200 YEARS OF STATEHOOD, 300 YEARS OF CIVIL LAW:
NEW PERSPECTIVES ON LOUISIANA’S MULTILINGUAL LEGAL EXPERIENCE

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- Judicial Review in Louisiana: A Bicentennial Exegesis
  Paul R. Baier & Georgia D. Chadwick

- De Revolutionibus: The Place of the Civil Code in Louisiana and in the Legal Universe
  Olivier Moréteau

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- Clashes and Continuities: Brief Reflections on the “New Louisiana Legal History”
  Seán Patrick Donlan

- Making French Doctrine Accessible to the English-Speaking World: The Louisiana Translation Series
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- Louisiana Civil Code - Code civil de Louisiane
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REDISCOVERED TREASURES OF LOUISIANA LAW

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AVANT-PROPOS

In 2012, the state of Louisiana commemorates the Bicentennial of Louisiana’s statehood: on April 30, 1812, Louisiana was admitted as the 18th state in the Union. This event happens to coincide with the Tercentennial of the enactment of French law as the law applicable to La Louisiane, marking a starting point of the law of Louisiana. A Letter Patent signed on September 14, 1712 by King Louis XIV of France granted to Sieur Crozat, the king’s Secretary, exclusive trade rights in all lands possessed by the king “under the government of Louisiana,” whilst providing in article VII that all laws applicable in Paris and its province, including Edicts, Ordinances and Customs, were applicable to Louisiana. This is the first document to make reference to the law to be applied in Louisiana. Until the cession to Spain fifty years later, French law officially applied in the immense territories that stretched from the Gulf of Mexico to the Great Lakes and from the Mississippi River to the Rocky Mountains and to the Isle of Orleans east of the Mississippi River. The rediscovery of colonial archives in New Orleans, and their future availability in digital format, opens a new horizon to historical studies, though their ambit might be limited to New Orleans and South Louisiana.

French law would cease to apply in Louisiana after its cession to Spain in 1762. The complex and intricate Spanish laws, largely derived from the Roman law of Justinian and that of the Visigoths, remained in force after the retrocession of the Louisiana territories to France in 1800 and the subsequent Louisiana Purchase by the United States in 1803. The southern part of it was organized as the Territory of Orleans, to become in 1812 the state of Louisiana. French law would never apply again as such, but it would remain

1. One should not neglect the laws and customs of Native Americans. The author feels ashamed to relegate them to a footnote. Whilst acknowledging their existence, he pleads guilty and admits his ignorance.
influential after the territorial period, during two centuries of statehood.²

Two Notes published in this issue illustrate some of these developments. Seán P. Donlan discusses the work of recent historians of Louisiana law, showing that the study of the development of a mixed legal system (such as the Louisianan), whether based on a clash of legal cultures or continuity, requests a combination of multiple skills, pertaining to a new discipline called comparative legal history.³ Alexandru-Daniel On authored a very informative text on the Louisiana Translation Series, which makes monuments of French legal literature accessible to English speakers, and allows Aubry & Rau, Baudry-Lacantinerie, Gény, and last but not least, Planiol, to remain leading doctrinal sources in the state of Louisiana.

The present issue of the Journal of Civil Law Studies contributes to the celebration of the past, showing how earlier accomplishments can be reenergized to pave the way to the future, moving the civil law of Louisiana from nearly dead, barely resurrected status, to that of a beacon in a world where the civil and common law traditions interfere and interact, mixed jurisdictions becoming the norm.

This volume is an inaugural issue, with a new section Civil Law in Louisiana to feature notes on significant cases decided in the state, written by our Student Editors, all second and third year law students at the LSU Paul M. Hébert Law Center, under the supervision of their civil law or comparative law professors. From Volume 5 onwards, Civil Law in Louisiana will appear in every volume of the Journal. Also, for the first time, the Journal publishes an LSU Law student Essay, showing how the civil law of

3. Comparative Legal History is the name of a new journal published by Hart Publishing. Seán P. Donlan, an LSU Law Center graduate, is the Editor.
Louisiana can help address a serious environmental problem of our time.

This volume includes the presentation of a portion of the translation work done at the Center of Civil Law Studies. Several titles of the current Louisiana Civil Code are published in a bilingual format in Civil Law Translations, with the original English on the left and a French translation on the right. In addition, short informative Book Reviews bring evidence of the regained vitality of civil law scholarship in Louisiana.

Two Articles discuss and recombine two major themes of the celebration: constitutional law and civil law. Professor Paul Baier, a distinguished scholar and playwright, stages the origins of judicial review in Louisiana and trumpets words he rediscovered in the Louisiana Constitution of 1812: “All laws contrary to this Constitution shall be null and void.” This phrase was not to be reenacted in more recent constitutions but Paul Baier makes an opera out of it, promoting exegesis in a dialogue of two giants of the judiciary, United States Chief Justice John Marshall and Louisiana Judge François-Xavier Martin, showing how the latter, known as the Father of Louisiana Jurisprudence, introduced judicial review in the newly admitted state. The libretto was carefully researched and drafted by coauthor Georgia Chadwick, curator of most valuable original documents on Louisiana’s legal history and the civil law in general, at the Law Library of Louisiana, housed in the beautifully renovated building of the Louisiana Supreme Court in New Orleans. *De Revolutionibus*, reprinted with the kind permission of the Montreal based Éditions Thémis and McGill University, redefines the place of the Civil Code in Louisiana and in the legal universe. The author shows, among other things, the growing influence of the Constitution on

4. His Play, “FATHER CHIEF JUSTICE”: E.D. WHITE AND THE CONSTITUTION (1997) has been staged in several places in Louisiana, in Washington, D.C. and soon in Boston. It features the life and work of Edward Douglass White, the only Louisianan ever to become a Justice of the United States Supreme Court (in 1894), and Chief Justice from 1910-1921.
the Code in all civil law jurisdictions, and discusses how the Civil Code, once at the center of the galaxy, has become a peripheral star in Louisiana, much like in other civil law jurisdictions. In Louisiana, like elsewhere, the Civil Code can be reenergized if re-centered around the citizen.

Whether familiar or not with Louisiana law, readers will also enjoy a *Rediscovered Treasure of Louisiana Law*, a late-19th century essay by Thomas Semmes surveying the history of the laws of Louisiana and offering a short and accurate overview of the development of Roman law, proving if need be that the Louisiana legal system, though technically 200- or 300-year old, has roots ten times older. As expressed by the well-known Southern author, William Faulkner, “The past is never dead. It’s not even past.”

*Olivier Moréteau*

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JUDICIAL REVIEW IN LOUISIANA: A BICENTENNIAL EXEGESIS

By Paul R. Baier* and Georgia Chadwick**

This court, and every court in this state, not only possesses the right, but is duty bound, to declare void every act of the legislature which is contrary to the constitution. The due exercise of this power is of the utmost importance to the people, and if it did not exist their rights would be shadows, their laws delusions, and their liberty a dream.

—François-Xavier Martin

I. PRÉFACE: 1812-2012

No scholar of Louisiana’s public law that we can find has trumpeted a “general provision” of Louisiana’s Constitution of 1812 that has since disappeared. This was a long time ago. Louisiana joined the United States of America on April 30, 1812, exactly nine years after the Louisiana Purchase of 1803—the year of Marbury v. Madison. Jefferson doubted the constitutionality of the purchase; John Marshall later sustained it. John Marshall was Chief Justice of the United States in 1812. War with Britain raged. General Andrew Jackson triumphed in the Battle of New Orleans. But the Constitution triumphed over the General. This was the last skirmish of the War of 1812, another Bicentenary to celebrate—or to lament—depending on one’s view of the facts and the law. Here is an early chapter, the earliest we can find, in the annals of judicial review in Louisiana.

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** Law Librarian of Louisiana. Executive Director, Supreme Court of Louisiana Historical Society. Curator, Supreme Court of Louisiana Museum, 400 Royal Street, New Orleans, open to the public. The Museum’s exhibit cases walk you through two hundred years of the Court’s history, in photographs, portraiture, and memorabilia, from its earliest days in the Cabildo, built under Spanish rule, ca. 1795, to the beaux arts magnificence of the Supreme Court’s 1910 building, now restored to its original glory in the heart of the Vieux Carré. For a tour, call Georgia Chadwick, 504.310.2402.
We mean judicial control by way of the Great Writ of Habeas Corpus of the Executive Branch, of the Commander in Chief—the judicial root, if you will, of *Boumediene v. Bush*, 553 U.S. 723 (2008), of late, the Supreme Court’s condemnation of Section 7 of the Military Commission Act of 2006 as an unconstitutional suspension of the writ of habeas corpus in violation of Article I, Section 9, Clause 2 of the United States Constitution: “The Clause protects the rights of the detained by a means consistent with the essential design of the Constitution. It ensures that, except during periods of formal suspension, the Judiciary will have a time-tested device, the writ, to maintain the ‘delicate balance of governance’ that is itself the surest safeguard of liberty.”—per Kennedy, J.—Chief Justice Roberts, joined by Justice Scalia, Justice Thomas, and Justice Alito, dissenting. Another 5-4, split decision. Binding on the President?

II. *LE TEXTE*

**ARTICLE VI. SECT. 25.** By way of a Bicentennial exegesis we propose assaying the last general provision of Article VI of Louisiana’s Constitution of 1812, the lost provision of Louisiana’s fundamental law that caught our eye. It is the last of twenty-five “*Dispositions Générales,*” to quote the French version. It appears almost as an afterthought.

Here is the text of Section 25, precisely as it appears in the English version of **ARTICLE VI. General Provisions, CONSTITUTION** or **FORM OF GOVERNMENT** of the State of Louisiana, adopted January 22, 1812, quoted in its elegant simplicity, center-stage, so to speak, echoing down through contemporary legislative, executive, and judicial chambers:

“All laws contrary to this Constitution shall be null and void.”

Or, to quote the French version:

“*Les lois contraires à cette Constitution seront nulles.*”
III. THE LOST PROVISION

Section 25 disappeared from Louisiana’s public law with the adoption of the Constitution of 1845. It has never appeared in any Louisiana Constitution thereafter. Why? We suppose that after a generation on the books, by the time of the Louisiana’s Constitution of 1845, it was generally accepted that Louisiana’s fundamental law, voiced by the Judiciary, controls the Legislative and the Executive Magistracies. François-Xavier Martin in his painstaking HISTORY OF LOUISIANA, FROM THE EARLIEST PERIOD (Vol. I, 1827; Vol. II, 1829) blithely passes over Section 25 in his detailed description of the provisions of Louisiana’s first Constitution. More recently, Tulane Law School Dean Emeritus Cecil Morgan in his little jewel of a book, THE FIRST CONSTITUTION OF THE STATE OF LOUISIANA (1975), for the Historic New Orleans Collection, draws the reader’s attention to “some interesting aspects” of Louisiana’s first Constitution that “deserve special mention.” He says nothing at all, however, about Section 25. To us, it jumps off the page. It reminds us of John Marshall’s immortal principle, “supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.” The italics, nota bene, are John Marshall’s. Marbury v. Madison, 1 Cranch 137, 180 (1803).

After two hundred years we propose a Bicentennial Minute entry essaying the origin of judicial review in Louisiana. We throw Bicentenary light on what is a vital, yet completely overlooked, now lost, provision of Louisiana’s first “CONSTITUTION OU FORME DE GOUVERNEMENT DE L’ETAT DE LA LOUISIANE.”

IV. FRANÇOIS-XAVIER MARTIN, GEORGE WYTHE

Doubtless there was talk of Montesquieu’s Espirit des Lois in Vieux Carré coffee houses in the founding days of Louisiana’s
public law. François Martin, a jurist of indefatigable scholarship, undoubtedly nursed himself on Montesquieu and John Marshall. He hardly slept for all the books he read. He spent his nights preparing his astounding ORLEANS TERM REPORTS (1809-1812) and his LOUISIANA TERM REPORTS (1813-1830), to say nothing of his night watches reading law tirelessly, reading law endlessly. We can easily imagine François Martin reading George Wythe’s monumental opinion in Commonwealth v. Caton, 4 Call 5 (1782), by candlelight in his Vieux Carré lodgings. We are sure he read it. Here is Chancellor Wythe’s renowned passage announcing judicial condemnation of a legislative act, 4 Call 8:

I shall not hesitate, sitting in this place, to say, to the general court, Fiat justitia, ruat cœlum; and, to the usurping branch of the legislature, you attempt worse than a vain thing; for, although, you cannot succeed, you set an example, which may convulse society to its centre. Nay more, if the whole legislature, an event to be deprecated, should attempt to overstep the bounds, prescribed to them by the people, I, in administering the public justice of the country, will meet the united powers at my seat in this tribunal; and, pointing to the constitution, will say, to them, here is the limit of your authority; and, hither, shall you go, but no further.

Call in his report of the case advises: “N.B. It is said, that this was the first case in the United States, where the question relative to the nullity of an unconstitutional law was ever discussed before a judicial tribunal; and the firmness of the judges (particularly of Mr. Wythe,) was highly honourable to them; and will always be applauded, as having fixed a precedent, whereon, a general practice, which the people of this country think essential to their rights and liberty, has been established.” 4 Call 21.

Wythe’s biography is entitled, GEORGE WYTHE: TEACHER OF LIBERTY (Alonzo Dill, 1979) (“In observance of the 200th anniversary of the beginning of the teaching of law at the College of William and Mary, 1779-1979.”) Chancellor Wythe also taught constitutional law at the College of William and Mary. For a brief
period of time one of his students at William and Mary was none other than—guess who?—John Marshall.

What was John Marshall doing in 1812?—the year of Louisiana’s sovereignty? We will answer this question later in our Bicentennial Minute Entry.

V. BARON DE MONTESQUIEU, ESPRIT DES LOIS

Professor Jean Brissaud, late professor of legal history in the University of Toulouse, in his heroic book, A HISTORY OF FRENCH PUBLIC LAW (1904) (IX Continental Legal History Series; translated by James W. Garner) (1915), tells us of Montesquieu’s theory of separation of powers: “The spirit of independence of our old Parliaments, their opposition to the crown, and the example (which is questionable) of England counted for much in the formation of this theory.” But French Public Law severed the Judiciary’s head with La Révolution Française. “The judges could not meddle in the exercise of legislative power, either by means of orders taking jurisdiction, or by preventing or suspending the execution of laws; nor could they pass upon the constitutionality of laws.” Brissaud, § 502. The Principle of Separation of Powers.

Assuredly to the delight of Justice Antonin Scalia, Montesquieu insists that the judiciary should restrict itself to applying the laws to particular cases in a fixed and consistent manner, so that “the judicial power, so terrible to mankind, . . . becomes, as it were, invisible” ESPRIT DES LOIS, 1748, 11.6; THE SPIRIT OF THE LAWS, Thomas Nugent trans., New York, Hafner Library of Classics, 1949, p.156.

