resultase deber al declarante Antonio de Aranda, vecino de la Villa de Iznate.

= Como es cierto que dicho José Molina entregó al declarante en especie de pasa diferentes cantidades ascendientes aquella al número de 242 arrobas y algunas libras de pasa larga de sol por el mes de septiembre de 178 (…).

= En que la obligación del día 8 de abril de 1780 otorgó el José Molina a favor del declarante de la cantidad de 2.932 reales de vellón, no fue de dinero que efectivamente el declarante le hubiese prestado y con ellos socorrido para sus labores y otras urgencias, pues en la mayor parte de dicha cantidad consistió la citada obligación y escritura en una mera lisa y llanamente fianza que hizo José Molina a favor del declarante saliendo a pagarle lo que resultase deber el Antonio de Aranda por hallarse este perseguido ejecutivamente y ausente, y manifestándose esto falso, expresará el declarante en qué ocasión, con que motivo en qué día y ante qué personas entregó al José Molina los 2.932 reales de vellón comprendidos en la enunciada escritura del 8 de abril de 1780.

= Y así mismo especificará con individualidad el Matías Trujillo que cantidad fue la que entregó solamente al Antonio Aranda, y cuando era lo que este le restaba cuando el José Molina salió a pagarle por aquel.

= Así pido y suplico se sirva proveer y determinar como dejó solicitado pues es Justicia que pido costas y juros. Antonio Muñoz de la Chica, Licenciado Manuel Peliblanc y Victoria.

Y en su virtud se recibió la expresada declaración, cuyo tenor es a saber:

Y luego estando en dichas casas dicho señor Alcalde Mayor, por ante mí el Escribano recibió juramento de Matías Trujillo, vecino de esta Ciudad, quien lo hizo por Dios Nuestro Señor y a una señal de cruz y a su cargo prometió la verdad, y preguntado al tenor del pedimento que antecede a cada una de las preguntas dijo lo siguiente:

A la primera pregunta dijo es cierto su contesto y que lo hizo el que declara a ruegos de varias personas que para ello interpuso y en su consecuencia obligó el Claros por escritura ante el Escribano originario de estos autos y responde.

A la segunda pregunta dijo que liquidado principal y costas como resulta de sus cuentas por lo que resultó líquido se obligó el Claros como principal deudor y finiquito enteramente con José Molina y responde.

A la tercera pregunta dijo que es verdad (…) y repite es la misma que debía el Molina, pero como la intención del que declara fue no tener más que entenderse con el Molina y en su virtud como que venía ya para cobrar su dinero como que no entiende de asuntos forenses, dio su (…) para que en el Oficio se otorgase la escritura por dichas sumas de préstamos que le había hecho como en realidad así era pues manifestó traer el dinero pero que lo necesitaba para sus labores por venir a pagar dicha cantidad el Claros por el Molina y responde.

A la cuarta pregunta dijo que jamás le ha dado dineros al Claros aunque lo ha pretendido y solo ha hecho la que consta de estos autos y responde.

A la quinta pregunta dijo es cierto ha recibido cantidad de maravedís del Claros por cuenta del primer plazo de que le dio recibo e ignora la suma de que se compuso y responde.

A la sexta dijo no se acuerda de su contexto por el dilatado tiempo y sí que resultará de los libros en donde se apunta por menor las cantidades que se entregan y de que no ceden y responde.

A la séptima pregunta dijo se remite a los libros en donde igualmente resulta los frutos y dineros que entregan los deudores y responde.

A la octava pregunta dijo no se acuerda de su contexto y sí que resultará de dicho libro de cuentas como dicho tiene en la sexta pregunta y responde.

A la novena pregunta dijo se remite a los libros de cuenta como en las anteriores por tener muchos negocios con distintas personas de muchos lugares y no poder conservar tantas cuentas como ocurre con cada uno, y lo que a derecho y declarado es la verdad a cargo del juramento que hecho tiene que es de edad de 49 años, y lo firmó con dicho señor Alcalde Mayor. Doy fe= Baeza, Matías Trujillo, Francisco de Mesa.

Y por parte del mismo Claros se presentó el recibo del tenor siguiente:

Recibí del señor Baltasar de Claros 810,5 reales de vellón en cuenta de mayor cantidad por el señor José de Claros, su padre, y para que conste doy este en Málaga en 26 de noviembre de 1782= Lorenzo Hernández= son 810,5 reales de vellón.

(…) quien lo reconoció asegurando era cierto tenía resultado porque era del primer plazo los 810 reales de vellón de dicho recibo que estaba pronto a abonar.

Posterior a lo cual entre una y otra parte se fueron haciendo varias diligencias y abdujeron a los autos varios documentos, entre los cuales fue uno un testimonio dado por José Avendaño, de este, con referencia a autos que pasaban en el juzgado del señor Antonio Freire de Cora y dicho Escribano a instancia de José Molina, vecino de la Villa de Iznate, contra el mismo Matías sobre que declarase en razón de las cuentas que habían tenido y en que consta puesto cierto testimonio de los libros del dicho Matías, y se fueron continuando alegando difusamente el José de Claros y diciendo cada uno de su justicia durante el término legal y sus prórrogas. Y estando sustanciados los términos del derecho fueron llamados los autos para providencia citadas las partes y siendo recayó la sentencia de adición que dice así:

En el pleito y causa ejecutiva pendiente en mi juzgado entre partes de la una actor ejecutante Don Matías Trujillo, de este vecindario, y su Procurador Joaquín de Aguilera en su nombre, y de la otra reo ejecutado José de Claros, vecino de la Villa de Iznate que

se halla sometido a este juzgado, y Antonio Muñoz de la Chica su Procurador en su nombre, sobre el cobro de 1.756 reales de vellón de principal, parte de su adeudo constante de la escritura folio segundo y las costas por que se expidió ejecución fue citado de remate y a su virtud salió al juicio en uso de su derecho y hecho las defensas que de ellos consta vistos= Fallo atento a los autos y méritos del Procurador a que me remito que sin embargo de la oposición hecha en ellos por el dicho José de Claros, debo declarar y declaro, ser admisibles y de abono al susodicho el recibo del folio 22 importante 810,5 reales de vellón entregados por cuenta de mayor cantidad cual es la de la escritura con que principia el proceso, mandar y mando avivar la voz a la almoneda de los bienes en esta causa ejecutados, hacer trance y remate de ellos en el mayor postor, y de su procedido entero y cumplido pago a la parte ejecutante de 945,5 reales de vellón ha quedado (…) dando por el actor la fianza prevenida en conformidad de la ley real de Toledo, se ejecute ante mí sentencia por lo cual definitivamente juzgando así lo pronunciado y firmó con costas en que condenó los bienes ejecutados cuya tasación en mi reserva y reservó su derecho a salvo al dicho José de Claros para que sobre el ajuste y liquidación de cuentas y reconvención que enuncia en su oposición pida lo que le convenga= Cristóbal de Baeza y Ortiz.

Dada, pronunciada y firmada fue la sentencia antecedente por el señor Cristóbal de Baeza y Ortiz, Alcalde Mayor Corregidor Regente de ella estando haciendo audiencia pública en las casas de su posada en la Ciudad de Málaga a 29-10-1783, siendo testigos Manuel de Torres, Francisco de León y Salvador de Cea, vecinos de esta Ciudad y Escribanos de su Número, de que doy fe Blas de Mesa.

Diose la dicha fianza de la Ley de Toledo con el cuarto pregón de albalá, tasáronse las costas que importaron 736 reales de vellón y 16 maravedís, por los cuales y el principal se dio el competente requisitorio de apremio.

En dicho estado por parte del mismo José de Claros se apeló de la expresada sentencia para ante el ilustrísimo ayuntamiento y consistorio de esta Ciudad, solicitando se le diese libremente y en ambos efectos, y que para su mejoría se le diese el correspondiente testimonio de que dado traslado al actor tomó los autos y satisfizo a él consintiendo en ella, y con efecto por auto de 7 de noviembre último le fue admitida libremente y en ambos dichos dos efectos mandando se le diese el correspondiente testimonio para su mejora.