Ironically, Justice Scalia is hardly invisible on this side of the Atlantic. Judicial review in Louisiana, to be sure, is not one of our French inheritances.
VI. IL EMPEROR NAPOLEON, GENERAL ANDREW JACKSON

The Civil Law celebrates legislation, “c’est mon Code civil,” says Napoleon. True enough. But whence judicial review in Louisiana? What enables a Common Law judge to hold General Andrew Jackson in contempt? Judge Dominick Hall so held. This was the fiery judicial climax of the War of 1812. Hall was the United States District Court judge sitting in New Orleans. Jackson ordered Hall arrested for issuing a writ of habeas corpus challenging the General’s declaration of martial law and his arrest of one Louis Louallier, a native of France, a naturalized citizen of the United States, and a member of Louisiana’s House of Representatives. Louallier crossed Jackson’s sword by publishing a letter to the editor of the Courier de la Louisiane. The letter excoriated Jackson’s exile of Frenchmen from New Orleans. “MR. EDITOR:—To remain silent on the last general orders, directing all the Frenchmen, who now reside in New Orleans, to leave it within three days, and to keep at a distance of 120 miles from it, would be an act of cowardice, which ought not to be expected from a citizen of a free country; and when everyone laments such an abuse of authority, the press ought to denounce it to the people.”

Louallier extolls “the firmness of the magistrates, who are the organs of the laws in this part of the union, and the guardians of public order.”

He concludes by saying, “[I]t is high time the laws should resume their empire.” “[I]t is time the citizens accused of any crime should be rendered to their natural judges, and cease to be dealt with before special or military tribunals, a kind of institution held in abhorrence even in absolute governments . . . .” Alcée Fortier, A HISTORY OF LOUISIANA (1904), Vol. III, p. 155.

VII. JUDGE F.-X. MARTIN

François-Xavier Martin, one of the “natural judges” to whom Louallier addressed himself, says of General Jackson’s
explosive reaction to Louallier’s letter: “Man bears nothing with more impatience, than the exposure of his errors, and the contempt of his authority.” You can find this universal truth reported in Martin’s HISTORY OF LOUISIANA, Vol. II (1829), p. 392; Pelican Publishing Co. Reprint 1975, p. 393.

General Jackson ordered Louallier tried as a spy by court martial. It mattered not that Louallier was a naturalized citizen of the United States and a civilian member of the Louisiana Legislature. It made no difference that Louallier sided loyally with Jackson against the British, who had fled New Orleans. Louallier’s letter to the editor was seditious.

Death was the penalty under Jackson’s declaration of martial law. Jackson considered New Orleans his military camp. Inter arma silent leges, as Cicero says. The General was above the law. He was beyond judicial control, according to the Jurisprudence of the Camp.

VIII. JUDGE DOMINICK A. HALL

Not so at all. United States District Court Judge Dominick Hall had the last word—for the moment at least—duly reported in United States v. Major General Andrew Jackson, No. 791, United States District Court, District of Louisiana (1815). Jackson’s arrest of Hall was held a contempt of court, an unlawful military act against “the firmness of the magistrates.” The General was fined a thousand dollars. Later, after his two terms as President of the United States, the United States Congress at the urging of President John Tyler passed legislation reimbursing Jackson in full for the thousand dollar fine he paid, plus interest amounting to $2,700.

Here, then, is the earliest chapter in the life of judicial review in Louisiana, recently revisited as a highlight of the Bicentennial of the United States District Court, Eastern District of
IX. SOURCES OF SECTION 25

1. ALEXANDER HAMILTON. Alexander Hamilton’s Federalist Paper No.78 is a pretty good place to start. We quote the relevant passage:

The complete independence of the courts of justice is peculiarly essential in a limited constitution. By a limited constitution I understand one which contains certain specified exceptions to the legislative authority; such for instance is that it shall pass no bills of attainder, no ex post facto laws, and the like. Limitations of this kind can be preserved in practice no other way than through the medium of the courts of justice; whose duty it must be to declare all acts contrary to the manifest tenor of the constitution void. Without this, all the reservations of particular rights or privileges would amount to nothing.

This from the original edition of The Federalist: A Collection of Essays, Written in Favor of the New Constitution, As Agreed Upon by the Federal Convention, September 17, 1787, Vol. II. New-York: Printed and Sold by J. and A. M’Lean, No. 41, Hanover-Square, MDCCCLXXVIII, p. 292-293.

Hamilton’s No. 78 differs slightly, but significantly, from Section 25. Only laws contrary to “the manifest tenor” of the constitution are void.

This allows more flexibility in the joints of legislation and keeps the judges at a deferring distance. James Bradley Thayer of Harvard Law School dubbed this qualification on the scope of judicial review, “The Rule of Clear Mistake.” James Bradley Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893). Today this rule finds its voice most clearly in, say, Justice Breyer’s dissent in District of Columbia v. Heller, 554 U.S. 570 (2008), or Chief

2. **KENTUCKY CONSTITUTION OF 1799.** Next, it is generally said that the Kentucky Constitution of 1799 is the origin of Section 25. True enough, but our exegesis would emphasize a difference in text that warrants notice. Article X of Kentucky’s Constitution of 1799 is essentially a bill of rights that, through some twenty-seven sections, recites the fundamental rights of citizens, including the “natural and indefeasible right to worship Almighty God according to the dictates of their own consciences” and proclaims “[t]he free communication of thoughts and opinions is one of the invaluable rights of man, and every citizen may freely speak, write, and print on any subject, being responsible for the abuse of that liberty.” Note the latter limitation of free speech: “being responsible for the abuse of that liberty.” The Alien and Sedition Acts of 1798 come to mind. Justice Samuel Chase’s stiff enforcement of the Sedition Act against James Callender, a friend of Thomas Jefferson in Republican Virginia, is well known.

Callender published a book entitled, *The Prospect Before Us*, in which he called President John Adams a “repulsive pedant, a gross hypocrite and an unprincipled oppressor.” Chase presided at Callender’s trial; the defense attempted to argue the unconstitutionality of the law.

But Chase, a loyal federalist judge on the Supreme Court, thought the law pristine, pure, and certainly constitutional. On the other hand, Thomas Jefferson thought the Sedition Act pernicious, impure, and patently unconstitutional. As President of the United States Jefferson pardoned Callender on the ground that, in President Jefferson’s view, the Sedition Act violated the First Amendment. The President would follow his own legal judgment. Never mind Justice Samuel Chase’s opinion. Here is an early instance of inter-branch conflict over constitutional interpretation. We shall recur to this matter in a moment.
3. ARTICLE X. SEC. 28. ARTICLE X of the Kentucky Constitution of 1799 concludes in its last section as follows:

Sec. 28. To guard against transgressions of the high powers which we have delegated, we declare that everything in this article is excepted out of the general powers of government, and shall forever remain inviolate; and that all laws contrary thereto, or contrary to this constitution, shall be void.

This section’s text emphasizes the fundamental rights of the citizen; all laws contrary thereto shall be void. Judicial review, just as Hamilton justified it in No. 78, is aimed at protecting the expressed fundamental rights of the citizen.

4. THOMAS JEFFERSON TO JAMES MADISON (March 15, 1789). Thomas Jefferson is on record to the same effect. Writing to James Madison about the proposed Bill of Rights, he opined:

In the arguments in favor of a declaration of rights, you omit one which has great weight with me; the legal check which it puts in the hands of the judiciary. This is a body, which, if rendered independent and kept strictly to their own department, merits great confidence for their learning and integrity.

James Madison’s support of the Judiciary as a guardian of the proposed Bill of Rights is well known (1 Annals of Congress 457 (1789)):

If they are incorporated into the Constitution, independent tribunals of justice will consider themselves in a peculiar manner the guardians of those rights; they will be an impenetrable bulwark against every assumption of power in the Legislature or Executive; they will be naturally led to resist every encroachment upon rights expressly stipulated for in the Constitution by the declaration of rights.

5. MARBURY v. MADISON. Every first-year law student can recite Chief Justice Marshall’s reasoning in Marbury v. Madison in favor of the Judiciary adjudging the constitutionality of
legislation. “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.” Marbury v. Madison, 1 Cranch 137, 177 (1803). But who declares the repugnancy? Says the Great Chief Justice: “It is emphatically the province and duty of the judicial department to say what the law is.”

Of course, Jefferson insisted that the Judiciary keep strictly to its own department. He thought John Marshall wandered too loosely into Executive territory in Marbury v. Madison.

Jefferson always believed that each branch of government should decide for itself the constitutionality of laws affecting it. In other words, to him Judicial Supremacy was an anathema.

6. MONTESQUIEU. Ironically, judicial review in the American Republic traces itself back ultimately to the Framers’ insistence on separation of powers, a morphed version of the Baron de Montesquieu’s political theory. Recall Montesquieu considered the judicial power “so terrible to mankind.” He had in mind the French Parliaments of the Ancien Régime.

After the French Revolution the Parliaments were dissolved. The judges were rendered eunuchs. “Of the three powers above mentioned, the judiciary,” said Montesquieu, is “next to nothing.” Not so here. George Wythe, John Marshall, François Xavier-Martin—all gave voice to the Judiciary as Guardian of the Ark of the Constitution. In other words, in America the Judiciary is Montesquieu’s watchdog—over Separation of Powers, as well as the Bill of Rights. Judicial Review is born of both.

The doctrine of “division of powers,” as Montesquieu formulated it, appears as the first Article of Kentucky’s Constitution of 1799. Thomas Jefferson was its source, transmitted by James Madison to John Brown to assist in the formation of the Kentucky Constitution. The Papers of Thomas Jefferson, Julian
P. Boyd ed., Princeton Univ. Press, 1952, Vol. 6, p. 283. In turn, it appears as Article I of Louisiana’s Constitution of 1812; they are duplicates. Here is Louisiana’s:

ARTICLE 1st.

Concerning the distribution of the Powers of Government.

Sect. 1st. The powers of the government of the State of Louisiana shall be divided into three distinct departments, and each of them be confided to a separate body of Magistracy viz—those which are Legislative to one, those which are executive to another, and those which are judiciary to another.

Sect. 2d. No person or Collection of persons, being one of those departments, shall exercise any power properly belonging to either of the others; except in the instances hereinafter expressly directed or permitted.

George Wythe justified judicial review in the name of separation of powers. He held an act of the Virginia House of Delegates, a pardon, unconstitutional where Virginia’s Constitution required the concurrence of the Senate, which was not forthcoming. Commonwealth v. Caton is the taproot of judicial review in the American Republic, as we have unearthed it.

John Marshall himself while a member of Virginia’s Executive Council was asked to remove a Justice of the Peace for gross misdemeanors disgraceful to his office. In an opinion signed by the future Chief Justice of the United States, dated February 20, 1783—twenty years before Marbury v. Madison—the Executive declared that “the Law authorizing the Executive to enquire into the Conduct of a Magistrate . . . is repugnant to the Act of Government, contrary to the fundamental principles of our constitution, and directly opposite to the general tenors of our Laws.” Papers of Thomas Jefferson, p. 280.

So too, judicial review in Louisiana finds root in the first article of the Constitution of 1812, “Concerning the distribution of the Powers of Government.”
X. ON READING LAW

What would Justice Antonin Scalia say of ARTICLE VI, SECT. 25? He would insist on reading its text according to its original meaning. We had better repeat the text: “All laws contrary to this Constitution shall be null and void.” What this means to us is that all laws contrary to this Constitution are null and void. But this is an exegesis of judicial review in Louisiana, not a review of Justice Scalia and Bryan Garner’s new book, READING LAW, THE INTERPRETATION OF LEGAL TEXTS (Thompson/West 2012).

XI. SECTION 25’S TEXT

The text of Section 25 says nothing at all about which organ of government, or perhaps all of them, has the constitutional authority to decree a conflict between statute and Constitution. The text says nothing at all about this. For the answer, we must look elsewhere. Perhaps to history. Perhaps to THE FEDERALIST, favorite reading of Justice Scalia. Perhaps “Es liegt in der Natur der Sache,” as the Germans say. Or, to repeat Chief Justice John Marshall’s exclamation in Marbury: “It is emphatically the province and duty of the judicial department to say what the law is.” 1 Cranch 137, 177 (1803).

Justice Scalia subscribes to judicial review, to be sure, but not the freewheeling nonsense of the Living Constitutionalist Society. We commend READING LAW to our readers.

XII. THE NOTION OF A “LIVING CONSTITUTION”

Justice Scalia condemns the notion of a “Living Constitution.” That is to say, a “living organism,” one that must evolve with society or else “become brittle and snap.” Reading Law, p. 410. So speak its advocates. Scalia’s response? “Sed truffa est!” “But this is nonsense!” To the contrary (id., 407-408):
[I]f the Living Constitution advocates are correct, if the American Constitution should mean whatever each successive generation of Americans thinks it ought to mean, then *Marbury v. Madison* was wrongly decided. The Members of Congress take the same oath to support the Constitution that the Justices do. *Marbury v. Madison*’s holding that the Supreme Court can disregard Congress’s determination of what the Constitution requires is firmly rooted in the reasoning that the Constitution is a law, whose meaning, like that of other laws, can be discerned by law-trained judges.

But what of law-trained Presidents? What of a Harvard Law School President who thinks the Affordable Health Care Act constitutional? The Constitution says nothing at all about why Justice Antonin Scalia’s legal opinion should trump President Barack Obama’s. The Defense of Marriage Act is unconstitutional according to President Obama. He instructed his Attorney General not to defend its constitutionality in court. The Congress of the United States, however, passed the Act. Members of Congress, a majority for sure, presumably judged DOMA constitutional pursuant to their oath to support the Constitution. The Supreme Court has yet to voice its opinion on the question.

**XIII. A BLANK SPACE**

Our point here is that the text of Section 25, however clear, gets us nowhere. It is a blank space in our Bicentennial inquiry. To be sure, we bow humbly to Justice Scalia’s “2. Supremacy-of-Text Principle”:—“The words of a governing text are of paramount concern, and what they convey, in their context, is what the text means.” *Reading Law,* p. 56.

But ironically, the very power that makes Justice Scalia’s opinion trump that of the President, assuming he has four votes for his OPINION OF THE COURT, is nowhere to be found in what the text of Section 25 means. Judicial supremacy comes to life only later, after John Marshall, after *Marbury v. Madison.*
It is clear to us at least, if not to Justice Scalia, that “The judicial Power of the United States,” as Article III of the United States Constitution declares it, has evolved over time—in fact and in law.

Thomas Jefferson in response to Chief Justice Marshall’s subpoena duces tecum in the Burr trial invoked the prerogatives of the Presidency, an early claim of Executive Privilege. He withheld certain documents in the interest of national security. Abraham Lincoln defied Chief Justice Taney’s writ. Richard Nixon disgraced the Presidency, but he stiffly yielded to Chief Justice Burger’s judicial rejection of his claim of Executive Privilege, a claim that “he and he alone” is the proper one to interpret the Constitution regarding the scope of Executive Privilege. The quotation is from Leon Jaworski’s oral argument.


XIV. CHIEF JUSTICE JOHN MARSHALL

For our Bicentennial salute to Section 25, we should rather invoke the immortal words of The Great Chief Justice, John Marshall: “In considering this question, then, we must never forget, that it is a constitution we are expounding.” McCulloch v. Maryland, 4 Wheat. 316, 407 (1819). (Justice Scalia quotes this line in READING LAW, but he mistakenly fails to italicize the “a” in John Marshall’s “it is a constitution we are expounding” (p. 405). Pardonez nous, Mr. Justice.

XV. IL GIUDICE SAPIENTE

We consider Justice Scalia Il Giudice Sapiente—from the Latin “sapere,” to have taste or flavor; wise; full of knowledge; discerning; often ironical—surely a fit description of the first Roman on the Court. Paul R. Baier, The Supreme Court, Justinian,


Justice Scalia considers the evolutionists’—the contemporary constitutional Darwinists’—reliance on Chief Justice Marshall’s grand dictum, “it is a constitution we are expounding” to be absolute nonsense, at worse an absurdity, at best a canard. “But far from suggesting that the Constitution evolves, its whole point was just the opposite.” *Reading Law*, p. 405.

XVI. EVOLUTION OF JUDICIAL REVIEW

Quite to the contrary, our researches convince us that Section 25’s vital significance, its Bicentennial meaning after two hundred years, is not to be found in its text—after all it has disappeared—but in the evolution of judicial review in the American Republic. Section 25 shows that Justice Scalia’s horse is dead. It has been withdrawn from *il Palio di Siena*.

*Mea culpa, Il Giudice Justinianus*. But let us move on to other Bicentennial data.

XVII. TREATY OF CESSION, ENABLING ACT

Article III of the Treaty of Cession between the United States of America and the French Republic of April 30, 1803 (8 Stat. 200) contains a promise that the inhabitants of the ceded territory shall be incorporated in the union of the United States, and admitted as soon as possible, “according to the principles of the federal constitution”; the Enabling Act of Congress of February 20, 1811 (2 Stat. 641), authorizes a constitutional convention for the purpose of framing a government and incorporating the citizens
of the Territory of Orleans into a sovereign state. It requires the
convention to declare, “in behalf of the people of the said territory,
that it adopts the constitution of the United States” and provides
further that the constitution to be formed:

    shall be republican, and consistent with the constitution of
    the United States; that it shall contain the fundamental
    principles of civil and religious liberty; that it shall secure
to the citizens the trial by jury in all criminal cases, and the
    privilege of the writ of habeas corpus, conformable to the
    principles of the constitution of the United States . . .

We see in the Treaty of Cession and the Enabling Act the
inchoate right of judicial review, assuring to the people of
Louisiana as their birthright the fundamental principles of
separation of powers and of individual rights. Marbury v. Madison
announced these vital features of the public law of the United
States of America on February 24, 1803, a couple of months before
the Treaty of Cession and the Enabling Act. To our minds, Article
III and the Enabling Act adopt by reference John Marshall’s
reasoning in Marbury v. Madison: “[A]n act of the legislature,
repugnant to the constitution is void.”

Certainly our research and exegesis suggest that the
principle of judicial review implicit in Marbury, and perhaps John
Marshall’s opinion itself, may very well have been on the minds of
the Framers of Article VI, Section 25 of Louisiana’s Constitution
of 1812.

XVIII. LOUISIANA’S MARBURY V. MADISON

Mayor v. Morgan, 7 Martin (N.S) 1 (1828), is Louisiana’s
Marbury v. Madison. François-Xavier Martin—assuredly,
Louisiana’s John Marshall—delivered the opinion of the Court.
The case is this. The Mayor and City Council of New Orleans
refused obedience to a writ of mandamus issued by a court of first
instance commanding the Mayor et al. to seat a person on the
Council whose election was drawn in question. An act of the
Legislature declared that the City Council “shall be the judge” of the election of its members. Judge Martin reasoned that if the Legislature had the power to grant to the municipal corporation of New Orleans the right to determine the validity of the elections of its members, the district court was without jurisdiction to issue the writ of mandamus. Held: The Legislature had the power to render the City Council the “judge of the validity of their elections, and prohibit courts of justice from interfering with its decisions”; the provision of the Acts of 1816 in question was constitutional. Thus the writ of mandamus was void. Morgan, the Sheriff, who seized the revenues of the City in execution of the judicial orders, was a trespasser liable in damages.

We commend Judge Martin’s full opinion to the reader as an exemplar of Martin’s judicial statesmanship and the power of his judicial poetics.

There is plainly an echo of John Marshall in Judge Martin’s opinion in Mayor v. Morgan, 7 Martin (N.S.), at 7:

This court, and every court in this state, not only possesses the right, but is duty bound, to declare void every act of the legislature which is contrary to the constitution. The due exercise of this power is of the utmost importance to the people, and if it did not exist their rights would be shadows, their laws delusions, and their liberty a dream; but it should be exercised with the utmost caution, and when great and serious doubt exists, this tribunal should give to the people the example of obedience to the will of the legislature.

XIX. CHIEF JUSTICE JOHN MARSHALL, 1812

What was Chief Justice Marshall doing in 1812? We promised to answer to this question earlier on. The case we have in mind is State of New Jersey v. Wilson, 7 Cranch 164 (1812). It is not mentioned in any contemporary constitutional law casebook. We dug it up ourselves by leafing through the pages of 7 Cranch, February Term 1812. This is what legal historians call original research.
Our digging shows the Great Chief Justice adjudging a constitutional claim arising under a Treaty of Cession between certain Delaware Indians and what was then the Province of New Jersey, under a conveyance of land from King Charles 2d, to the Duke of York. These Delaware Indians had claims to a considerable portion of lands in New Jersey. The Act of Cession, August, 1758, relinquished the Indians’ claims on condition that the government purchase a tract of land on which they might reside in perpetuity. The Act stipulated that the land to be purchased for the Indians “shall not hereafter be subject to any tax, any law usage of custom to the contrary, in any wise notwithstanding.”

Later on, in 1801, the Delaware of New Jersey wanted to migrate from the State to join their brethren in Stockbridge, New York. The New Jersey Delaware obtained an act of the New Jersey Legislature authorizing the sale of their land. “This act contains no expression in any manner respecting the privilege of exemption of taxation which was annexed to those lands by the act, under which they were purchased and settled on by the Indians,” recites Chief Justice Marshall in his opinion of the Court. Thereafter in 1803, the year of Treaty of Cession between the United States and the Republic of France, and, coincidently, the year of *Marbury v. Madison*, the land in question was sold.

Next, as you might imagine, the New Jersey Legislature repealed the act of 1758, which had exempted the land from taxation. Held: The Repealing Act “is repugnant to the constitution of the United States, in as much as it impairs the obligation of a contract, and is, on that account, void.” And more—per Marshall, C. J. (7 Cranch 167):

The privilege [of exemption from taxation] though for the benefit of the Indians, is annexed, by the terms which create it, to the land itself, not to their persons. It is for their advantage that it should be annexed to the land, because, in the event of a sale, on which alone the question could become material, the value would be enhanced by it.
In short, in 1812, the year of Louisiana’s sovereignty, Chief Justice Marshall was enforcing the Constitution of the United States, viz.: “The Constitution of the United States declares that no state shall “pass any bill of attainder, ex post facto law, or law impairing the obligation of contracts.” Article VI, Section 20 of the Louisiana Constitution of 1812 says almost the same thing: “No ex post facto law nor any law impairing the obligation of contracts shall be passed.” And, then, we know, there is Article VI, Section 25. We quote its pristine text one last time: “All laws contrary to this Constitution shall be null and void.”

Chief Justice Marshall, if we may say so, is an honored guest at our Bicentennial table.

XX. A BICENTENNIAL MINUTE ENTRY

We come full circle, back to the future, back to CASES ARGUED AND DETERMINED IN THE SUPREME COURT OF THE STATE OF LOUISIANA, EASTERN DISTRICT. FEBRUARY TERM, 1815, 3 Martin (1813-1815).

We mean the clash between the General and the Judge previously rehearsed. This time, however, we draw the legal historian’s attention to the Minute Book of the Louisiana Supreme Court. It plainly shows that it was Louisiana’s Judge François Martin, not United States District Court Judge Dominick Hall, who first trumpeted the authority of judicial review in the annals of Louisiana’s public law.

Here are the facts, a matter of reported chronology.

At the opening of the February Term, Eastern District, 1815, a commission was read by which François-Xavier Martin, then Attorney General of the State, was appointed a Judge of the Supreme Court of the State of Louisiana, together with a certificate of his having taken the oaths required by the Constitution and law, whereupon he took his seat. “The din of war prevented any business being done, during this term.” 3 Martin V 3 [529].
A month later, at the opening of the March Term 1815, before the Honorable Pierre Derbigny and the Honorable F.-X. Martin, the Minute Book shows:

On motion of Mr. Duncan of counsel for the appellees it is ordered that the appellant—to show cause on Monday next the 13th instant—why the parties should not proceed in this case notwithstanding the act passed by the Legislature on the 18th December last, entitled “An Act . . .

We quote the minute entry of March 7, 1815. The case is *James Johnson v. Duncan et al.'s Syndics*, reported in 3 Martin 530.

On the same page of the Minute Book, appears the minute entry of Monday 13th March 1815:

The parties aforesaid having appeared by their attorneys in conformity with a rule taken in this case on the 7th instant & the arguments thereon being closed the Court took time to decide.

Next, our Bicentennial Minute entry appears on the same leaf of the Minute Book, this for Monday, March 20th, 1815:

The Court now delivered their opinion in writing on the motion made in this cause on the 7th instant and ordered that the same be overruled.

What is this case about?

Martin, J., explains the case in his report, 3 Martin 530. Remember, the din of war raged. Here is the terse opening of Judge Martin’s opinion of the Court:

Martin, J. A motion that the Court might proceed in this case, has been resisted on two grounds:

1. That the city and its environs were by general orders of the officer, commanding the military district, put on the 15th of December last, under strict Martial Law.

2d. That by the 3d sec. of an act of assembly, approved on the 18th of December last, all proceedings in any civil case are suspended.
Judge Martin first addresses the argument of General Jackson. Listen to the voice of Louisiana’s Judge François-Xavier Martin—Bicentennial fireworks on the levee (3 Martin, 532-533):

We are told that the commander of the military district is the person who is to suspend the writ, and is to do so, whenever in his judgment the public safety appears to require it: that, as he may thus paralyze the arm of the justice of his country in the most important case, the protection of personal liberty of the citizen, it follows that, as he who can do the more can do the less, he can also suspend all other functions of the civil magistrate, which he does by his proclamation of Martial Law.

This mode of reasoning varies toto celo from the decision of the Supreme Court of the United States, in the case of Swartout [sic] and Bollman, arrested in this city in 1806 by general Wilkinson. The Court there declared, that the Constitution had exclusively vested in Congress the right of suspending the privilege of the writ of Habeas Corpus, and that body was the sole judge of the necessity that called for the suspension. “If, at any time,” said the Chief Justice, “the public safety shall require the suspension of the powers vested in the Courts of the United States by this act, (the Habeas Corpus act,) it is for the Legislature to say so. This question depends on political considerations, on which the Legislature is to decide. Till the Legislature will be expressed, this Court can only see its duties, and must obey the law.” 4 Cranch 101.

Swartwout and Bollman, you might surmise, is the voice of John Marshall.

Thus, John Marshall is brought home to our Bicentennial table as a surprise guest. The Great Chief Justice is here courtesy of Louisiana’s Great Jurist François Martin. It is a nice touch to our way of seeing things that John Marshall and F.-X. Martin’s marble busts face each other, today, after two hundred years, guarding the portal to the Louisiana Supreme Court Chamber, fourth floor, 400 Royal Street, in the heart of the Vieux Carré—open to the public.
Of course Judge Martin sustained the act of the Louisiana Legislature suspending all judicial proceedings during the War of 1812, against the claim that the act impairs the obligation of contracts (3 Martin, 542, et seq.)

It does not, however, necessarily follow that an act called for by other circumstances, than the apparent necessity of relieving debtors, one of the consequences of which is nevertheless to work some delay in the prosecution of suits, and, consequently to retard the recovery and payment of debts, must always be declared unconstitutional.

One thinks of our contemporary Louisiana Legislature likewise suspending prescription after Hurricane Katrina. Nothing unconstitutional about that.

Now notice, please, that Judge Martin first takes up Major General Jackson’s claim that his declaration of Martial Law trumps the Great Writ of Habeas Corpus. Why do that? The Legislature has constitutionally suspended judicial proceedings. Why address the General’s claim? The answer lies in what scholars call “judicial statesmanship.” Chief Justice Marshall’s opinion in Marbury v. Madison comes to mind. He addressed jurisdiction last. So too, Martin.

Here is the closing part of Judge Martin’s rejection of Major General Jackson’s claim (3 Martin 537): “How preposterous then the idea that a military commander may, by his own authority, destroy the tribunal established by law as the asylum of those oppressed by military despotism!”

★★★

We reach the end of our Bicentennial sojourn, a final minute entry.

The Minute Book of the Louisiana Supreme Court shows that Judge Martin rendered on Monday, March 20, 1815.
On the other hand—take note ye legal historians—the contempt proceedings against Major General Andrew Jackson, No. 791, commenced the next day, March 21, 1815. John Dick, the United States Attorney, was anxious to initiate contempt proceedings against General Jackson; “but Hall insisted on a few days being exclusively given to the manifestation of the joyous feelings, which termination of the war excited. He did not yield to Dick’s wishes till the 21st.” François Xavier Martin, HISTORY OF LOUISIANA, Vol. II (1829), p. 416; Pelican Publishing Co. Reprint 1975, p. 405. Amazingly, our Bicentennial Minute Entry shows that Judge Martin appears first in the Chronology of Judicial Review in Louisiana.

Judge Martin himself, in his LOUISIANA TERM REPORTS, appends a note (3 Martin 557) to his report of Johnson v. Duncan et al.’s Syndics. We leave the last word to Reporter F.-X. Martin—his enduring gift to the American Republic: “THE doctrine established, in the first part of the opinion of the Court, in the above case, is corroborated by the decision of the District Court of the United States for the Louisiana District, in the case of United States vs. Jackson, in which the defendant, having acted in opposition to it, was fined $1000.” (Our Bicentennial emphasis—corroborated.)

Requiescat in pace, F.-X. Martin.
I. OF CENTER AND REVOLUTION: CIRCLING WITHIN AND AROUND COPERNICUS’ SKULL

In May 2010, the Polish astronomer Nicolaus Copernicus (1473-1543) was buried at the Frombork Cathedral, in Poland, 467 years after his death. His remains had rested in this cathedral, along with those of many others, since 1543, the year of his death. Modern technologies helped identify his remains (some hair found in a book that he had used matched the DNA of a skull found under the marble floor of the church)\(^1\) and he was buried again on May 22, at a ceremony in which the Catholic Church, represented by the papal Nuncio and the Archbishop of Lublin, solemnly acknowledged a prominent scientist who had been declared a heretic because of his revolutionary ideas.