Hízose saber y expidió el testimonio decretado en virtud del cual y reconvenido por el mismo actor, a los 12 de dicho mes de noviembre, presentó el Claros testimonio de su mejora, del que constó que en el Cabildo que los señores, Consejo, Justicia y Regimiento de esta celebraron a 6 de dicho mes y presidió el dicho señor Don Antonio Francisco Freire de Cora, se vio el pedimento de dicha apelación y acordó admitirla cuanto hubiese lugar en derecho presentando testimonio de estarlo, que se verificó, y nombró por Jueces Consistoriales a los Caballeros Diputados Sobre Fieles de dicho mes para que con Abogados (…) por derecho haciendo saber para su aceptación y juramento y se devolviese a la parte para uso de su derecho. Hízose saber a Don Fernando de Cárdenas y José de Cea y Ordoñez Regidores Perpetuos de esta Ciudad y Diputados Sobre Fieles de dicho mes, quienes aceptaron su nombramiento, juraron en forma, y nominaron por su Abogado el Primero a Manuel José Herrero, que lo es del Ilustre Colegio de esta Ciudad, y el segundo se conforma con el mismo nombramiento.

E intimado al citado letrado, también lo aceptó y juró en forma, y hecho saber al Procurador de dicho Claros le fueron entregados los autos, y en su virtud devolvió con cierto pedimento por el que en grado de apelación y alegando de agravios relacionó que la sentencia de remate de que queda hecha expresión era mala, y como tal se había de declarar o al menor revocar como injusta, proveyendo a favor del susodicho según tenía solicitado en su escrito del folio 52 que daba por reproducido, porque subsistían en todo su vigor cuantas razones había expuesto en dicho escrito con las demás vertidas en otro de 30 del propio mes sin que fuese de virtud alguna cuanto de contrario se había dicho en su último escrito desentendiéndose del nervio de la disputa con arreglo a las confesiones del Don Matías.

Porque el Claros, como además plenamente justificaría, no se había obligado a favor de Don Matías a otra cosa que a salir por fiador de lo que resultase deberle José de Molina, vecino de la misma Villa, para lo cual únicamente habían sido los ruegos y empeños que le habían hecho por el Padre Lector Fray Tomás de Cuenca, religioso de Santo Domingo, a que había sido solo su anuencia respecto a manifestársele que el relacionante estaba pronto a sobrexceder en la ejecución siempre que se le diese fiador.

Y que en efecto habiendo pasado a esta Ciudad el Claros, manifestó al que relaciona venía a fiar al Molina, a que le satisfizo estaba bien si pero que la cantidad se le había de pagar en pasa en el verano próximo, a que había respondido sería en tres a lo menos

por el día del Apostol Señor San Andrés, y que respondió el que dice que no siendo dentro de un año no se convenía.

Que con esta repulsa se retiró al Convento de Santo Domingo y dio parte a dicho padre lector se retiraba a su pueblo pues no era lo que se le había dicho. Pero el mismo padre volvió a suavizarle y con (…) el relacionante pusiere uno es que suplicándole que los plazos de la fianza que va a hacer fuesen al menos en dos años, con cuya esquela había vuelto segunda vez (…) del que expone. Y enterado de su contenido había manifestado su consentimiento, y preguntándole si sabía escribir, respondidole que no, había formado una papeleta y lo remitió al Oficio con ella, diciéndole no tenía que hacer otra cosa que llevarla al Oficio estaba despachado. Y el padre servido, que sin enterarse de su contenido, obrando con toda buena fe, convenido con autoridad de los sujetos mediantes para no poder imaginar la más leve diferencia o engaño, no tuvo escrúpulo para solicitar se la leyesen. Y habiéndola dejado en el Oficio volvió al convento y el dicho padre lector le preguntó si se había convenido el Don Matías, a que le manifestó que sí y que en su inteligencia se había hecho la escritura.

Cuya sencilla exposición de verídicos hechos que no se atrevería a negar delante de Dios, la conciencia del relacionante ni en tan firme concepto podría hacer sin escrúpulo sostenido su malicioso tema, convenciéndose la justicia del Claros, y que no era conforme a derecho ni caridad tuviese la condenación del pago de una cantidad de que no había percibido, dejándole envuelto en un nuevo pleito por solo abuso que su buena fe se había hecho cuando estos convencían el ánimo para su obligación, y parecía más que extraño tuviese más auxilio el litigante que trataba de lucro captando, que el infeliz cuyo ánimo era tratar de damno vitando. Por lo que suplicó se proveyese con arreglo a lo que dejaba expuesto y por otro si presentó interrogatorio y por otro recibo al infrascripto Escribano.

Y en decreto de 26 de noviembre de lo principal se dio traslado al que relaciona, se admitió el interrogatorio cuanto fue pertinente, y con la debida citación se examinasen los testigos. Y se hubo por recusado a dicho infrascripto Escribano y nombró en clase su acompañado a Francisco de León, que lo es de este Número, cuyo interrogatorio se compuso de seis preguntas relativas a lo que queda expuesto. Y habiendo presentado por testigos al José de Molina que se hallaba preso en esta cárcel y al dicho Padre Lector Fray Tomás de Cuenca (…) Padre del Convento de Nuestro Padre Señor Santo Domingo, y precedida la venia al citado Padre Fray Tomás de Cuenca, es instruyéndoles

del fin a que se dirigía la diligencia, expresó que aunque tenía Licencia de su reverendo Padre Prior para declarar a motivo de que se valió de un fulano, Dueñas, para que consiguiese con el relacionante que el Claros se obligase como fiador del Molina, el propio Dueñas le había informado hizo este oficio no en clase de fiador, y si en la de principal, para que no hubiese intervención con el Molina, en cuya inteligencia no tenía por conveniente poner su derecho en opinión. Y habiéndose procedido a la declaración del Molina que fue en 6 de diciembre último se evacuó y su tenor es a saber.

En la Ciudad de Málaga en este mismo día mes y año del mismo señalamiento, nos, los Escribanos, pasamos a la cárcel real de esta Ciudad y estando en ella y su sala de audiencia compareció preso José de Molina, vecino de la Villa de Iznate a quien le recibimos juramento que hizo por Dios Nuestro Señor y a una señal de cruz y a su cargo prometió la verdad y preguntado al tenor de los particulares que comprende el interrogatorio presentido por José de Claros a cada uno dijo lo siguiente:

A la primera pregunta dijo conoce a las partes que litigan, tiene noticia del pleito, desea lo venza el que justicia tenga, y que no les toca en ninguna parte las generales de la ley que le fueron explicadas, y que tiene interés en este pleito por la responsabilidad que el que declara tiene a sus resultas, y que es de edad de 44 años, y responde.

A la segunda dijo es cierto todo su contenido en el modo y forma que en él se expresa, por haber sido el que declara como deudor interesado con el Padre Fray Tomás para que hiciese dicho empeño, y responde.

A la tercera dijo que consta su contenido por habérselo dicho el mismo Claros y el Lector Cuenca, y responde.

A la cuarta pregunta dijo que por el mismo padre y el José de Claros sabe su contenido y responde.

A la quinta pregunta dijo es cierto todo el contenido por haberlo ejecutado el Don Matías con el declarante y otros vecinos de su mismo pueblo, y responde.

(…) personas que como el testigo la saben por ser la verdad de cargo del juramento que dicho lleva, no firmó por que dijo no saber, lo hicimos nos los Escribanos de que damos fe. Don Francisco de León y Uncibay= Francisco de Mesa.

Y habiendo satisfecho al traslado la parte del que la relaciona, solicitó se confirmase la sentencia con costas, apercibiese y multase al Claros y sus testigos haciendo la

prevención debida al defensor contrario sobre la articulación. Porque subsistiendo en fuerza lo expuesto en primera instancia se convencía que el intento contrario terminaba solo a atropellar la fuerza de una escritura guarentigia principada a pagar llanamente al vencimiento del primer plazo, y a desacreditar al que relaciona envolviéndolo en un juicio de cuentas con José de Molina, deudor primitivo que habiendo estado en silencio desde que Claros se obligó e hizo su primer pago, consiguientemente había principiado instancia de cuentas ante el dicho José de Avendaño, que abandonó a los primeros pasos de su seguimiento, y la experiencia acreditaba era el objeto de formar un pretexto para que no se estrechase al Claros, cuyo extraviado pensamiento había tenido protector en la primera instancia. Mas el que relaciona se había cerrado a no contestar, afirmándose en la fuerza de su escritura y ofreciendo satisfacer plenamente en el juzgado del señor Cora y escribanía de Avendaño, siempre que el Molina continúe aquella instancia.

Y como tal resultó la dicha sentencia de remate, lo que siendo constante de la primera instancia y por tema del capricho contrario, se seguía esta segunda. Pero que registrado su pedimento ya no se hallaba lo más mínimo resurtivo a cuentas, porque se había desengañado con dicha sentencia de que tal excepción no podía detener la ejecución de una escritura cantidad líquida. Pero había tomado otro medio más escabroso e intrincado cual era falsificar el instrumento negando su formal otorgamiento, cuya especie era inadmisible en el juicio ejecutivo y expresamente repulsada por la ley, por requerir el mayor conocimiento de causa y habiendo sido despreciada la excepción de cuenta con mucha más razón (…) defensiva al tenor de que aunque (…) sobre que excepciones podrán admitirse en el juicio ejecutivo, ningún autor concedía que en caso alguno fuese la de falsedad, que esta jamás era decidible sin plenario conocimiento de causa, citación y convencimiento de sus autores. Y a no ser así, no habría deudor que a vista de la ejecución no negase la fe a la escritura con varios pretextos que probarían fácilmente porque en los lugares todos los más están llenos de deudas, se ayudarían unos a otros y lograban quedarse con el dinero ajeno sin recelo de la estada de una escritura guarentigia. Lo que supuesto ser disposición de derecho no obstante por honor decía que aun ni la más refinada malicia podía presumirse contra la escritura, porque si el José de Claros hubiese quedado entendido en que se obligaba solo de fiador era preciso que vencido el primer plazo y avisado extrajudicialmente para que pagase, lejos de entregar 810 reales de vellón habría alzado el grito y dicho lo que ahora producía; a que se respondía que a cualquiera que se llega con una escritura falsa o no extendida

según su concepto, es preciso clamase lo que no había habido, y como tal era evidente que otorgó la escritura formalmente (…) bien era de reflexionar ser imposible que teniendo el relacionante sus autos en apremio, se aviniese a entregarlos al Claros enredarse en cuentas con Molina, y que a cual quedase por fiador del que resultase deber, porque esto era lo mismo que tirar el dinero, por lo que era preciso pensar que Claros por hacer bien a Molina se obligó al pago de principal y costas del apremio sin que el relacionante tuviese que entender con Molina.

Todo lo cual así supuesto, manifestó que el hecho verdadero consistía en que sofocado el relacionante con los infinitos efugios del Molina, ya de ruegos, ya de valerse de la Población para impedir las ventas de sus fincas, ya de otros que frecuentemente van los deudores, todos vencidos y puesto el apremio, envió a Esteban Dueñas con empeño de no retirarse hasta hacerse la cobranza. Y con efecto, estando en dicho pueblo, se le propuso convenir al relacionante recibiese por deudor a José de Claros, que por otro lado el Molina había buscado de empeño al Padre Lector Cuenca y este al Padre Fray Juan Guerrero, y que aunque de pronto lo había repugnado, a fuerza de ruegos (…) del Claros, vino en recibirlo por deudor en lugar de Molina, concediéndole los plazos que pedía, porque el Claros con su buen modo y ofrecer que pagaría en la hora si el que relaciona quería, pero que le hacía falta para sus urgencias, negó no completamente y el que dice quedó más clavado cuando le trajo los 810 reales de vellón y pidió espera de unos días para el completo, del modo que aunque el Molina inquietó al que relaciona sobre cuentas no pensó tuviese complicidad hasta advertir demasiada demora en traer el resto, lo que era el verdadero hecho conforme a la escritura, y por el contrario violento cuanto se figuraba, y que su defensor no debía haber articulado porque no se podían hacer articulaciones que resistían las escrituras, y el mismo hecho de la parte que era poner en ocasión a los testigos de que falsamente jurasen, y concluyó pidiendo se proveyese como tenía solicitado y por un otro si.

Dijo que sin embargo de la escritura no necesitaba prueba, convenía que el Dueñas declarase en clase de testigo mediador ser cierto que la proposición que hizo al que relaciona fue recibir por principal deudor al Claros sin tener que meterse más con Molina, y de lo principal de dicho pedimento se dio traslado al Claros. Y en cuanto al otro, sí se mandó evacuar la declaración con citación contraria, y habiéndose esta hecho, se evacuó la insinuada declaración.

Y tomados los autos por parte del Claros, insistió en que se declarase por nula o al menos revocase la dicha sentencia de remate y proveyese a su favor que así era de hacer, porque para poner al tribunal en estado que con facilidad descubriese el fondo de la malicia del relacionante y la incontrastable justicia del Claros, convenía desentrañar los sofísticos argumentos de que se hallaban vestidos sus escritos. Que convencido el relacionante de las excepciones opuestas, se había empeñado en despreciarlas diciendo era de extrañar se sentase. Que en el juicio ejecutivo se podían admitir todas las excepciones porque seguramente en esto había equivocación, pues eran expresamente asignadas por las leyes del Reino las únicas que podían admitirse, cuya doctrina, que como preferente quería enseñar, era muy ajena de la universal práctica de todos los tribunales declarándolas los glosadores y autores de la mejor nota (…) ajena de las (…) de los legulados, y contraria a la justicia y cristiana equidad y que había depreciarse por los Señores Jueces y patronos de las causas. Y porque a la verdad la ley del Reino, aunque por ejemplo había señalado las siete excepciones de paga, falsedad y demás que expresaba, sin embargo, añadió, se debía admitir cualquiera otra que de derecho se debiese recibir o fuese legítima, en cuya expresión se vio la intención del legislador a muchos más casos de lo que expresó que tuviesen la misma o mayor razón y solo excluyó las frívolas o inútiles excepciones.

En cuyo tan firme supuesto era manifiesto que el decir no había contestado sus excepciones era equivaler a hallarse convencida y sin razón que oponer a la eficacia de sus argumentos que era una tácita confesión. Pero, prescindiendo de su probadísima opinión, se equivocaba el relacionante en cuanto alegaba, pues la excepción propuesta era de pago, que explícitamente estaba comprendida en la ley del Reino que citaba, porque era decir el relacionante se hallaba íntegramente solucionado de los 3.500 reales de vellón comprendidos en la escritura del 4 de marzo, lo que se justificaba de sus libros como había acreditado el Claros en su escrito del folio 52, luego era impertinente que el relacionante quisiese confundir las excepciones haciéndolas intrincadas cuando eran tan obvias y justificables, no solo en los 10 días, y en los de los 30 de esta segunda instancia, sino en el brevísimo de menos de una hora, y que así cuantas excepciones de pago le proponían en la vía ejecutiva contra los instrumentos guarantegios se deberían despreciar por la sofística razón a que se acogía la contraria, diciendo eran cuentas por que para el cargo y la data se necesitaba guarismo, pero este nada tenía que ver con lo que en propiedad se llamaba Juicio de Cuentas, que son las de muchos ramos y diversas

negociaciones pero no la de un cargo y data cual la que resultaba de los libros del relacionante: Que aunque la escritura traía preparada ejecución, la excepción de pago propuesta le quitaba su virtud, de tal suerte que la dejaba ineficaz. Y aunque se había querido acoger al beneficio del pago de los 810 reales de vellón, era inútil cuanto exponía, porque era bien notoria la disposición de la Ley de Partidas que dispone deberse revocar la paga hecha por error, y que creían muchas veces los hombres eran obligados de dar y hacer pagas que no debían, lo que concordaba con las disposiciones civiles sobre la materia de condiciones indebiti cuyo modo de pensar y obrar a estimado por muy común, no solo en la sabia y prudente capacidad de los Romanos, si también los soberanos legisladores de nuestros Reinos. Y así, si tuviera alguna eficacia para la certeza del débito, su paga por error se deberían borrar tan sabias disposiciones, a cuya reflexión se debía agregar la ignorancia de unos hombres rústicos nada versados en negocios en quienes sobre abunda la buena fe con que descansaron en las palabras del relacionante.