In 1543, just before his death, Copernicus had published *De Revolutionibus Orbium Celestium* (On the Revolutions of the...
Celestial Spheres), a book where he explained that the sun, and not the earth, is the center of the universe. He is alleged to have first expressed this view five hundred years ago, around 1510. \(^2\) Little did I know that Copernicus would be buried again between my oral presentation, given in Montreal in November 2009, and my writing this text for publication, in May 2010. But I knew that one year before Copernicus’s first funeral Hernando de Soto, the Spanish explorer and conquistador, had died on the banks of the Mississippi River near the mouth of the Red River, \(^3\) north of the future Baton Rouge. He was the first documented European to discover the region, yet he did not claim it for Spain. The vast territory was later named Louisiana by Robert Cavelier de la Salle, who solemnly took possession in the name of King Louis XIV of France in 1682.

Did a geocentric or heliocentric vision of the universe mean anything to the great explorers who mapped remote and unknown areas of the Earth? Their concern was to find an alternative route to India and discover new resources; at least they knew that their planet was spherical. If a center existed, they were physically and mentally far from it, charting the fringes of the known world. After all, Copernicus himself had understood that our universe has no center.

Many legal scholars, even the most sophisticated, believe that their legal universe has a center. When comparatists describe modern civil law systems, they place the civil code at its center. True, this does not always reflect the way civil law jurisdictions view themselves. Scotland and South Africa cannot view themselves as civil code centric, since they do not have civil codes.

\(^2\) It appeared in his *Commentariolus* or “little commentary” circulated between 1510 and 1514: *Nicolaï Copernici de hypothesibus motuum coelestium a se constitutis commentariolus*, known from later transcripts.  
\(^3\) THE NEW ENCYCLOPAEDIA BRITANNICA, MICROPÆDIA (15th ed., Encyclopædia Britannica, Chicago, 2007), s.v. “Copernicus, Nicolaus”.

France views itself as legicentric,\textsuperscript{4} rather than civil code centric, but perceives its Civil Code as a civil constitution.\textsuperscript{5} Inside a given legal system, the paradigm is rather pyramidal, reflecting the hierarchy of norms, especially for those espousing a positivistic vision of the law.

Turning to Louisiana and Quebec, the two North American jurisdictions having kept the civil law tradition, there is a clear perception, at least among lawyers trained in the civil law, that the civil code occupies some central position. Together with the French language, courageously maintained in Quebec and sadly undermined in Louisiana, the civil code and civil law are markers of identity. The civil code is a powerful symbol of the survival of the civil law tradition on a continent dominated by the common law.

Yet, to focus now on Louisiana, which will be at the core of the following paragraphs, the civil code appears as a weakened celestial body, with a rather low gravitational force. In addition, the position of the code is less and less central to the legal order. As will be seen in this paper, Louisiana scholars and lawyers are very much aware of the phenomenon and may have a tendency to see things as even worse than they are: civilians feel like a minority and have developed an inferiority complex, preventing them from being aware of the remarkable skills they have developed, such as on the one hand exercising a highly valuable ability to express the civil law in English, somehow resisting the linguistic contamination of common law phraseology, and on the other hand demonstrating a unique ability to revise the civil code, making it more compatible with the common law system whilst somehow keeping it in the realm of the civil law. These two skills are greatly needed in the present global world and they should be


\textsuperscript{5} Paul Dubouchet, La pensée juridique avant et après le Code civil 92 (L’Hermès, Lyon, 1991).
marketed actively and exported, a mission that the author of this paper has placed at the core of the agenda of the Louisiana State University Center of Civil Law Studies, together with the promotion of an active Louisiana civil law doctrine.

Louisiana is not the only civil law jurisdiction feeling that its civil law tradition is threatened by a conquering common law. It is true that in less mixed jurisdictions where the civil law does not have a strong competitor – systems that some may be tempted to describe as pure civil law – the civil code may have a much higher gravitational force. However, other legal bodies exert a very strong attractive force, such as constitutions, charters, conventions protecting human rights, and international agreements. Even in the countries that cradled the ancient and modern civil law tradition, extrinsic pressure comes via many channels, including European integration and global commercial practice. In addition, intrinsic forces are also at work: decodification is endemic; codes are hastily revised or are oftentimes weakened by a multiplication of satellite codes or ancillary statutes that may be compared to errant meteors.6

Whatever the situation may be in mixed or less mixed civil law jurisdictions, the civil code remains the port of entry for any exploration of the legal universe, even if that point is less and less central or more and more peripheral.

Does this mean that the center has been lost? Copernicus’ intuition may be revived in our legal context. This paper suggests that the center may be retrieved, as everything is a matter of perception or representation. It may be retrieved if one agrees to place the citizen at the center of the legal order. A Copernician revolution may be proposed:7 legal bodies must gravitate around the citizen rather than the other way around. Based on this idea or


7. For a prior use of the Copernician metaphor, see LÉONTIN-JEAN CONSTANTINESCO, TRAITÉ DE DROIT COMPARE, t. 1 at 8 (Librairie générale de droit et de jurisprudence, Paris, 1972).
renewed perspective, which echoes the work of those turning the pyramid of norms upside down, I propose to revisit what may be the essence of the civil law tradition.

This journey in the form of a revolution will start in Louisiana, with a brief survey of the Louisiana Civil Code experience and a study of the perception of the code in judicial practice. We will then look for the lost center, to watch phenomena such as the decomposition and recomposition of codified law, and comment on the constitutionalisation and internationalization of private law. Finally, the revolution will take us back to the perspective of a legal order recentered around the citizen, taking us to the core of the civil law tradition. A revolution is a circular motion. We must identify what we are turning around to understand the future of civil codes in the Americas and in other parts of the world. But let us start where we are, in Louisiana.

II. WHY WE LOST THE CENTER: QUO VADIS CODEX CIVILIS LOUISIANENSIS?

Where is the Louisiana Civil Code heading to? Well, no question as to the future may be answered without looking at the past and the present. My first visit to Louisiana was from Boston where I used to admire Gauguin’s masterpiece “D’où venons nous, que sommes nous, où allons nous.” Let us explore the code and check where it stands in classroom and court practice.

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A. The Louisiana Civil Code: between ius and lex

The Louisiana Civil Code is often described as a clone of the French Civil Code.\(^\text{10}\) This is not true, not even on the surface, a study of the evidence and of historical literature\(^\text{11}\) revealing a complex and subtle reality.

1. The Digest of 1808

The ancestor to the current code is the *Digest of the Civil Laws now in force in the territory of Orleans* enacted five years after the United States purchased Louisiana from the French.\(^\text{12}\) The Digest of 1808 may have the format of a code, but strictly speaking it is a digest and not a code for the very reason that it does not replace the preexisting law. The laws of Spain in force in the Territory of Orleans at the time of the Louisiana Purchase remained in force after the enactment of the Digest. The French did not reestablish French law during the few weeks in which they took control of the territory retroceded to them by Spain in the Treaty of St. Ildefonso. Spanish laws remained in force and they were abrogated only to the extent that they were contradicted by the provisions of the Digest.\(^\text{13}\) The Digest of 1808 was meant to encapsulate the basic civil laws in force in Louisiana at the time of the purchase, namely Spanish laws.

\(^{10}\) BÉNÉDICTE FAUVARQUE-COSSON & SARA PATRIS-GODECHOT, *LE CODE CIVIL FACE À SON DESTIN* 31-32 (Documentation française, Paris, 2006); GÁBOR HAMZA, *LE DÉVELOPPEMENT DU DROIT PRIVÉ EUROPÉEN* 176 (Faculty of Law, Eötvös Loránd University, Budapest, 2005); GILLES CUNIBERTI, *GRANDS SYSTÈMES DE DROIT CONTEMPOURAINS* 122 (L.G.D.J., Paris, 2007); ÉRIC CARPANO & EMMANUELLE MAZUYER, *LES GRANDS SYSTÈMES JURIDIQUES ÉTRANGERS* 141-142 (Gualino, Paris, 2009).


\(^{12}\) This part of the article borrows part of its exposition from Moréteau & Parise, supra note 6, at 1112-1121, sometimes drawing from it verbatim, with the coauthor’s kind permission.

\(^{13}\) Act of March 31, 1808, No. 120, 1808 La. Acts XXX, at 126.
A Louisiana scholar once contended that the Digest was to a large extent a replica of the *Code Napoléon*, with 85% of the articles derived from or influenced by French sources. The resemblance to the French Civil Code, and even greater resemblance to France’s more Roman *Projet* of 1800, is not surprising. Spanish law and French law were alike on a large number of issues, primarily wherever they derived from Roman law or the Law Merchant. It was therefore legitimate and expedient for James Brown and Louis Moreau Lislet to borrow from the French texts wherever they encapsulated the substance of both French and Spanish laws. The substance of the Digest differs wherever the two laws were different. Examples may be found, among others, in the law that pertains to marriage, community of gains, successions, and alimony.

The fact that we are not dealing with a code in the French sense is evidenced to by the response of judges to the Digest, which also proves the Spanish ancestry of the Digest. Wherever they did not find the precise solution to a problem by looking at the letter of the Digest, judges looked back to the texts on which it was founded and followed the solutions of antique Roman law and Spanish law, since these were still in force. Though resembling the French Civil Code like a brother rather than a distant cousin, the Digest is different in its essence. It is not a new law but a digest of ancient laws. What makes the difference is the abrogation clause.

The Act of March 31st, 1808, by the Territorial Legislature, approving and putting in effect the Digest of 1808 reads:

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16. *Id.*

17. *Id.* and Pascal, *supra* note 8.

18. *E.g.*, Cottin v. Cottin, 5 Martin (O.S.) 93 (1817).
§2. And be it further enacted, That whatever in the ancient civil laws of this territory, or in the territorial statute, is contrary to the dispositions contained in the said digest, or irreconcilable within them, is hereby abrogated.\textsuperscript{19}

The French law of March 21\textsuperscript{st}, 1804, promulgating the \textit{Code civil des français} as a whole reads:

Art. 7: From the day when these laws [constituting the Code] become effective, the Roman laws, the ordinances, the general and local customs, the charters and the regulations all cease to have the force either of general or of special law concerning the subjects covered by the present Code.\textsuperscript{20}

2. The Civil Code of 1825

In 1825, the legislature of the State of Louisiana (the territory of Orleans had been granted statehood in 1812) enacted a Civil Code. The need for a new enactment was felt because of the confusion generated by the fact that judges kept citing sources that were not easily accessible and written in a foreign language. The

\textsuperscript{19} Other relevant sections of the Act read:

Whereas, in the confused state in which the civil laws of this territory were plunged by the effect of the changes which happened in its government, it had become indispensable to make known the laws which have been preserved after the abrogation of those which were contrary to the constitution of the United States, or irreconcilable with its principles, and to collect them in a single work, which might serve as a guide for the decision of the courts and juries, without recurring to a multiplicity of books, which, being for the most part written in foreign languages, offer in their interpretation inexhaustible sources of litigation.

Digest was meant to clarify and simplify the laws, making them more accessible, in the French language and also in English, since the original French was translated into English, though rather poorly.\textsuperscript{21} The fact that judges felt bound to rely on the ancient Spanish law and antique Roman law sources, available in Spanish and Latin only, defeated the central purpose of the Digest: there was no simplification.

One may note that the situation had been completely different in France where, with an energetic abrogation clause, judges understood that there was a break with the past and a fresh start. This does not mean that judges never looked back to Roman law and custom, but when they so did it was in an attempt to clarify the solutions in the Code, not to have the ancient laws survive.

The text of the Code of 1825 very much resembles that of the Digest. Some rewording was done here and there, and entire chapters were added. As Rodolfo Batiza proved, many of these additions are borrowed from the French Civil Code or from Toullier, and therefore are of French origin.\textsuperscript{22} It may be true to say that the Code of 1825 is more French than the Digest, as Batiza contended.\textsuperscript{23}

In sum, the texts of 1808 and 1825 are largely similar except for a number of additions, deletions, and modifications.\textsuperscript{24} The first one is a digest and the second one a code, because it contains an abrogation clause. Indeed, Article 3521 reads:

From and after the promulgation of this Code, the Spanish, Roman and French laws, which were in force in this State, when Louisiana was ceded to the United States, and the


\textsuperscript{23} See Batiza, \textit{id.} at 24.

\textsuperscript{24} See the results of a study by Batiza, \textit{id.} at 5.
acts of the Legislative Council, of the legislature of the Territory of Orleans, and of the Legislature of the State of Louisiana, be and are hereby repealed in every case, for which it has been especially provided in this Code, and that they shall not be invoked as laws, even under the pretense that their provisions are not contrary or repugnant to those of this Code.25

Otherwise, if one compares the text of the Digest to that of the Code of 1825, there are no structural differences and the substance of articles remains much the same. The text is partly rewritten and augmented. However, purists will rightfully contend that this is not a revision but a first codification, since the 1808 text was not a code but a digest.

Nothing is simple and clear-cut in Louisiana, where trees are mirrored in the swamps. What appears to be a tree may be the reflection of a tree in water, and you are never sure where the roots are.

What made a remarkable difference, however, was the judicial resistance to positivism. Louisiana judges of the first half of the 19th century did not accept that legislation (lex) could do away with or abrogate what Professor Pascal calls right order26 and may simply be called law in its broadest sense, meaning droit or ius.

François-Xavier Martin, who sat on the Louisiana Supreme Court between 1812 and 1846, had been in favor of a clean abrogation clause in the Digest,27 and yet at the same time believed that such a clause could only repeal the positive laws adopted by a legislature. In Reynolds v. Swain, a case decided in 1839 when Martin was

25. LA. CIV. CODE ANN. art 1112 (1825).
27. Commenting on the work of Moreau Lislet and Brown, he wrote: “Their labor would have been much more beneficial to the people, than it has proved, if the legislature to whom it was submitted, had given it their sanction as a system, intended to stand by itself, and be construed by its own context, by repealing all former laws on matters acted upon in this digest.” MARTIN, supra note 2, at 344.
Chief Justice (at that time called Chief Judge),\(^{28}\) he said that the legislature cannot abrogate unwritten law such as natural law or the law of nations,\(^{29}\) proving that Louisiana law was much more than mere positive law. The Civil Code is \textit{lex}, not \textit{ius},\(^{30}\) and therefore has a lower density than it may have in a positivistic system.

For approximately half a century, the Code of 1825 was able to survive without significant alterations. The abolition of slavery after the Civil War led to a major change. In 1868, the Louisiana Legislature ordered the revision of the code.\(^{31}\)

3. \textit{The Civil Code of 1870}

John Ray was appointed to draft the revision, and he submitted his finished work on December 27\(^{th}\), 1869. In his report he mentioned his thorough acquaintance with the Louisiana Civil Code, statutes, and court decisions.\(^{32}\)

Scholars of the 19\(^{th}\) century say that the revision of 1870 was a work of clerical compilation\(^{33}\) which had become necessary at that moment for the growing state. The text of 1870 is in fact a revision of the Code of 1825. Ray introduced several changes to the text. Articles were renumbered and the quality of the English text was improved: the Code of 1825 had been drafted in French and the translation was not that good: the ability to develop a civil law in

\(^{28}\) Reynolds v. Swain, 13 La. 193 (1839).