Siendo admirable el decir que el Claros recogió los autos en premio contra el Molina cuando nunca los había visto, y el Don Matías presentó en el Oficio de Avendaño dejando recibo, y que si en una cosa de tan fácil comprobación había faltado a la verdad que se debería discurrir en los demás hechos: Que se clamoreaba el juicio principiado ante el señor Freire, y para instruir al tribunal de la malicia del relacionante, hacía presente que en aquel juicio no había podido lograrse en más de tres meses que el testimonio de que hacía relación de los libros del que expone por la oposición con que había versado, empeñado en que el Molina no era parte y solo el Claros, con que debía entenderse de manera que cuando le demandaba Molina le remitía al Claros, y cuando Claros intentaba su defensa en este juicio se remitía del Molina, diciendo que Claros no debía ni podía entender en el asunto, y esta razón tuvo Molina cansado de litigar sin haber llegado a el principio para ausentarse a su tierra, por lo que perdía con su ausencia en sus posesiones y haberes.

Que alegaba que el juicio ejecutivo no podía detenerse por el ordinario aunque estuviese solemnemente contestado, y que a la verdad no se comprendía a qué venía tan doctrina, pues no se había intentado tal cosa, no pretendido embotar el juicio ejecutivo con el principiado por Molina ante Avendaño, que lo que únicamente se había intentado era que en el supuesto de que el relacionante había conferido que el Claros salió a pagar lo que debiese el Molina, y que en esta consecuencia se otorgó la obligación una vez

que Molina nada debía, por consiguiente tampoco Claros. Y así como aquel podía presentar recibos o justificación de pagos, así el Claros lo había hecho por un testimonio en que hizo ver que la deuda del Aranda de 1.732 reales de vellón y 10 maravedís la había solventado el Molina, y que el Aranda, por seis recibos reconocidos por el relacionante, le había entregado 102 arrobas y 10 libras de pasa, y que siendo el cargo del Molina 2.000 reales de vellón, le tenía entregadas 217 arrobas de pasa, de que resultaba pagado enteramente y con exceso. Que sin recurrir a juicio ordinario en la misma vía ejecutiva se le oponía una tal legítima excepción como en la de pago, y que mientras el que le relaciona no acreditase deberle el Molina otras sumas nada tenía que pedir a Claros, respecto a que lo que este se obligó fue pagar lo que resultase deber el Molina.

Que estrechado con el argumento en el ejemplar sacado del Digesto, había ocurrido a decir se debía tener presente no podían citarse en tribunal del Reino tales disposiciones, que parecía ocioso exponer al tribunal lo que observaba en las defensas y estrados de la Real Chancillería de la Ciudad de Granada, en que a cada paso usan los letrados el texto civil porque lo practican los mismos autores, y que aunque no tuviesen virtud de ley tenían la de una razón natural, y más en un caso para explicar la naturaleza de una obligación y conocer su esencia donde no se halla símil en la disposición del Reino.

Y aunque se alega que la ley nada dice ni se puede acomodar al caso porque la escritura no se refiere a cosa que deba liquidarse, respondía que también usaba de argumento falaz y sofístico, desentendiéndose de la aplicación ley del Digesto, pues esta no se había aplicado a la escritura sino que a lo que tenía más fuerza que ella que era a la respuesta del relacionante, confesando que a lo que se obligó Claros fue a pagar lo que resultase deber Molina, que se hallaba fugado. Era visto que la obligación era (…), y no absoluta, según confesión del que expresó: Que la expresión de a lo que tenía más fuerza que la escritura era porque es incuestionable que las posiciones juradas de la parte en juicio tenían más virtud que el relato de una escritura, con que descubría la falacia de contrario, desentendiéndose de la aplicación de la ley del Digesto, llevándola a la escritura de que nada se decía.

Que para crédito de no querer contestar sus excepciones, y asegura tácitamente no tener razones en su contra, exponía la variedad y falsedad con que se versaba el relacionante al final de sus dos escritos del folio 76 y 89. Que en aquel dijo que no resultando del testimonio de Avendaño la cuenta de Marfil y de Aranda, no podía

entender el Abogado de Claros como habiéndose obligado solo a 2.000 reales de vellón Molina y remitido a cuenta de varias partidas de pasa que cubrían casi el todo de ellos, se ponía un reglón que decía "ajuste de cuentas y me quedó debiendo 3.000". Que el segundo aseguraba que aunque era cierto que con los frutos de Molina y Marfil como no había traído frutos suficientes quedó descuento de 3.000, sobre que hace cierta digresión manifestativa de no tener razones que oponer a sus excepciones, y expuso otros fundamentos de hecho y derecho sobre la prueba, fuerza, actividad, excepción y falsedad de la escritura, y otras escrituras con que esforzó la justicia de su parte, con el mendo se determinase a su favor según tenía pretendido.

Y por otro si, pidió se diese compulsorio para que el Escribano Avendaño pusiese testimonio de los autos que el Molina principió ante el señor Don Antonio Freire en cuanto se acreditase que el Procurador del relacionante, Joaquín de Aguilera, había presentado los autos ejecutivos contra el Molina, los mismos que volvió a recoger bajo de su recibo. Expidiose el referido compulsorio y posterior se exhibió por el relacionante una pieza de autos que parece principiada ante el señor Bernardo de Oscoz, Alcalde Mayor que fue de esta Ciudad, y Don Gregorio Martínez de Ribera, Escribano de su Número a 22 de septiembre de 1780, que principian con una copia de escritura otorgada por José Martín Molina, vecino de dicha Villa de Iznate, a 8 de abril del propio año otorgada por ante el mismo Don Gregorio, por la cual el Molina se obligó a pagar al relacionante 2.938 reales de vellón que le prestó para sus labores y avío de su campo, que se dio por entregado y renunció las leyes competentes y capituló su pago en primero de septiembre del propio año con salario ejecutor, renuncia de su propio fuero y sumisión a este, cláusula guarentigia y demás de la naturaleza de semejantes contratos. Y en ellos consta expedida ejecución por la enunciada cantidad de principal y por más las costas que se trabó en ciertos bienes. Y habiendo sido citado de remate personalmente sin perjuicio del término de pregones, pasado que fue este, acusada rebeldía, se dio sentencia de remate, condenándole al pago de dicha cantidad y costas. Y dada la fianza de la Ley de Toledo y cuarto pregón de albalá se tasaron las costas, que importaron 196 reales de vellón y 27 maravedís, por los cuales y el principal se dio exhorto de apremio, en fuerza del cual se hicieron distintas diligencias: y habiéndose habido por exhibidos dichos autos se mandó corriesen con calidad de por ahora con los ejecutivos, y devuelto que fue el compulsorio diligenciado, estando los autos en estado, recayó la Providencia consistorial del tenor siguiente.