\(^{29}\) “The repeal spoken of in the code, and the act of 1828, cannot extend beyond the laws which the legislature itself had enacted…. It cannot be extended to those unwritten laws which do not derive their authority from the positive institution of any people, as the revealed law, the natural law, the law of nations, the laws of peace and war, and those laws which are founded in those relations of justice that existed in the nature of things, antecedent to any positive precept.” \textit{Id}.

\(^{30}\) For further discussion, see Pascal, \textit{supra} note 8.


\(^{33}\) \textit{E.g., CHARLES E. FENNER, THE GENESIS AND DESCENT OF THE SYSTEM OF CIVIL LAW PREVAILING IN LOUISIANA} 20 (Graham, New Orleans, 1886).
English was still in the making. New articles included the legislative enactments since 1825. The revised text was approved by the Louisiana Legislature on March 14th, 1870. The text was written and published in English, without a French version, and it had 3,556 articles divided into a Preliminary Title and three books, following the structure of the original code, borrowed in turn from the French Civil Code and the Institutes of Gaius.

4. The Revision of the Civil Code

With the dawn of a new century, the need for a new civil code or for revision was reborn. Conditions had changed, and the conceptual framework of the revision of 1870 had proved to be analytically deficient in certain instances. Therefore, in 1908 the Louisiana Legislature created a commission in order to revise and re-enact the civil code. Very few changes were suggested by the commission; finally, the draft code was never adopted by the Louisiana Legislature.

In 1948, pressed by the need to update the existing civil law, the Louisiana Legislature instructed the Louisiana State Law Institute (LSLI) to prepare comprehensive drafts for the revision of the Civil Code of Louisiana. In order to fulfill its duty, the LSLI—which was created in 1938—faced a choice among three

34. See supra note 32, at vii-viii.
35. Id.
37. Id., Preliminary Title “Of the general definitions of law and of the promulgation of the laws”; Book I “Of persons”; Book II “Of things, and of different modifications of ownership”; and Book III “Of the different modes of acquiring the ownership of things”.
possible ways to carry-out the work: i) purify the linguistic aspects, eliminate the obsolete provisions, and update the norms; ii) undertake a structural revision that would start by a deep analysis of the grounds for each institution, followed by a study of the existing case law, and provide on this basis a new wording for the articles; and iii) perform partial revisions of the text of 1870.\footnote{Saúl Litvinoff, Codificación en Louisiana, in 2 LA CODIFICACIÓN: RAÍCES Y PROSPECTIVAS 135 (El Derecho, Buenos Aires, 2004).}

The LSLI finally opted for the third possible way, that is to say, partial revisions.\footnote{Id.} In the 1970s, the LSLI began the revision of the Louisiana Civil Code on a title-by-title basis.\footnote{Crawford & Haymon, supra note 42, at 91.} In the decades that followed, dozens of reporters and hundreds of people participated in the revisions,\footnote{Id.} and the different titles and chapters were subjected to analysis.\footnote{Preliminary Title: Chapters 1 and 2 (1987), Chapter 3 (1987 and 1991); Book I: Title I-Natural and Juridical Personas (1987), Title III-Absent Persons (1990), Title IV-Husband and Wife (1987), Title V-Divorce (1990, 1993, and 1997), Title VI-Of Master and Servant (repealed in part in 1993), Title VII-Parent and Child (1993), Chapters 1-3 (1976, 2005), Title IX-Persons Unable to Care for Their Persons or Property (2000), Title X-Of Corporations (repealed in part in 1993); Book II: Title I-Things, Title II-Ownership, Title III-Personal Servitudes, Title IV-Predial Servitudes, Title V-Building Restrictions, Title VI-Boundaries (all revised by a series of legislative acts from 1976 to 1979), Title VII-Ownership in indivision (added in 1990); Book III: Preliminary Title (1981), Title I-Of Successions, Chapters 1-3 (1981), Chapters 4-6 and 13 (1997), Title II-Of Donations Inter Vivos and Mortis Causa, Chapter 2 (1991), Chapter 3 (1996), Chapter 4 (2001), Chapter 6 (1997 and 2001), Chapters 8 and 9 (2004), Title III-Obligations in General (1984), Title IV-Convention Obligations or Contracts (1984); Title V-Obligations arising Without Agreement, Chapters 1 and 2 (1995), Title VI-Matrimonial Regimes (1979), Title VII-Sale (1993), Title IX-Of Lease, Chapters 1-4 (2004), Title XI-Partnership (1980), Title XII-Of Loan (2004), Title XIII-Deposit and Sequestration (2003), Title XV-Representation and Mandate (1997), Title XVI-Suretysipship (1987), Title XXII-Of Registry (2005), Title XXIII-Occupancy and Possession (1982), Title XXIV-Prescription, Chapters 1-3 (1982), Chapter 4 (1983), Title XXV-Of the Signification of the Sundry Terms (1999); and Book}
It has been estimated that so far approximately 72% of the text of 1870 has been fully revised. Hence only 28% remains still in force, with many old provisions still coexisting and interacting with the new wording. The current text of the Louisiana Civil Code is divided into a Preliminary Title and four books.

It has been argued that the revision did not repeal the old Code, which survives wherever it is not contradicted: “these old Code articles have been kept alive provided that they are not contrary to or irreconcilable with the Revision.” A new Digest then? To those who fear that they do not see the boundaries between the swamp, the bayous, and a wet sky, a firm and reassuring response was given: “The modern Revision of the Civil Code of Louisiana is a continuing process. […] it is a better instrument than before […]. The Civil Code is not an uncertain body of law. Those who must use it have used it since 1976 without any problem other than those common to any practice of the law.”

Louisiana’s Civil Code has had substantial revisions. May we talk in terms of an ongoing recodification process? The structure of the code is largely unchanged, but civilians may contend that the introduction of a significant number of rules borrowed from common law states or uniform laws, such as the Uniform Commercial Code (UCC), may have changed the spirit of the


49. Preliminary Title; Book I “Of persons”; Book II “Things and the different modifications of ownership”; Book III “Of the different modes of acquiring the ownership of things”; and Book IV “Conflict of Laws”.


Code. This may be true, but only in part. Louisiana civilians should remember that the UCC, and particularly Article 2 on sales, has received a substantial civil law influence, cleverly instilled by Karl Llewellyn: the good faith principle, the irrevocability of an offer, are by no means common law doctrines! Civilians find themselves at home in the Louisiana Civil Code. Even the addition of detrimental reliance is not that much of a sign of common law contamination. Its presence in the article on cause makes it seem of mixed stamp. However, the term “promissory estoppel” is not used in article 1967, and it has been demonstrated that detrimental reliance is an underlying principle of the civil law of obligations as much as it is of the common law.52

The genius of the civil law is its ability to absorb doctrines from foreign and sometimes distant origins. This is nothing new. Legal ideas have circulated at all times.53 Common law influence in judicial practice should therefore be no surprise in an environment where many lawyers and judges have received common law training and are at best self-educated in the civil law.

B. Contemporary Classroom and Court Practice

For a civilian trained in France, the study of Louisiana cases, even on matters governed by the Civil Code, can be something of a challenge. The following paragraphs are largely based on my experience teaching the Law of Obligations at the LSU Law


School over the past five years. Louisiana judgments are written like judgments in other American States and reflect a common law methodology. The majority opinion may be accompanied by a dissent and judges give their own analysis and personal opinion, citing a significant number of cases, doctrinal sources, and the Civil Code. Codal citations are sometimes hidden amidst jurisprudential and doctrinal citations. When reading cases, students do not get a strong impression that the law is to be found in the code. Few cases offer a clear and full analysis and interpretation of code provisions. Lip service is paid to the code, with the judgments sometimes checking that the code’s solution is not contradicted by the cases.54

In such a context, it is hard to develop in the students a strong confidence that the code can respond to the needs of social and business life. They trust the case rather than the enacted provision. At the same time, they are fascinated by the logical organization of the code and its ability to solve countless disputes, also reflecting powerful principles that underlie the law of obligations, such as the duty of good faith and the prevalence of a cooperation principle over an approach promoting purely individualistic and selfish deals and strategies. Yet they have a hard time to accept the idea that they can win a case by an argument based on a code article or code interpretation. They tend to trust the individual case more than the use of the code and logic. Louisiana students are after all American and grow up in a fundamentally pragmatic culture.

It comes as no surprise that, in the first half of the 20th century, a scholar declared that Louisiana law was no longer civil law but common law, Louisiana judges having adopted the system of *stare decisis*.55 This triggered a salutary reaction that generated a revival

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54. Examples of well drafted and poorly drafted opinions may be found in S. Litvinoff & Ronald J. Scalise Jr., The Law of Obligations in the Louisiana Jurisprudence (Paul M. Hebert Law Center 6th ed., Louisiana State University, Baton Rouge LA, 2008), the coursebook I use in class.
of the civil law tradition. Dean Hebert and a few others pointed out the misunderstanding experienced by Professor Ireland; they explained that cases had at all times had a crucial importance in the civil law tradition and explained that Louisiana judges tend to follow *jurisprudence constante* much as those in other civil law jurisdictions.

Here is a brief account of how I am teaching the civil law of obligations to my first year law students, in the spring semester. They have received, during the fall semester, a course on the common law of contract, and another one called Western Legal traditions in which they have been introduced to the history and the method of the civil law, the common law, and the Louisiana experience. Teaching at LSU is bi-jural rather than trans-systemic. It tends to follow the old McGill approach rather than the new trans-systemic model, though the latter is in a sense applied to the study of torts, with a real mix of civil law and common law.

I start the class with an analysis of the problem of the day, for instance acceptance of an offer, contractual damages, or solidarity. I develop a typology of possible solutions, and try to have students identify the possible responses. This is the trans-systemic part of my teaching. I may show, in discussion of contract formation or contract interpretation, that the focus may be on interpreting unilateral communications by the parties or on the search for a consensus. The former approach may lead to a battle of forms when the parties exchange contradictory printed documents, favoring the private interest of the one having the last shot, and the


57. See State of Louisiana v. Justin Malone, 25 So. 3d 113, at 126 (La. 2009) where, in her dissent, Justice Knoll notes that “one of the fundamental rules of [the civil law tradition] is that a tribunal is never bound by the decisions which it formerly rendered, it can always change its mind....” citing PLANJOL’S TREATISE ON THE CIVIL LAW § 123... and further noting that “prior holdings of this court are persuasive, not authoritative, expressions of the law.”
latter approach, by focusing on the consensus, may leave matters of disagreement on one side and complement the contract with the suppletive provisions provided by the code. I bring a fair amount of comparative law into that part of the discussion, presenting some foreign and transnational solutions. I make sure students envision the full spectrum of possible solutions and identify the various types of responses. Students can relate this to their experience of having studied the common law of contract and western legal traditions.

I then turn to the code. All students must at all times have in front of them a paper edition of the Louisiana Civil Code and I urge them to use the “pocket” edition compiled by my colleague Alain Levasseur,58 which contains nothing but the text of the code. We read the code’s articles and it happens time and time again that I read a given article or have it read aloud by a student several times during one and the same class. From the code articles or their combination, we derive the answer of Louisiana law to the problem at hand.

Then and only then, we engage in the reading and discussion of cases, covering two, sometimes three cases in one hour, adjusting the length of the discussion accordingly. The facts of the case give us a context to better understand the problem as it may appear in real life, and I occasionally use the facts of the case at the beginning of the class. The case serves as an illustration. It permits noting the good or poor application of the code by the judge. The case opens debate and discussion that may lead students to think of what could be done to improve the law when the latter is not found fully satisfactory. Of course the class is very interactive, but the Civil Code serves as the Ariadne’s thread, that the students must never lose if they are to find their way out of the labyrinth.

It is crucial, in my opinion, to make students aware of the existence of different models and to make them understand which

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ones fit or do not fit the higher purpose of the law, identified in the
general discussion. They can then understand and assess the
choices made by the Louisiana legislature, and develop a critical
approach. For instance, study of the cases may prove that
subjecting conventional subrogation by the creditor to the rules
governing the assignment of rights\(^{59}\) may have detrimental effects,
for instance in cases of first-party insurance where the insured
grants subrogation to the insurer after having been paid partial
compensation.\(^{60}\) Oftentimes it shows the wisdom of some solutions
that bridge apparently fundamental differences between the civil
law and the common law, like the elimination of the need to put
the deficient obligor in default when there is a contractual term or
there is prior evidence that there will be no performance once the
term is reached.\(^{61}\) The relative abandonment of the distinction
between obligations to give, to do, or not to do in the context of
specific performance is another good example of a wise and highly
practicable solution, one that may be providing inspiration for
other jurisdictions, particularly France.\(^{62}\)

\(^{59}\) LA. CIV. CODE art. 1827: “An obligee who receives performance from a
third person may subrogate that person to the rights of the obligee, even without
the obligor’s consent. That subrogation is subject to the rules governing the
assignment of rights.”

\(^{60}\) All rights are indeed transferred to the insurer and the insured is
deprived of the benefit of LA. CIV. CODE art. 1826B: “An original obligee who
has been paid only in part may exercise his right for the balance of the debt in
preference to the new obligee. This right shall not be waived or altered if the
original obligation arose from injuries sustained or loss occasioned by the
original obligee as a result of the negligence or intentional conduct of the
original obligor.”

\(^{61}\) This is the way Louisiana law has introduced something comparable to
anticipatory breach, while staying within the logic of the civil law, where failure
to perform does not per se terminate a contract that remains, in principle,
enforceable. LA. CIV. CODE art. 2016 provides: “When a delayed performance
would no longer be of value to the obligee or when it is evident that the obligor
will not perform, the obligee may regard the contract as dissolved without any
notice to the obligor.”

\(^{62}\) LA. CIV. CODE art. 1986: “Upon an obligor’s failure to perform an
obligation to deliver a thing, or not to do an act, or to execute an instrument, the
court shall grant specific performance plus damages for delay if the obligee so
demands. If specific performance is impracticable, the court may allow damages
to the obligee.”
Students may be impressed at the time of a class, and the bright ones may develop good civil law skills, but I know they will not stay on firm ground for too long.

Legal practice places the case before the code. When appealing to the Supreme Court of Louisiana, attorneys must submit a brief, prepared and presented according to the Rules of the Supreme Court of Louisiana. In the appellant’s brief, a list of cases must appear prior to the statement of the facts of the case and a specification of the alleged errors. The brief of the respondent must be arranged the same way. This is a clear incentive to focus on cases rather than on the code or legislation.