En la Ciudad de Málaga a 19 de diciembre de 1783, los señores Fernando de Cárdenas y José de Cea y Ordóñez, Jueces Sobre Fieles, y Cristóbal de Baeza y Ortiz, Alcalde Mayor y Corregidor Regente de ella, estando en consistorio habiendo visto estos autos en segunda instancia seguidos entre José de Claros y Don Matías Trujillo sobre revocación de la sentencia de remate dada por dicho Corregidor a 29 de octubre último que sale al (…) de ellos, teniendo precisa los que ha exhibido el dicho Don Matías, lo probado, expuesto y alegado recíprocamente por las partes, dijeron, declaraban y declararon no haber lugar a la revocación de dicha sentencia, lo cual confirmaban y confirmaron en todas sus partes, y mandaron se lleve a puro y debido efecto su tenor, reservando como reservaron su derecho al José de Claros para que por vía de acción, excepción o como más haya lugar lo de desga en el modo, vía y forma contra el relacionante, digo contra el Don Matías Trujillo o contra José Molina. Y por esta su sentencia definitiva con condenación de costas de esta instancia al José de Claros, así lo proveyeron y mandaron dichos Señores Jueces Consistoriales con acuerdo del Ldo. Manuel Herrero y Chiquero, Abogado del Ilustre Colegio de esta Ciudad y su asesor en estos autos, quienes lo firmaron con dicho señor Alcalde Mayor, siendo testigos Francisco Tollera, Francisco de Mesa y José Ruíz Cobos, vecinos de esta Ciudad de todo lo cual doy fe= Don Cristóbal de Baeza y Ortiz= Don Fernando de Cárdenas y Valenzuela= José de Cea y Ordóñez=Ldo. Don Manuel José Herrero y Chiquero= Blas de Mesa.

Lo que se hizo saber a las partes, y por la del relacionante se pidió tasación de las costas de esta segunda instancia, y que por todas y el principal se diese exhorto de apremio y pago, y con efecto fueros tasados e importaron 209 reales de vellón y 10 maravedís, por las cuales, las de primera instancia y principal, se expidió el pretendido exhorto, que cumplimentado en la Ciudad de Vélez y requerido así el, el Claros por defecto de pago se aseguró su persona en aquella real cárcel posterior, a lo cual a instancia del que relaciona, y con otra escritura copia igual a la que dio principio al referido juicio, en el día 16 del corriente mes se pidió y despachó requisitoria de ejecución contra el propio Claros por 1.756 reales de vellón de principal y segundo plazo vencido el 1 de noviembre de dicho año último pasado, la que igualmente se cumplimentó en dicha Ciudad de Vélez y trabó de nombramiento, en cuyo estado por parte del mismo Claros y en el día 24 del corriente se dio pedimento diciendo estaba pronto al pago del principal y costas de ambas ejecuciones, y que atento que tenía que

repetir contra los principales deudores de Don Matías, se tasasen las costas causadas por su parte, y por todo se diese escritura de pago, cesión y lasto. Y con efecto, por decreto de dicho día, se mandó unir el referido pedimento a los autos, y también los nuevamente principiados, y los excluidos por el relacionante, que se hiciese tasación de costas por las cuales y el principal y las del Don Matías, siendo efectivo el pago que se ofrecía, se otorgase la escritura que se pretendía, y en su virtud se hizo la tasación del tenor siguiente.

En cumplimiento de lo que se manda por el auto anterior, yo, el Escribano, hago la tasación de costas en él decretada y lo ejecuto en la forma y manera siguiente:

Primeramente, al señor Alcalde Mayor, por sus providencias y firmas, 76 reales de vellón y 24 maravedís.

A los señores Don José Ordóñez y Don Fernando de Cárdenas, Jueces Consistoriales de la segunda instancia, por sus derechos, 30 reales de vellón.

A Don Manuel Herrero y Chiquero, su asesor, 167 reales de vellón.

Al Abogado, por sus pedimentos de justicia, 480 reales de vellón.

A Don Gregorio Martínez, por un testimonio, 10 reales de vellón.

A Don José Avendaño, por otros testimonios, 47 reales de vellón.

A Don Francisco de León, Escribano acompañado para la prueba, 21 reales de vellón.

A Don Francisco Ferrer, por su actuado, 16 reales de vellón.

Al Procurador, por sus pedimentos y agencia, 96 reales de vellón.

A los Porteros, 20 reales de vellón.

A mi Oficio, por todo su actuado inclusa esta tasación, 243 reales de vellón y 29 maravedís.

Por el papel sellado gastado en estos autos (…) el de esta tasación, 59 reales de vellón y 24 maravedís.

A los Ministros de Justicia, por sus apremios, 6 reales de vellón.

Cuyas partidas importan 1.272 reales de vellón y 9 maravedís, y esta tasación la ha hecho bien y fielmente con arreglo al real arancel y en lo que no contiene a práctica del

juzgado, y procedo a hacer resumen general de las partidas de que se ha de componer el lasto decretado y es en la forma siguiente.

Resumen General:

Primeramente, de las dos ejecuciones por que se repite, 3.512 reales de vellón.

Costas causadas por Don Matías Trujillo hasta el último apremio, 945 reales de vellón y 26 maravedís.

Costas a instancia del mismo Don Matías en diligencias de apremio practicadas en la Ciudad de Vélez y según recibo de Don Juan Fernando García y Don Diego Angulo, 270 reales de vellón y 31 maravedís.

Ya causadas en la última ejecución a instancia del propio Matías y por derechos de todos interesados, 146 reales de vellón y 23 maravedís.

A los 1.272 reales de vellón y 9 maravedís que resultan de la anterior tasación.

De modo que importa este resumen 6.147 reales de vellón y 21 maravedís, y por ellos se ha despachar el lasto decretado en Málaga ut supra= Blas de Mesa.

Lo que habiéndose hecho saber al relacionante manifestó estar pronto otorgar la dicha escritura siendo efectivo el pago ofrecido. Lo inserto y relacionado concuerda y es acorde con dichos autos y su original en ellos, de que el infrascripto Escribano originario ante quien han pasado da fe, y se remite a la resultancia de dichos autos y en su virtud quiere el que (…) proceder a celebrar la correspondiente escritura de recibo pago finiquito poder cesión y lasto, respecto a que con efecto por parte del José de Claros se hace efectivo y pagadero el interés que repite el que relaciona por estos autos, y a su consecuencia, poniéndolo en ejecución confesando como confiesa la relación antecedente por la escritura, sabedor que declara estar de cuanto en el presente caso le corresponde: otorga que recibe en contado del dicho José de Claros 4.875 reales de vellón y 12 maravedís, de los que solo son efectivos 4.064 reales de vellón y 29 maravedís, que con los 810 reales de vellón y 17 maravedís que constan pagados por el recibo inserto y mandado abonar importan los dichos 4.875 reales de vellón y 12 maravedís que importa el principal y costas generalmente causadas por el otorgante en dichos autos. Y citadas dos ejecuciones, inclusive las costas apremiales y demás invertido en dicha Ciudad de Vélez, y porque los 4.064 reales de vellón y 20 maravedís son en contado, me piden de fe.

Y yo, el infrascripto Escribano del Rey Nuestro Señor, Público en el Número de esta Ciudad, la doy de que a mi presencia, y las de los testigos de esta escritura, el referido José Claros y por parte de este se aportaron los dichos 4.064 reales de vellón y 29 maravedís en moneda de oro, plata y vellón, física, usual y corriente, que lo sumo y monto, los mismos que el Don Matías Trujillo otorgante contó, recibió, paso a su poder y guardó, y de ellos a mayor abundamiento como de los dichos 810 reales de vellón y 17 maravedís se dio por contento y entregado a su voluntad sobre que renunció las leyes de la entrega non numerata pecunia de la paga excepción del recibo y demás del caso como en ella se contiene, y a su consecuencia, como legítimamente pagado de dicha suma principal y costas que repetía, se declara por tal, y otorga tan bastante carta de pago solemne recibo y finiquito en forma como convenga al derecho y seguida del expresado José de Claros, su herederos. Y como tal (…) nula, invalidada y deja por de lo ningún momento valor en efecto la citada escritura de obligación, a cuyo margen, para que siempre conste, pide a mi, el Escribano, anote la celebración y otorgamiento de esta escritura.

Y respecto a que además de los dichos 4.875 reales de vellón que lleva pagado con dichos 12 maravedís, ha sufrido el lasto de 1.272 reales de vellón y 9 maravedís importe de las costas procesales causadas en su defensa en los citados autos a instancias, según judicial tasación en ellos hecha, a que se agregan 300 reales de vellón que importan los derechos de esta escritura original, para cuya formación ha sido indispensable la vista y prolijo reconocimiento de dichos autos, nota que de ello se ha de pasar al original Matías su copia que se ha de dar y papel de uno y otro, importando todas estas partidas 6.447 reales de vellón y 21 maravedís.

Para que el referido las pueda repetir del dicho José de Claros o de quien más viere, le conviene por consecuencia de su reservado derecho, desde luego le confiere todo su poder cumplido bastante el que tiene de derecho se requiere, más puede y valer debe al dicho José de Molina, a quien pone en su propio lugar, grado y derecho, y le constituye su Procurador actor general, en cuya propia para que por su virtud y con total prescindencia y absoluta separación del otorgante, ponga en uso su derecho contra el José Martín Molina o quien más vea conveniente o contra quien le competa, ya por vía de acción, excepción o en otro cualesquier modo, vía y forma correspondiente como ante y contra quien haya lugar haciendo las más exquisitas, agudas y eficaces diligencias con ser fuentes en todos términos y disposiciones hasta conseguir su íntegra

solvencia y paga no solo de dichos 6.447 reales de vellón y 21 maravedís, si también de las costas, dietas y demás que ocasionare y lastare como de los perjuicios y daños que se le hayan seguido y recrecido, y en adelante se le sigan y experimente hasta quedar completamente satisfecho de dicho principal, sus costas y demás cuanto deba hacer de cuyo (…) poder, cesión y lasto en toda forma para que lo (…) repita de su cuenta, cargo y ruego como más le convenga.

Y todo cuanto por consecuencia de ello haya, perciba y cobre lo reciba en sí por sí y para sí o por medio de sus apoderados, dando de todo los recibos, cartas de pago y finiquitos simples o auténticos que le sean pedidos, lastos a favor de los que paguen como fiadores de otros. Que todo tenga entera validación y firmeza como obrado por parte legítima pueda transigirse, dimitir o perdonar cuando a bien tenga deferir los pagos, y hacer lo que estime por conveniente sin que hubiese reparo alguno, se le oponga como persona hábil y pudiente por derecho, otorgue las escrituras, vales y contratos jurídicos o extrajudiciales que le requieran con las cláusulas, vínculos y firmezas a su mayor validación, conducentes, y caso necesario nombre contadores, pida cuentas, las apruebe o repruebe según méritos, y se comprometa a juicio de buen de varón, nombrando Jueces, árbitros, juris arbitradores, amigables componedores, tercero en discordia con asignación de término para la decisión y facultad de prorrogarlo, obligándose a estar y pasar por el lado o laudor que den bajo las penas y multas que se impongan, en cuyos contratos no siendo la paga por ante Escribano que la certifique, las confiese y renuncien las leyes de la entrega y demás que se dan expresadas con las otras que se contraigan a la naturaleza de los tales contratos.

Y en razón de todo o sus incidencias pueda parecer en el juicio ante los señores Justicias de Su Majestad de cualesquier tribunales superiores e inferiores de todos fueros, haciendo y prestando lícitos juramentos de calumnia una misma propia. Presente pedimentos, requerimientos, protestas, pida ejecuciones, prisiones, solturas, embargos, desembargos, ventas, trances y remates de bienes. De que tome su posesión su amparo con lanzamiento de sus poseedores, y en prueba o fuera de ella haga todo género de información y presente todos instrumentos en cuyo abone, tache, contradiga, alegue y concluya. Pida y renuncie términos, diga autos y sentencias interlocutorios y definitivas, consiéntalas a favor y de las en contrario. Apele y suplique, siga estos recursos en todas instancias y tribunales, gane reales providencias, cartas sobre cartas acordadas, mandamientos con censuras, letras y bulas apostólicas, censuras, antemas y otros reales

rescriptos despachos, los que hagan requerir de personas (…), se dirija y pida de llevar cumplimientos (…) debido efecto y haga que las diligencias judiciales y extrajudiciales convengan.

Y el otorgante podría hacer que el poder especial, cesión y lasto en causa propia que para ello lo incidente y dependiente se requiera, ese mismo le da y otorga con toda amplitud y sin limitación, de modo que por falta de poder o cláusula que se haya omitido no deje de obrar cuanto conduzca a los fines a que termina, pues para lo mismo se lo amplía y revalida con libre, franca y general administración, facultad de mandar defender, enjuiciar querellas, jurar, tachar, probar, recusarlas Señores Jueces y demás subalternos, separarse cuando convenga, y la de sustituir en todo o parte como le pareciere. Revoque los sustitutos y nombre otros de nuevo, con causa o sin ella, todas las veces que a bien lo tenga y con relevación y obligación de su cuenta y cargo, en forma y a la firmeza de este instrumento y de lo que en su virtud se obrare. Se obligó según derecho son sus bienes y rentas habidos y por haber, dio poder cumplido a los Señores Jueces, Justicias de Su Majestad, de cualesquier partes que sean, y que de sus causas puedan y deban conocer para que le apremien a lo que derecho es como por sentencia pasada en autoridad de cosa juzgada, renuncio todas las leyes, fueros y derechos de su defensa y favor y la que prohíbe la general renunciación de ella. Y así lo dijo, otorgó y firmó siendo testigos Don José Buso, Don Salvador Coso y Don Andrés Suárez, vecinos de esta dicha Ciudad= (…).

(Signatures of Matías Trujillo and Blas de Mesa)

Source: AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v.

APPENDIX 2.6: Analysis of the lawsuit between Matías Trujillo and José de Claros

In order to complete our analysis of the effectiveness of notarized contracts in Malaga, we must analyze what happened when they were breached. None of the legal advantages of these instruments would be valuable if the courts refused to apply them. Unfortunately, neither the AHMM nor the AHPM have a specific judicial fond documenting cases between private parties heard in the judicial district court. The AHPM contains notarial records of judicial decisions (bail bonds, payments, etc.), but they only briefly mention the reasons for the dispute and the judicial resolution. Nevertheless, among the notarial records recorded in 1784, I have identified a deed of "payment, power, debt transfer and transfer of rights" (*pago, poder, cesión y lasto*) that meticulously describes an executory process originated by the breach of a notarized obligation.[1] Analysis of this document could help us understand the functioning of the justice system, and, more specifically, the legal support that the courts gave to these instruments.

This lawsuit involved two litigants: Matías Trujillo, citizen and merchant of the city of Malaga, and José de Claros, citizen of the town of Iznate, a small municipality located in the judicial district of Velez-Malaga. On March 4, 1782, Claros obliged himself to pay 3,512 r.v. that Trujillo had lent him to cover his emergencies. He would pay half of the amount on November 1, 1782, and the other half on November 1, 1783. Blas de Mesa, public notary of Malaga, notarized this transaction. On November 26, 1782, Baltasar de Claros, son of José, delivered 810 r.v. and 17 mrvds. to Trujillo, and he promised to deliver the rest of the first payment in a few days. On January 13, 1783 Trujillo had still not been paid, so he launched legal actions against Claros. On January 21, 1783 the *Corregidor* of the judicial district of Velez-Malaga seized the assets of Claros after receiving a requisition request (*requisitoria*) from the courts of the judicial district of Malaga. After a few months, on June 27, 1783, Trujillo asked the *Corregidor* of Velez-Malaga to announce the future auction of the seized assets (*pregones*). Claros then opposed the execution, and a trial before judge Cristóbal de Baeza y Ortiz, *Alcalde Mayor* of the city of Malaga, was initiated. This trial took place in two different

[1] AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-52v.

instances over six months (first before the *Alcalde Mayor* first, and then before a *tribunal consistoria*l), until the final sentence was passed on December 19, 1783.[2]

The attorneys who represented the two litigants followed different legal strategies during the trial. Antonio Muñoz de la Chica (Claros' attorney) tried to invalidate the contract by providing testimonies of his client and some witnesses. This strategy was summarized in his own words: "It is unquestionable that the sworn positions of the parties during the trial are more virtuous than the tale of a deed". Since notarized documents were supported by the faith of public officers, Castilian law only accepted its invalidation if some legal exceptions were proved (Carvajal, 2013, pp. 115-116). These legal exceptions included, for example, demonstration that the loan had already been paid, documentary falsehood or the existence of usury.[3] In both the first and second instances Muñoz de la Chica based his client's defence on two main arguments.