In addition, a number of norms external to the Civil Code must be taken into account. The Federal and State Constitutions take priority over any other norm. And it cannot be forgotten that the big bulk of legislation in Louisiana is to be found in the Revised Statutes. Revised Statutes are arranged in Titles running in alphabetic order, with General Provisions in a Title 1, and running from Aeronautics (Title 2) to Wildlife and Fisheries (Title 56). The General Provisions of Title 1 start with a Chapter 1, Interpretation of Revised Statutes, which contains interpretative provisions that differ from the traditional civilian rules to be found in the Civil Code and are of a common law stamp. For instance, R.S. 1:7 and

Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.”

63. Rules of the Supreme Court of Louisiana, Rule VII, Section 4: “The brief of the appellant, applicant or relator, as the case may be, shall set forth (1) an index of the authorities cited; (2) a concise statement of the case; (3) a specification of the alleged errors complained of; and (4) an argument free from unnecessary repetition and confined strictly to the issue or issues of the case.”

64. Rule VII, Section 5: “The brief of the appellee, or respondent, as the case may be, shall contain an index of the authorities cited and such statement of the case and such argument as may be deemed necessary.”

65. R.S. 1:1 reads: “This Act shall be known as the Louisiana Revised Statutes of 1950 and shall be cited as R.S. followed by the number of the Title and the number of the Section in the Title, separated by a colon. Example: Section 1 of Title 20 shall be cited as R.S. 20:1.”

8, providing that the singular may also denote the plural and one gender may also denote the other, sound pretty much like Section 6 of the British Interpretation Act 1978 or similar provisions of other states’ codes.

It is hard to claim that the law of Louisiana is Civil Code centered. Apart from matters dealt with in the Civil Code – they are many and of significant importance in people’s daily personal and business life – almost everything else is dealt with in much detail in legislation of common law stamp.

Even at LSU, the only one, out of the four law schools in the State, to impose a bi-jural curriculum, civil law trained professors, reduced to not even a fifth of the faculty these days, feel disheartened and tend to react like a threatened minority, viewing themselves as scarce specimens of an endangered species. It is quite a job in that context, especially in times of recession and severe budget cuts, to lead the Center of Civil Law Studies, and yet it is a fascinating challenge. At the same time, traditionalist civilians need to be reassured and Louisiana law needs to be encouraged towards a future that does not after all appear to be that frightening. Yes, there is a venerable civil law heritage, which is part of the local culture and identity. No, the civil law is not the reason why corruption exists and the economy lags behind that of other States. What is perceived as a threatened local identity is shared by many other peoples and may be changed into a powerful asset.

Many legal systems belonging to the civil law tradition are in search of a lost center.

III. IN SEARCH OF THE LOST CENTER

All civil law systems, mixed or less mixed, are losing sight of what once was their center. Two types of forces largely contribute to a weakening or dissolution of the core. The first set of forces is endogenous and pertains to a sometimes awkward legislative
management of the code. To keep a somewhat optimistic perspective, let us describe this in terms of decomposition and recomposition of codes. The second set of forces is exogenous as it stems from the constitutionalization and internationalization of the civil law and its norms, more often than not with overall beneficial consequences.

A. Endogenous Forces: Decomposition and Recomposition of Codified Law

This phenomenon was described in recent papers, the most recent of which will be simply plagiarized in the next paragraph.67 Codes are sometimes decodified as a consequence of empirical legislative reform, distorting the structure of the code, or reforming significant matters by way of ancillary legislation that is no longer to be found in the code. Efforts to rewrite the codes, either partly or completely, and sometimes in a piecemeal fashion, are confusingly described as revision or recodification. Doctrinal efforts have been made to clarify the concepts of decodification, revision, and recodification.68

A redefinition of those terms was recently proposed, based on architectural metaphors, comparing codes with churches or temples.69

Codification is the construction of a homogenous building where the spirit can be felt in every single stone, window or ornament. Where the building is expanded in such a way that the connection between the different parts is lost, one gets close to what is called decodification. This may be the addition of new chapters in the code that do not connect clearly to the original text – like the addition of the regime of contracts with tour operators, full of consumer protections, making exception to the general law of

67. Moréteau & Parise, supra note 6, at 1109-1112. This paragraph largely reproduces Moréteau, A Summary Reflection, supra note 8.
68. Michael McAuley, Proposal for a Theory and a Method of Recodification, 49 LOY. L. REV. 261 (2003); and Moréteau & Parise, supra note 6, at 1103 et seq.
69. Moréteau & Parise, supra note 6, at 1105 et seq.
obligations. Like unconnected wings of an enlarged building, they exist next to it, and the material is sometimes of a different fabric. Decodification also occurs when extensions are totally unconnected, like separate statutes or freestanding buildings.\textsuperscript{70}

Codes can be revised by the reform of one or several articles, chapters, or titles. It sometimes happens that the entire code is rewritten, sometimes as the consequence of a complete revision process, as happened in the Netherlands and Quebec.

Partial revision may revitalize the code, but may also trigger a decodification process where the revision causes the code to lose its coherence. For instance, if the Louisiana revision of obligations\textsuperscript{71} undoubtedly contributed towards a revitalization of the Civil Code, the revision of the Title on sale,\textsuperscript{72} aiming at introducing Article 2 of the Uniform Commercial Code into Louisiana law, created discrepancies, especially in Chapter 9 on redhibition.

Decodification also typically happens as a result of the multiplication of ancillary statutes outside the code, dealing with matters that were once regulated by the code itself. In Louisiana, most provisions contained in Title 9 of the Revised Statutes\textsuperscript{73} are ancillary to the articles of the code, dealing for instance with procedural details that pertain to a topic dealt with in the Civil Code, as in the case of divorce.\textsuperscript{74} They also contain matters not dealt with in the Code and that could have found a place there, like the law on human embryos,\textsuperscript{75} in which case we may talk about decodification. Title 9 of the Revised Statutes is nothing more than an annex to the Civil Code.

\textsuperscript{70}. \textit{Id.} at 1106.
\textsuperscript{73}. On the Revised Statutes, see II. 2. above.
\textsuperscript{74}. LA. REV. STAT. 9:301 to 376.
\textsuperscript{75}. LA. REV. STAT. 9:121 to 133.
Recodification is sometimes the answer. The entire civil code may be rewritten, either on a new structure, or based on new doctrines or ideas. The new civil code regains the density and gravity the previous one had lost as a result of revision and decodification. The new civil code appears like a revitalized star in the legal system, and we may describe this as “solar recodification.”

Recodification, however, often takes place in a far less ambitious way. Decodified matters will not be returned to the civil code. They will be amalgamated into specialized codes that may be described as satellite codes, revolving around a less dense and partly emptied civil code. These satellite codes are often little more than clerical compilations, coming close to the common law idea of consolidation. They do not have the density of the civil code. Those satellite codes are generally created because the specific areas of law started to develop in fragments outside of the civil code, thus generating decodification. This process may be described as “satellite recodification.”

Like solar recodification, satellite recodification is meant to make legal provisions more accessible for jurists and laypersons alike. However, it often appears to be more technical, and therefore less accessible to ordinary citizens.

Recodification may generate new types of re-energized civil codes, strengthening the solar system. Examples of solar recodification are not many: they include the Netherlands and Russia, in the Old World, and Brazil and Quebec, in the New World.

Recodification more often results in the enactment of loose satellite codes, which would probably not pass the test of being called codes in the Napoleonic or Germanic sense. These satellites revolve, sometimes in a distant orbit, around a weakened solar civil code, which may undergo revisions and continued decodification.

76. Moréteau & Parise, supra note 6, at 1109 et seq.
77. Id.
For instance, France allowed substantial matters to be moved outside the Civil Code. Legislation on insurance and consumer protection grew outside the code by way of separate statutes, causing a decodification process. The enactment of an Insurance Code and a Consumer Code were meant to consolidate dispersed legislation, and this looks like recodification in the form of satellite codes. To take the most recent of those codes (the *Code de la consommation*), it was not meant to be more than a rearranged collection of existing statutes and regulations protecting consumers in various transactions, without any change in substance. The table of contents appears more coherent, and like the *Code des assurances*, this code contains a legislative part and another part consisting of regulations. These codes are a rearranged collection of existing legislation and regulations on a given topic, to make the texts more accessible. They are a collection rather than a system, and are satellites to the Civil Code. In Louisiana, one may cite the Insurance Code, the Mineral Code, and the Trust Code, actually enshrined in the “Civil Code” Title of the Revised Statutes.

To conclude on the place of the Civil Code in Louisiana, it remains the center of a solar system but, within the image of Louisiana’s legal galaxy, this solar system is now a peripheral element. Comparative analysis reveals that the situation in Louisiana is far from unique, endogenous forces pushing civil codes to the edge of the galaxy even in so called pure civil law jurisdictions.

Things are not any different regarding exogenous causes.

78. LA. REV. STAT. tit. 22.
79. LA. REV. STAT. tit. 31.
80. LA. REV. STAT. 9:1721 to 2252; LA. REV. STAT. 9:1721 reads: “This Chapter shall be known and may be cited as the Louisiana Trust Code.”
B. Exogenous Forces: Constitutionalization and Internationalization of Private Law

Two sets of forces, extraneous to domestic private law, are at work, marginalizing the position of the civil code. The first one, though domestic, is linked to the development of the jurisdiction of Supreme or Constitutional Courts, extending the scope of judicial review and constitutionalizing some areas of private law. The second one is truly external, and linked to the development of different kinds of international norms, interfering with traditional fields of private law.

1. The Constitutionalization of Private Law

The constitutionalization of private law is a well-known phenomenon. The American model of judicial review, based on the reading of the United States Constitution by the Supreme Court in *Marbury v. Madison*, allows the highest court in the nation to declare any type of legislative provision unconstitutional and void, therefore imposing the supremacy of law over the will of the legislators. This model had a formidable influence all over the Americas. Not only was it adopted in Canada, but also in Latin American countries.

It impacts Louisiana as much as it does Quebec and Latin American countries. For instance, in *Loyacano v. Loyacano*, the Louisiana Supreme Court was asked to annul an article of the Civil Code that allowed a wife who had not been at fault to claim alimony after a divorce. Art. 160, as it then stood, was

81. It was described twenty years ago by MARC FRANGI, L'APPORT DU DROIT CONSTITUTIONNEL AUX DROITS DES PERSONNES ET AUX DROITS ÉCONOMIQUES INDIVIDUELS: CONTRIBUTION À L'ÉTUDE DE LA CONSTITUTIONNALISATION DU DROIT PRIVÉ (Université Aix-Marseille III, 1990).
84. “When the wife has not been at fault, and she has not sufficient means for her support, the court may allow her, out of the property and earnings of the husband, alimony which shall not exceed one-third of his income.”
allegedly a denial of equal protection of the laws, prohibited by both the Fourteenth Amendment to the Constitution of the United States and Article I, § 3 of the Louisiana Constitution of 1974. Rather than taking the risk of depriving all divorced women of alimony by declaring the provision null, the majority of the Louisiana Supreme Court preferred to fix the problem by way of interpretation, ruling that the *ratio legis* commanded it to be extended so as to cover the case of men who might need alimony from their ex-wife after a divorce. Justice Dennis also referred to article 21 of the Civil Code, inviting the judge, where positive law is silent, to proceed and decide according to equity, defined in the article as meaning natural law, reason, and received usages.86

Examples of interference by the constitution with the civil code can be found in many jurisdictions. A number of countries of continental Europe adopted judicial review following World War II. Not surprisingly, judicial review flourished in those moving from a totalitarian regime to democracy, such as Germany, Austria, and Italy, and later Spain and Portugal. Having denied its wartime Vichy Regime, France remained loyal to its revolutionary tradition of putting the will of the people (*demos*) above judicial rulings (rule of law), due to fear of government by judges. A Constitutional Council was created in 1958 but could only intervene by way of abstract review (without the context of a case), upon the request of politicians, during the very short period between the vote on the legislation and its promulgation by the President of the Republic. The constitutionality of promulgated

85. It was later replaced by art. 112, which now reads: “A. When a spouse has not been at fault and is in need of support, based on the needs of that party and the ability of the other party to pay, that spouse may be awarded final periodic support in accordance with Paragraph B of this Article.”

86. Act of June 18, 1987, effective January 1, 1988, No. 124, § 1, 1987 La. Acts 404, at 407, later amended and renumbered art. 21, now article 4, abandoning the reference to natural law, under the strange and false pretence that “The term ‘natural law’ in Article 21 of the 1870 Code has no defined meaning in Louisiana Jurisprudence.” (Revision Comments (b)).
legislation could not be challenged. The Constitutional Council worked tirelessly at enlarging the scope of review, recognizing a constitutional value to all texts cited in the preamble to the Constitution, including the 1789 Declaration of the Rights of Man and the Citizen. A major step was taken with the constitutional reform of 2008, allowing a party to a case to raise an exception of unconstitutionality, to be determined by the Constitutional Council, and opening the possibility of annulment of a legislative provision in force. The constitutionalization of private law, long identified, is thereby intensified.

Other courts, this time supranational, may also interfere with domestic private law and therefore with civil codes.

2. The Internationalization of Private Law

European civil codes are subjected to the supremacy of European Union law, enforced by the Court of Justice of the European Union. Likewise, the European Court of Human Rights sanctions violations of the Convention for the Protection of Human Rights and Fundamental Freedoms, signed and enacted by the Members of the Council of Europe. For instance, Article 8 protecting the right to respect for private and family life and Article 14 prohibiting discrimination are likely to interfere with matters covered in civil codes, causing provisions of national codes to be placed under the scrutiny of the European Court in Strasbourg. Civil codes are double-checked or triple-checked, with the Charter of Fundamental Rights of the European Union coming into force on December 1, 2009. The situation becomes as complex in Europe as in Quebec, where the Canadian Charter of Rights and

87. Loi constitutionnelle n° 2008-724 du 23 juillet 2008, adding art. 61-1 to the Constitution: “Lorsque, à l'occasion d'une instance en cours devant une juridiction, il est soutenu qu'une disposition législative porte atteinte aux droits et libertés que la Constitution garantit, le Conseil constitutionnel peut être saisi de cette question sur renvoi du Conseil d'État ou de la Cour de cassation qui se prononce dans un délai déterminé.”
88. See Frangi, supra note 81.
Freedoms, forming the first part of the Constitution Act, 1982, sometimes conflicts with the Quebec Charter of Human Rights and Freedoms of 1975. Other international instruments also interfere, and increase complexity; for instance when the courts are forced to construe federal or provincial legislation in the light of the United Nations Convention on the Rights of the Child.\textsuperscript{89}

In Quebec, Louisiana, and all other civil law jurisdictions, centers are many and the civil code may be influenced by constitutions, supranational or national charters of human rights, and international treaties. They are like planets revolving around several stars.