First, he claimed that his client had never received 3,512 r.v. from Trujillo. The contractual relationship between Claros and Trujillo was originated by a previous relationship between another debtor from Iznate, called José Molina, and Trujillo. On April 8, 1780 Molina obliged himself to pay 2,932 r.v. to Trujillo. Molina breached the contract, so Trujillo launched a legal action against him on September 22, 1780. An agent called Esteban Dueñas was sent to Iznate to claim the debt, and Molina fled the town to avoid being sent to prison. Then, in order to avoid the execution of Molina's assets, two priests of the Santo Domingo convent of the city of Malaga (Fray Juan Guerrero and Fray Tomás de Cuenca) spoke with Trujillo. They compromised to find a guarantor for the contract if Trujillo stopped the execution. For this purpose they spoke to José de Claros, who accepted this role on March 1782. If Molina did not deliver the money on November 1782 and on November 1783, Claros would do so. The problem, according to Claros' attorney, was that his client had been tricked by Trujillo, who told the notary to include Claros as a debtor, not as a guarantor. Claros was illiterate and had

[2] In early modern Spain the judges of judicial district courts (*corregidores* and *alcaldes mayores*) and the mayors of the municipalities (*alcaldes ordinarios* and *alcaldes pedáneos*) administered first-instance civil justice. District courts were responsible for all disputes that occurred in the capitals of the districts, as well as those matters in the remaining municipalities of the districts that involved more than 600 mrvds. If the affair involved a lower amount, it was the mayors of the municipalities who judged it (Heras Santos, 1996, pp. 126-135). Appeals were heard by regional high courts of justice (*audiencias* and *chancillerías*) if the litigation involved more than 40,000 mrvds. If a lower amount was involved, a tribunal composed by the judge of the first instance and two aldermen of the city (*tribunal consistorial*) heard the appeal (NR, *Libro XI*, *Título XX*, *Leyes VIII* and *X-XI*, 1805, pp. 222-225).

[3] NR, *Libro XI*, *Título XXVIII*, *Ley III* (1805, p. 272).

not asked the notary to read the contract. Thus, he returned to his town without knowing the true countents of the contract.

Second, the attorney also alleged that, even if his client had obliged himself as debtor, the debt had already been paid. Muñoz de la Chica explained that the original debtor was neither Claros nor Molina, but another citizen of Iznate called Antonio de Aranda. Just like Molina would do later, Aranda fled his town to avoid being sent to prison. Then Molina obliged himself to pay Aranda's debt. The attorney provided a testimony by his client to prove that this debt had already been paid. According to Claros, Aranda originally owed Trujillo 1,732 r.v. and 10 mrvds., even though the latter had received 102 *arrobas* and 10 pounds of raisins from the former. Molina promised to pay 2,000 r.v. to Trujillo, delivering 217 *arrobas* of raisins to him some time later. The attorney could not understand how it was possible that, after delivering this amount of raisins, Molina's debt had increased from 2,000 r.v. to 2,932 r.v. Consequently, he considered that the original debt had been paid.

Joaquín de Aguilera, Trujillo's attorney, relied on a simpler strategy. During the trial he basically supported his position in the strength of the deed. This strategy was summarized in his own words: "The deed does not need any proof". When Trujillo was interrogated, he acknowledged that Claros had never received the amount specified in the contract. However, he claimed that Claros had agreed to oblige himself as a debtor, not as a guarantor, and he referred to the content of the notarized deed.[4] To reinforce his version, he offered the testimony of the executor. In the same vein, when he was interrogated about the primitive debts of Aranda and Molina and the deliveries of raisins, he referred to the contents of his account book. Both Trujillo and his attorney alleged that Molina and Claros were implicated together maliciously and had initiated the trial in the hope of avoiding paying the debt.

On October 29, 1783 *Alcalde Mayor* Baeza passed sentence. He declared that Trujillo was right and, consequently, he ordered the auction of Claros' assets in order to pay both the remaining amount of the first payment (945 r.v. and 17 mrvds.) and the court fees (whose amount was not specified). On November 7, 1783, however, Claros appealed against the sentence. Appeal was allowed to a tribunal consisting of *Alcalde Mayor* Baeza and two aldermen of the city (Fernando de Cárdenas and José de Cea

[4] The original contract, written on March 4, 1782, effectively mentioned Claros as debtor, not as guarantor (AHPM, *protocolos notariales de Málaga capital*, *libro* 3234, pp. 174r-174v).

Ordoñez), and assisted by a lawyer of the *Ilustre Colegio de Abogados* of the city, Manuel José Herrero. After hearing new witnesses (including José Molina, who had already been imprisoned) and new legal arguments, the tribunal passed sentence on December 19, 1783. Once again Trujillo won the lawsuit, and the judges ordered Claros to pay both the remaining amount of the notarized contract (the remaining 945 r.v. and 17 mrvds. of the first payment and 1,756 r.v. of the second instalment) and the court and notarial fees of the two instances (2,935 r.v. and 21 mrvds.). On January 26, 1784, Claros paid Trujillo. Furthermore, both parties notarized a transfer of rights deed that authorized Claros to launch legal actions against Molina in order to recover his money.

It is impossible to know which of the two parties was right, but it is clear that these courts gave greater value to the content of the notarized deed than to the testimonies it heard during the trial. This greater value is clearly reflected in the initial description of the motives of the lawsuit made by the notary who wrote the deed of "payment, power, debt transfer and transfer of rights". In the deed, the notary emphasized that the original contract between Trujillo and Claros included acceptance by the latter of both the *guarentegia* clause and three of the waiver clauses (the resignation to the *non numerata pecunia* exception, the resignation to his *fueros* and the acceptance of the executor):

"In the city of Malaga, on January 26, 1784, before me public notary and the undersigned witnesses, appeared Matías Trujillo, citizen and merchant of this city, known to me, which I attest. And he said that in the court of Mr. Don Cristóbal de Baeza y Ortiz, Lawyer of the Royal Councils, *Alcalde Mayor* and regent *Corregidor* of this city, and before me as his notary, he initiated an executory process on January 13, 1783 against José de Claros, citizen of the town of Iznate, jurisdiction of the City of Velez, subjected to its *fuero*, with the copy of a deed of obligation *guarentigia* that the afore-mentioned had granted before me and the competent number of witnesses on March 4, 1782, by which he (Claros) obliged himself to pay him (Trujillo) 3,512 r.v. that he had loaned him to cover his emergencies. He (Claros) recognized the delivery, and waived the laws of the unseen goods (resignation to the *non numerata pecunia* exception), accepting the payment in two instalments of 1,756 r.v. on November 1, 1782 and on November 1, 1783, plus the wage of the executor that was sent, and he

obliged himself waiving his own *fuero* and expressly subjecting to the *fuero* of this city."[5]

Of course, it is not possible to extrapolate this example to the entire Spanish judicial system. In fact, it is not even possible to extrapolate it to the entire judicial system of the city of Malaga. In the same way, the existence of judicial corruption cannot be ruled out, as has been evidenced for other parts of Spain (Castellano Castellano and Gómez González, 1995). Nevertheless, analysis of this case suggests that, in a context of high transaction costs that characterized pre-liberal and pre-industrial economies, notarized documents boosted certainties for economic agents.[6] This should have been useful not only for one's own lawsuits, but also in encouraging extrajudicial solutions. Because sentences were more predictable, the contracting parties might prefer to seek an extrajudicial solution, thus avoiding costs in time[7] and money.[8]

[5] Own translation. AHPM, *protocolos notariales de Málaga capital*, *libro* 3236, pp. 28r-28v.

[6] This certainty could have been lower for those transactions that involved a different court for the appeal. For example, between 1540 and 1680 the *Chancillería* of Valladolid reversed 25.6% of the decisions taken by inferior courts, while the Council of the Indies, between 1583 and 1598, reversed 23.7% of the decisions taken by the *Audiencia de la Contratación* of Seville. See Kagan (1981, p. 100) and Fernández Castro (2015, p. 60) respectively.

[7] For example, the average duration of those lawsuits judged by the *Chancillería* de Valladolid between 1480 and 1521 was 3.4 years (Carvajal, 2013, p. 183). Between 1540 and 1620 only a small fraction of those cases judged by the same court were solved in less than one year (ranging from 21% in 1540 and 12% in 1620). See Kagan (1981, p. 43). Certainly, the *Chancilleria* was an appeal court that judged litigation of a very varied nature, both spatially and typologically. In the *Audiencia de la Contratación* of Seville, a first instance court, between 1583 and 1598, 79% of the lawsuits – most of them governed through an executory process – were solved in less than six months (Fernández Castro, 2015, p. 247).

[8] According to Kagan (1981, pp. 38-42), court fees in early modern Castile were high. Once again, however, there should have been huge differences among courts and types of litigation. For example, in 76% of those lawsuits that were judged by the *Audiencia de la Contratación* of Seville between 1583 and 1598, court fees did not exceed 3% of the value of the claimed assets (Fernández Castro, 2015, p. 250). Even so, it should be noted that notarial and court fees had priority of payment, which could have reduced the amounts recovered by creditors (Febrero, 1786, p. 702). A good example is the lawsuit that the Royal Treasury and two ecclesiastical institutions followed against a tax farmer from the town of Casabermeja called Antonio Sánchez Villalba in 1783-1784. Sánchez Villalba owed them 3,955 r.v. and 5 mrvds. After the sentence was passed, one of his properties was foreclosed and sold for 1,207 r.v. and 17 mrvds. Creditors, however, only recovered 585 r.v. and 9 mrvds., since notarial and court fees absorbed 622 r.v. and 8 mrvds. (AHMM, *caja* 635: *expediente* 15).

APPENDIX 4.1: List of registries created in Spain before 1768*

Municipality	Area	Date of creation
Santa María de Nieva	Kingdom of Castile	1514**
Sepúlveda	Kingdom of Castile	1515**
Seville	Kingdom of Seville	1541***
San Cristóbal de la Laguna	Canary Islands	1543**
Albacete	Kingdom of Toledo	1574**
Madrid	Kingdom of Toledo	1589
Écija	Kingdom of Seville	1590
Santa Cruz de Tenerife	Canary Islands	1615**
Cáceres	Kingdom of León	1622**
Órgiva	Kingdom of Granada	1626**
Madrid	Kingdom of Toledo	1646
Seville	Kingdom of Seville	1646
Alcalá de Henares	Kingdom of Toledo	1646
Cádiz	Kingdom of Seville	1647
Santa Fé	Kingdom of Granada	1678**
Valencia de Alcántara	Kingdom of León	1738**
Vallecas	Kingdom of Toledo	1745**
Almodóvar del Campo	Kingdom of Toledo	1751**
Salamanca	Kingdom of León	1753**
Zamora	Kingdom of León	1759**
Lillo	Kingdom of Toledo	1760**
Sanlúcar de Barrameda	Kingdom of Seville	1760
San Sebastián	Province of Guipúzcoa	1760**
Antequera	Kingdom of Seville	1761**
Ocaña	Kingdom of Toledo	1762**
Ponte Caldelas	Kingdom of Galicia	1764**
A Cañiza	Kingdom of Galicia	1766**
Lalín	Kingdom of Galicia	1766**

*Note: I have evidence for other places, but have not been able to find the date of creation: Molina, Nájera, Ciudad Rodrigo, Palencia –all of them at the end of the sixteenth century –, San Fernando, Toledo and Carmona (Serna Vallejo, 1995, pp. 239, 272 and 276). In Zamora and Cádiz other registries were created (Serna Vallejo, 1995, p. 239 and pp. 245-246).

**Note: the archive catalogue does not state that the registry was created in that year, but the first preserved document corresponds to that year.

***Note: 1541 is the year in which Seville received the second and last order to create the registry (Porras Arboledas, 2004, p. 252).

Source: catalogs of Archivo Histórico de Protocolos de Madrid, Archivo Histórico Provincial de Albacete, Archivo Histórico Provincial de Cáceres, Archivo Histórico Provincial de Ciudad Real, Archivo Histórico Provincial de Gipuzkoa, Archivo Histórico Provincial de Granada, Archivo Histórico Provincial de Málaga, Archivo Histórico Provincial de Pontevedra, Archivo Histórico Provincial de Salamanca, Archivo Histórico Provincial de Santa Cruz de Tenerife, Archivo Histórico Provincial de Segovia, Archivo Histórico Provincial de Toledo, Archivo Histórico Provincial de Zamora and Archivo Municipal de Écija. See also Serna Vallejo (1995, pp. 232, 246-248 and 258), Cerdeña (2003, p. 420), and Porras Arboledas (2004, p. 252).

APPENDIX 4.2: Variations of average contracts according to type of mortgage in 1764 and 1784 (general mortgage=100)

Kind of mortgage	Number of contracts (1764)	Average contract (1764)*	Number of contracts (1784)	Average contract (1784)*
1.General mortgage	208	100.0	898	100.0
2. General mortgage + special mortgage (all)	1,103	101.5	283	208.2
2.1. Registrable	991	99.3	215	227.8
2.1.1. Real property (lands and real estate)	985	99.1	212	229.9
2.1.1.1. With public annuity	277	87.4	52***	182.5***
Censo de población**	275	86.2	43***	146.1***
Others	2	248.5	8	357.1
Both	-	-	1	349.9
2.1.1.2. With private annuity	220	96.2	81	274.0
2.1.1.3. With public and private annuity	45	184.0	10	308.4
Censo de población**	44	156.1	8	334.3
Others	-	-	2	204.7
Both	1	1414.1	-	-
2.1.1.4. Unspecified	10	88.4	5	418.7
2.1.1.5. Free property	433	99.5	64***	188.7***
2.1.2. Personal property (offices and annuities)	5	110.8	2	68.2
2.1.3. Real and personal properties	1	162.1	1	115.4
2.2. Non-registrable	112	122.0	68	149.0
2.2.1. Cattle	72	57.8	54	70.3
2.2.2. Cattle and others	-	-	4	360.4
2.2.3. Others (harvest, tools, devices, boats and cargoes)	40	237.2	10	481.5

*Note: contracts whose amount is not specified are excluded.

**Note: emphyteutic contract between the king and the Christian families who repopulated the Kingdom of Granada after the deportation of the *moriscos* (Spanish Muslims who were forced to convert to Christianity) to other kingdoms under the Crown of Castile in 1571. According to this contract, the king would receive an annual rent until the settler decided to redeem the charge by buying the property from the king. See Campos Daroca (1984-85).

Source: see footnote No. 30 of the chapter 4.

***Note: in the version published in *Revista de Historia Económica/Journal of Iberian and Latin American Economic History*, I wrongly interpreted one of the 1784 contracts supported with a property with the *censo de población* to have been a contract supported with a free property. This mistake,

however, does not affect the econometric results. Regarding the average amounts mentioned in that version, were practically the same: "With public annuity" (180.6), "*Censo de población*" (142.9) and "Free property" (190.2). Equally, the percentage of real property-mortgage obligation contracts encumbered with public and private annuities that I mentioned in that version was also very similar (69.0%) (see chapter 4, footnote No. 18).

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