One may try to imagine a legal universe with multiple centers, with satellites revolving around several stars or planets. For instance, the French \textit{Code de la consommation} may revolve around the \textit{Code civil}, the Constitution, European treaties and directives. One may accept and bow to the complexity of the post-modern world (whatever the meaning of this term may be) and modelize legal reality shifting from the pyramid of norms to complex and pluralistic networks.\textsuperscript{90}

Quebec has found a way to re-center private law on the Civil Code, the Preliminary provision of which provides:

\begin{quote}
"The Civil Code of Quebec (S.Q. 1991, c. 64), in harmony with the Charter of human rights and freedoms (R.S.Q., c. C-12) and the general principles of law, governs persons, relations between persons, and property."
\end{quote}

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions,

\begin{footnotes}

\footnotetext{90. FRANÇOIS OST & MICHEL VAN DE KERCHOVE, \textit{DE LA PYRAMIDE AU RÉSEAU? POUR UNE THÉORIE DIALECTIQUE DU DROIT}, (Publications des Facultés universitaires Saint-Louis, Bruxelles, 2002); and Vanderlinden, supra note 9.}
\end{footnotes}
lays down the jus commune,\textsuperscript{91} expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.”

A strong case should be made for the adoption of a similar provision at the beginning of the Louisiana Civil Code. It would also make sense to adopt it in France and in other civil law countries, also adding a reference to the citizen. Re-centering private law around the civil code must also mean re-centering it around the cives, the citizen wherefrom the adjective civil derives. For the raison-d’être of law is not the norm, but the citizen regulated by the norm.

\textbf{IV. Back to the Center: A Citizen-Centric Legal Universe}

We reach the term of our revolution, the wheel going full circle. After all, Nicolaus Copernicus did not create a new world, but like all great scientists he taught us to see the world with a different eye, taking us closer to the truth. The truth is often simple. At all times, great developments in legal history have been centered on the citizen. The word sounds passé, but sujet de droit is too abstract and ambiguous, with somewhat negative overtones, and the major inconvenience of being norm-centric. Should we use “person,” or “human being?” Citizen has a different energy, and a center must be strong, energetic, and meaningful.

A citizen is an individual, a human being of course, who is ontologically a member of a community of mankind, for there is no possible survival outside a community. The present writer believes that this community is under God. He fully accepts that many a fellow human being may not believe in God and yet be solidly convinced that what makes our humanity is the full recognition of the dignity of the other, which is the cement of human rights. For, in his opinion, the recognition of the dignity of the other is the

\:\textsuperscript{91} This term offers the best possible translation of the French “droit commun.”
acknowledgment that we share a common condition and therefore a common origin, which takes us back to the idea of God.

The citizen as member of a community has obligations and rights. I am not just a person with multiple droits à or entitlements. I am obliged in essence, by my very presence in this world. Obligations precede rights and legitimize rights. Because I was fed when I came into this world, I must feed those in need. This is what natural law commands.

Sadly, the citizen has become the invisible part of the legal universe, a sort of black hole. There is too much dust; there are too many laws and regulations, darkening the center. Too much focus is placed on the norm, leaving the citizen in the dark. Let us be revolutionary and place the citizen at the center.

Let us avoid the many categories of consumer, administré, elector, taxpayer, worker, and resident, as useful as they may be in a given context. Let us take the person as a whole and in its social essence, and we fall back to the dynamics of the civil law tradition.

The civil law placed the citizen at the center. By saying this, I do not claim that this was regardless of social status. The Twelve Tables did not change plebeians into patricians, but recognized the plebeians have the right to know their limited rights and less limited obligations. The capacity given to the plebeians to know the law applicable to them was a significant progress. This was after all the very purpose of the Louisiana Digest of 1808.92

We must not be naive; the very idea of codification or compilation is not free from ambiguity. The Corpus juris civilis strengthened the power of Emperor Justinian. Glossators, Post-glossators, and Commentators later confiscated the knowledge of the law, with books written in Latin and not accessible in the vernacular. Meantime, by reducing the local customs to writing, the kings of France deprived the people of their ability to create and develop the law in a spontaneous way, freezing the evolution

92. See supra note 19.
of custom and placing its interpretation in the hands of judges or jurisconsults. The Prussian Code of 1792 (Allgemeines Landrecht für die Preussischen Staaten) was by no means a tool of social change or emancipation. However, the Enlightenment also produced a Civil Code centered on the citizens, meant to safeguard their rights against the arbitrary judicial abuse that was commonplace in Ancient Regime France.

Law must be accessible to the citizen. In this respect, the civil codes of France and Louisiana, Lower Canada or Quebec, and all Latin American countries, are a great improvement, empowering the citizen by making the law more easily accessible. Of course the code does not say everything, and judges often have to make meaning out of very general and sometimes – though not often – confusing provisions. But at least the citizen can have access to the reasoning of the judge and check for manifest errors or contradictions. By contrast, the common law is only accessible to those who master the subtle technique of distinction and are patient enough to read multiple cases that no single book may contain. When statutes exist, and there are many, they tend to be lengthy, over detailed, verbose, and confusing, and therefore not accessible to ordinary citizens.

95. Where this is expressed in an articulate manner, unlike in France where the Cour de cassation, by not setting-out the arguments for its rulings, confiscates the legislative power. Moretou, The Future of Civil Codes in France and Louisiana, 2 J. CIV. L. STUD. 39, 49 (2009).
96. See Connally v. General Construction Co., 269 U.S. 385 (1926), where Sutherland J. said, at 391, “a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law.” This dictum was cited by the Supreme Court of Canada, in Reference re ss. 193 and 195.1(1)(c) of the CRIMINAL CODE (MANITOBA), [1990] 1 S.C.R. 1123.
This deals with form, but much more can be said about substance. Civil law promotes cooperation over sheer individualism, recognizing *negotiorum gestio* and the duty to help those in urgent need. It promotes the matrimonial community of gains, forced heirship, protecting family interest rather than favoring fancy donations. It fights arrangements allowing the dead to control the resources that should be available to the living. It is sometimes blamed for not being business friendly but a number of civil law countries have vibrant centers for business and rank among the wealthiest in the world economy. The civil law should not be blamed for making Louisiana and less developed Latin American countries less prosperous than neighboring regions having the common law. The blame should rather be on the lack of responsibility: in neglecting the education of the young, in accepting corruption as a fatality, and in neglecting sustainable development. This has nothing to do with the nature of the legal system. After all, a number of underdeveloped countries, some very near the United States, are common law jurisdictions.

Traditional civil law is citizen-centered and its ideal form of expression is in the civil code. Civil codes are more precise than constitutions and bills of rights and leave less room to judicial discretion. They read more easily than complex statutes, detailed regulations, or multivolume compilations.

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V. THREE RECOMMENDATIONS AS A CONCLUSION

First recommendation: one must treasure or restore the civil code’s original clarity both in style and substance, and reread frequently the preliminary speech by Portalis, who was a great legislator and philosopher.100

Second recommendation: one must consult the people before modifying the code. By this, I do not necessarily mean a popular referendum. A referendum is appropriate when the question is of primary public interest and can be phrased in a simple and straightforward way, which is rarely the case with civil law reform. I mean consultation before the drafting of a bill, to identify the issues and the possible responses. In many respects, reforming a civil code is like amending a constitution. One may imagine a process comparable to a Constitutional Convention.

The French revision of the Code civil under the leadership of the late Doyen Jean Carbonnier is exemplary in many respects. For instance, the revision of matrimonial regimes in 1965 or divorce in 1975 was preceded by extensive sociological studies and consultation. Louisiana can be proud of having a very efficient State Institute preparing the revision of code titles. Regrettably, Louisiana State Law Institute committees are composed of jurists only (academics, attorneys, judges), and do not include educated laypersons such as philosophers, theologians, or other scientists.

Beware of lobbyists, since they can be a threat to the common good. Limit recourse to consultative panels or advisory committees, they tend to slow down the legislative process and lack transparency. Favor direct consultation of the people on the Internet or through social groups, to promote direct expression, spontaneous debate, and give the unheard citizen a voice.101


101. Moréteau, A Summary Reflection, supra note 8, at 1456-1457; Moréteau, Libres propos, supra note 8, at 1057; Pascal, supra note 8.
Information technology favors a revival of direct democracy, an aspect which is missing in highly sophisticated societies.

Third recommendation: one cannot do away with ancillary legislation, but it makes sense to organize it in compilations or specialized satellite codes. Elsewhere, I have made suggestions on how to make them more accessible to the citizen: a simplified version may be printed for the layperson and a more sophisticated one for the jurist, a process that I compared to a double-decker bus.\textsuperscript{102}

However, the gist of this third recommendation is to make sure the civil code contains a Quebec style preliminary provision\textsuperscript{103} that may read as follows:

The Civil Code comprises a body of rules governing basic obligations and rights of citizens regarding their person, things,

\textsuperscript{102} The main purpose and effect of complex legislative provisions should be drafted in short two or three-line articles, couched in a simple and easily understandable style, in bold and attractive print, so as to be accessible to the layperson and attractive for reading. This constitutes the layperson-deck. Necessary technical provisions would follow, using where need be more technical language and giving the jurist the necessary details omitted from the simplified text. This constitutes the jurist-deck. Of course the layperson-deck may be printed or be available online separately. Any attempt to interpret provisions in the jurist-deck contrary to the letter or the spirit of the layperson-deck would of course be ruled out, inasmuch as it is illegal to have a regulatory text contravening the legislative provision. The upper layperson-deck will always take precedence, as commanded by traditional civilian rules of interpretation. Moréau, \textit{A Summary Reflection}, supra note 8, at 1458-1459.

\textsuperscript{103} The Civil Code of Québec, in harmony with the Charter of human rights and freedoms (chapter C-12) and the general principles of law, governs persons, relations between persons, and property. The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the \textit{jus commune}, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it.

and relations between persons and things which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it. It must be interpreted in harmony with the general principles of law and subject to norms having a constitutional nature.

This may be stating the obvious but may come as a salutary reminder in a jurisdiction where the civil law tradition is unknown to many and doubted by others.

The lack of response to this proposal, uttered two years ago,\textsuperscript{104} indicates that it may be too late and that there may be too much common law contamination to reasonably hope for a civil law revival in Louisiana.\textsuperscript{105} But as William of Orange, still a child when Copernicus died and later to be known as William the Silent, was fond of saying, “One need not hope in order to undertake, nor succeed in order to persevere.”\textsuperscript{106} History proves that he achieved much in his lifetime.

\textsuperscript{104} O. Moréteau, *An Introduction to Contamination*, 3 J. CIV. L. STUD. 9, 15 (2010).

\textsuperscript{105} O. Moréteau, *Mare Nostrum as the Cauldron of Western Legal Traditions: Stirring the Broth, Making Sense of Legal Gumbo whilst Understanding Contamination*, 4 J. CIV. L. STUD. 516, 530 (2011).

\textsuperscript{106} As quoted by EDMUND WILSON, *O CANADA: AN AMERICAN'S NOTES ON CANADIAN CULTURE* (1963).
CLASHES AND CONTINUITIES:
BRIEF REFLECTIONS ON THE “NEW LOUISIANA LEGAL HISTORY”

Seán Patrick Donlan*

I. INTRODUCTION

I’m a Louisiana native, but I’ve been away from the state for over a decade. In that time, I completed a Ph.D. (on Edmund Burke’s Legal Thought) at Trinity College Dublin and remained to teach law in Ireland. Most of my research has focused on comparative law, history, and legal history.¹ Given my Louisiana legal background and these interests, comparative legal history is especially important to my work. Indeed, I’ve long wanted to return to Louisiana history, in particular to the unusual legal and social history of my own “Florida Parishes”. That research, on the laws and norms of Spanish West Florida in the early nineteenth century is underway, though it’s proceeding slowly.² It has, however, drawn me back into the complex, sometimes convoluted, debates on Louisiana legal history. The bicentennial of Louisiana

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1. Most recently, for example, I co-edited, with Michael Brown of the University of Aberdeen, THE LAWS AND OTHER LEGALITIES OF IRELAND, 1689-1850 (Ashgate, London, 2011). My contribution to the collection was an article on Arthur Browne, an eighteenth-century, American-born civilian (a specialist in continental law) who taught civil law at Trinity College, practiced in both the admiralty and ecclesiastical courts and the courts of common law, and served in the Irish Parliament.

statehood provides an opportunity to briefly comment on the state of our legal history and historiography. In particular, I want to discuss the so-called “New Louisiana legal history” as articulated over the last three decades by Professors Warren M. Billings and Mark F. Fernandez. Their scholarship, with their allies, has made important individual contributions to a more nuanced history of our laws. But the revisionism of Billings and Fernandez is most wanting precisely where they have been most critical; that is, with respect to comparative legal history. Indeed, I suggest that a renewed engagement with the old legal historians and their heirs is in order.

Warren Billings and Mark Fernandez are both excellent historians with distinguished records in Louisiana history. A longtime resident of the state, Billings is Professor Emeritus in the History Department of the University of New Orleans (UNO). He was the official historian of the Louisiana Supreme Court and was responsible for making their records available in the UNO archives. Fernandez, a native of Louisiana and once a student of Billings, is Professor of History at Loyola University New Orleans. Like Billings, he is also a past President of the Louisiana Historical Association. Both are elected fellows of the Louisiana Historical Association. The published roots of the “New Louisiana Legal


History” lay in Billings’ *Louisiana Legal History and its Sources: Needs, Opportunities and Approaches*, published in *Louisiana’s Legal Heritage* (1983). There Billings launched a critique of the “lawyer-annalists” writing on Louisiana legal history and began to suggest that American legal history, like that of Virginia (on which he’d long specialized), was a better context than comparisons with continental legal traditions. The “New Louisiana Legal History” tag was developed in Billings’ review of Richard Kilbourne’s *History of the Louisiana Civil Code* (1989). There Billings both criticised and claimed Kilbourne, who must have been surprised to find that he’d been pressed into the ranks of the new historians. Billings continued his critique and call-to-arms, now assisted by Fernandez, across the 1990s. Their agenda became still clearer over time: our legal history and historiography must, they argued, generally be set in a wider social context and especially within the broad contours of American legal history. The efforts of Billings and Fernandez culminated in the jointly-edited *A Law unto Itself? Essays in the New Louisiana Legal History* (2001) and, in the same year, Fernandez’s *From Chaos to Continuity: The Evolution of Louisiana’s Judicial System, 1712-1862* (2001).

II. CODES AND CONTEXTS

The first plank of Billings’ and Fernandez’s critique is the insistence that we set our legal history and historiography in its broader social context. This call to place law in wider contexts—without denying some level of autonomy for law—is to be welcomed. As Fernandez wrote a decade ago, in his introduction to *A Law unto Itself?*, it’s important not “to view law in a vacuum” and to employ instead “interpretive schemes that mingle social,
political, and intellectual history into modes of analysis that treat things legal as one strand in a complex cultural matrix.\textsuperscript{7}

Professional historians rather than lawyers by training, Billings and Fernandez are certainly right to insist that trained historians have an important role to play in our legal history. It is a subject too important to be left to legal historians alone. If the “old legal historians” are never clearly identified, Louisiana legal historians have traditionally focused—with their counterparts throughout the West—on \textit{internal} or doctrinal legal history.\textsuperscript{8} Given the dominance of \textit{external} legal history in the United States over the last half-century—which attempts, like the “New Louisiana Legal History,” to place law in its wider economic, political, and social contexts—it is peculiar that it has taken so long for what Billings called a “sociocultural approach” to appear in the Bayou State.\textsuperscript{9}

The laudable aim of a more meaningful social history of law has already produced some results. Billings and Fernandez are responsible, at least in part, for encouraging or publishing work in which scholars they include as fellow travelers in their “New Louisiana Legal History”—e.g., Florence M. Jumonville and Judith Kelleher Schafer—have taken their studies beyond codes and courtrooms. Indeed, \textit{A Law unto Itself?} included not only a section on \textit{Judges and Courts}, but essays on \textit{Books and the Law} and \textit{Law in Society} as well. With these last two sections in mind, Fernandez noted the importance of contributors who “mov\textsuperscript{ed} past mere analyses of digests and codes to identify the books on which

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\textsuperscript{7} Fernandez, \textit{Louisiana Legal History} in \textit{A Law unto Itself?}, supra note 4, at 21.

\textsuperscript{8} Perhaps because of the acrimony of past debates, neither Billings nor Fernandez is usually very specific about their targets. Henry Plauché Dart gets the most attention, but he died in 1934. See Billings, \textit{Introduction} in \textit{An Uncommon Experience}, supra note 3, at 14-15 and \textit{Mixed Jurisdictions and Convergence: The Louisiana Example}, 29 INTL. J. LEG. INFO. 272, 296-297 (2001). See also Billings, \textit{Louisiana Legal History and its Sources} in \textit{Louisiana’s Legal Heritage}, supra note 3, at 194-5.

lawyers and judges relied, to gauge their content, and to assess their impression on Louisiana law and its practice.” 10 Even more important perhaps are those contributors who moved between legal and social history to investigate topics like slavery and the place of women in the nineteenth century. 11 Ironically, however, the collection contains little that is explicitly comparative even within the American context that the new historians have championed. As one reviewer put it, “its essays amplify the title’s ambivalence by engaging only sporadically with the unifying theme of evaluating Louisiana legal history in larger context.” 12

Indeed, the critique of Billings and Fernandez is not without problems. First, it may be a little unfair to portray inattention to social history as a failure of the lawyers. It’s hardly surprising, after all, that “[l]aw professors claimed legal history for their very own” or that histories written by lawyers would be, well, lawyerly. 13 Instead, the absence of the social history of law that Billings and Fernandez demand might suggest negligence on the part of historians rather than jurists. More importantly, the legal history produced by Billings and Fernandez is itself court-centered, largely focused on judges and jurisprudence. It looks, in fact, little different from traditional Anglophone legal scholarship, what we

might call the “Old Anglo-American Legal History”. More problematically, especially when arguing for a social history of law, are the conclusions drawn from case law. For example, rather than an exploration of “social, political, and intellectual history,” Fernandez argued in From Chaos to Continuity that the “[e]xamination of … state courts … allows for a sweeping analysis of law, society, culture, politics, conflict, and consensus.” But surely this overstates the significance of the judiciary and case law. These are obviously an important part of the overall picture of our laws and of the “law in action”. But the study of case law is hardly “sociocultural” analysis at its best. Both the old and new historians would do well to take more seriously the call to “modes of analysis that treat things legal as one strand in a complex cultural matrix.”

The general thrust of modern socio-legal scholarship is that law, including but not limited to the courts, may reflect society, but it also has meaningful autonomy as well. The relationship is extraordinarily complex. But Billings wrote, in 1997, not only that “[c]ulture, society, and law are inextricably intertwined,” but that:

> Ultimately law defines culture because it invests societies with their collective identities, which sets each off from another. Thus to examine even the most mundane facet of any legal order is to illuminate changes in society and its values through the passage of years.

Perhaps Billings misstated his view here or I’ve misunderstood, but the idea that “law defines culture” seems simplistic, if not naïve. Such an opinion has, of course, been held by older schools of legal historians who placed their legal traditions at the center of their cultures, not least long-standing views of Anglo-American legal exceptionalism. A continental European variant, reflecting

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14. Fernandez, From Chaos to Continuity, supra note 4, at xii.
17. Id. at 7 (emphasis added).
the nationalism of the nineteenth century, was the mystical *Volksgeist* of the influential German “Historical School”. But such views have little connection to an extensive, comparative scholarship on the frequency of legal transplantation. It contradicts, too, the historical complexity and plurality of both laws and cultures throughout Western legal history.

### III. Comparisons and Contexts

The second aim of Billings and Fernandez is, as the latter put it, to “explore new methods and areas of research with the aim of tying the state’s legal history more closely to that of the South and to the nation as a whole” is a perfectly reasonable endeavor. Billings had earlier written that the new historians:

share a commitment to novel methods, a revisionist bent, rigorous manuscript research, and an astute incorporation of Louisiana’s legal history into the larger contexts of national legal history, Southern history, and American history in general.

This emphasis on the American context is rooted in the belief, shared by Billings and Fernandez, that scholarship on Louisiana legal history is not merely internal, but has tended to unnecessarily and problematically accentuate its uniqueness or “exceptionalism”, especially its relationship to continental legal sources. There is some truth to this. Writing on our links to continental legal

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traditions, our legal historians have too often failed to attend to American parallels. Indeed, in this respect, much of Fernandez’s introduction to *A Law unto Itself?* is solid advice for the development of a richer legal history. But similarities, like differences, can be exaggerated. One partial perspective, or partiality, may simply replace another. I want to suggest that Billings and Fernandez appear confused about what the old legal historians—whoever they are—were doing, oscillate in their own appraisal of Louisiana law, and reveal important limitations in their understanding of the comparative analysis they reject.

Billings is especially critical of “exceptionalism …”, the belief in the *sui generis* nature of Louisiana’s laws, “as the organizing principle of Louisiana legal history.” Elsewhere, he refers to “[t]he myth” that “French civil law [was] the marrow, the bone, and the spirit of Louisiana jurisprudence.” Perhaps there remain some lawyers and laypeople who believe this, but to conclude that it reflects the *communis opinio* of any generation of Louisiana’s legal historians is mistaken. In fact, it seems to conflate an argument largely about the uniqueness of Louisiana’s *private law* for more sweeping conclusions about the tradition as a whole. The “civilian renaissance” to which Billings refers was part of a wider

22. A number of recurring, admittedly important, questions still distract from more productive analyses. Ongoing debates in Louisiana legal history include, at least for the early nineteenth century: the status—mere digest or modern code—of the 1808 redaction; the character—whether French or Spanish—of the *A Digest of the Civil Laws Now in Force in the Territory of Orleans* (1808) [hereinafter DIGEST] and the role of the 1808 redactors; the significance of the “De La Vergne volume” of the 1808 DIGEST; the character—whether continental or Anglo-American—of the jurisprudence; the general character—whether naturalist or positivist—of Louisiana law. For a similar list of debates, cf. Billings, *Louisiana Legal History and its Sources* in *Louisiana’s Legal Heritage*, supra note 3, at 195.


24. Billings, *Mixed Jurisdictions and Convergence*, supra note 3, at 299. Indeed, Billings seems to want it both ways. He suggests that the Louisiana claim to uniqueness “speaks more to myth than to reality” while acknowledging, in the same paragraph, that Louisiana would become “a jurisdiction apart.” *Id.* at 272, 273. Note, too, Billings’ odd contrast between the *French Civil Code of 1804* and the *Code Napoleon*, *id.* at 280.
debate against those who argued, anticipating in many respects the new historians, that Louisiana was virtually indistinguishable from its fellow American jurisdictions. Indeed, the most heated debate of the past four decades was precisely over whether the Digest of 1808 was best seen as redacting French or Spanish private law. But neither camp denied Anglo-American transplants then or the progressive influence of Anglo-American law since. Of course, in Louisiana, as in other jurisdictions, legal history can be whiggish and shallow among the public, practitioners, and professors alike. But if Billings contrasts “exceptionalism” with the idea that Louisiana is “an amalgamation of civil and common law precepts that commenced in 1803 and continued into the present,” I know of no scholar—certainly no living Louisiana legal historian—who maintains the former view.

This suggests a fundamental misunderstanding of the old legal historians—whomever they are—by at least some of the new historians. Similar to Billings, Fernandez makes an odd contrast between those who emphasized a “clash” of Anglo-American and continental legal traditions in the early nineteenth century and others who “walked a different route. [The latter] drew notice to a blend between civil and common law that made Louisiana a ‘mixed jurisdiction.’” The point of the clash thesis in its various forms was, especially for the early nineteenth century, precisely to explain the generation of Louisiana’s mixed legal system, of which

25. Fernandez called the revival an “intellectual cul-de-sac,” Louisiana Legal History, supra note 4, at 9.
27. The widespread belief that English common law was or is rooted in actual social custom is a well-known example. Cf. Fernandez, From Chaos to Continuity, supra note 4, at 112.
29. Fernandez, Louisiana Legal History, supra note 4, at 12.
no one is in doubt. Again, writing about the attempt by some Louisianans to protect their continental private law, Fernandez states that “[t]he petitioners hoped to control efforts to admit Louisiana into the Union, and to undermine Claiborne’s efforts to create a mixed jurisdiction by securing civilian traditions.” Assuming that this was Claiborne’s aim, it fails to appreciate the fact that whoever won (what certainly looks like a clash of some sort), the result would have been a mixed system. It’s only by securing the civilian traditions, in some manner at least, that a mixed jurisdiction could be created. It’s the nature of our mixture, not whether one was established, that has been the central question for Louisiana’s legal historians.

The concept of a “clash of legal traditions” and cultures in the Territory of Orleans, by being defined in different ways by different writers with different perspectives and agendas, has admittedly created enduring problems for Louisiana legal history. In 1983, Billings himself maintained that “[t]he rivalry between Louisiana law and American law after 1803 was no mere intellectual exercise for the edification and material benefit of lawyers; it is a conflict of culture in which Franco-Spanish Louisianans sought to preserve their identity.” He added that accommodation was found and “the story of that accommodation requires telling.” Both of these statements are in the mainstream of writing on Louisiana legal history. Since then, Billings and

33. Billings, Louisiana Legal History and its Sources, supra note 3, at 199.
34. Id.
Fernandez have not so much presented a study of the confluence of legal cultures, but to claim that Anglo-American law was victorious early in the century, largely by virtue of the numbers of Anglo-Americans in the Bar and on the Bench.\textsuperscript{35} This is less accommodation than annexation.\textsuperscript{36} It can also rather easily be presented as a clash. More importantly, however, conflict and consensus, like clashes and continuities, aren’t mutually exclusive. Louisiana legal historians have never denied that an accommodation was made. The question was, to repeat myself, about the character of that accommodation. The suggestion of Billings and Fernandez seems to be that Louisianans developed not a mixed system, but “a Louisiana version of [Anglo-American] common law.”\textsuperscript{37}

Indeed, it appears that Billings and Fernandez don’t merely want us to attend to American—or Anglo-American—contexts, but dismiss other comparisons as irrelevant.\textsuperscript{38} But their conclusion is,  

\begin{itemize}
  \item \textsuperscript{35} See Billings, Preface and Introduction in AN UNCOMMON EXPERIENCE, supra note 3, at 6, 16-17, and Fernandez, Louisiana Legal History, supra note 4, at 9-12. Kilbourne’s rejection of the clash thesis, at least in its most crude form, seems to have been an especially important influence on the new historians. His primary point was to deny that President Thomas Jefferson or William C.C. Claiborne, the Territorial Governor of Orleans, intended to suppress the local laws and replace them with Anglo-American law. See chapter one of RICHARD H. KILBOURNE, HISTORY OF THE LOUISIANA CIVIL CODE: THE FORMATIVE YEARS, 1803-1839 (Hebert Law Center, Louisiana State University, Baton Rouge, La., 1987). There are, of course, more modest possibilities. I suggest that if the true motivations of the advocates of the common laws of Orleans and England cannot easily be divined, some amount of low-grade competition and anxiety clearly existed, at least with regard to private law (regulating land, matrimonial regimes, successions, etc.). This needn’t deny that Creoles and their allies probably had mixed motives: the stability of property and politics, the possibility of expediting statehood, as well as a genuine concern about the substance of the law and the culture to which it was attached. In any event, we must be cautious not to confuse rhetoric for reality.
  \item \textsuperscript{36} Billings’ earlier article was more nuanced, noting both that Louisiana laws “set [them] off from their antecedents and the rest of the nation as well” and suggesting how “[t]he courts quickly became the forum in which the competing legal systems were harmonized.” Billings, Louisiana Legal History and its Sources, supra note 3, at 199.
  \item \textsuperscript{37} FERNANDEZ, FROM CHAOS TO CONTINUITY, supra note 4, at 76.
  \item \textsuperscript{38} Billings bemoaned the “preoccupation with comparative analysis” in Billings, Louisiana Legal History and its Sources, supra note 3, at 195. He
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in part, rooted in inattention to and unfamiliarity with comparative legal history. Fernandez’s *From Chaos to Continuity* is especially problematic in this respect. The work contains careful, useful, and important research on Louisiana’s courts. But the wider legal context it presents, both Anglo-American and continental, relies on stereotypes and anachronisms. In discussing judicial practice in the aftermath of the *Digest* of 1808, for example, Fernandez states that Louisiana judges “deviated from traditional civilian practice in which the jurist’s main occupation consisted of applying appropriate code citations.” This idea, with that of “[a]n inflexible code”, is not merely unsubstantiated in modern continental legal practice, it wasn’t even an aspiration for the *ius commune* traditions of which French and Spanish Louisiana, the subsequent Orleans Territory, was a part. The *Code Civil* (1804) was only four years old and the formalism of the French “exegetical” approach, insofar as it actually applied even in France at the time, was a *deviation* from the complex balancing of legal texts, reason, and equity (i.e., *équité*) in continental adjudication. The employment of such shibboleths results in attributing existing commonalities between Anglo-American and continental law to evidence of borrowing from the former, missing the more significant fact that there were numerous parallel developments in

40. FERNANDEZ, FROM CHAOS TO CONTINUITY, supra note 4, at 33-34.
41. Id. at 61. Fernandez writes that such a code “embodying logic and efficiency, simply could not provide for the plethora of challenging questions that often arose before the bench.” Even assuming that the exegetical approach of a later generation in France accurately expressed the practice of the French courts, it’s odd to hear that such a codal regime, applied across France for over two centuries, couldn’t provide for the legal challenges of Louisiana.
both.\textsuperscript{42} That is, rather than seeing Louisiana as part of a wider American movement to codify, the American movement must itself be, and has often been, set within wider codification movements across the West.

IV. CONCLUSION

Billings, Fernandez, and their allies have made important contributions to the study of Louisiana law and history. Collectively, they’ve edged us in the direction of a more meaningful social history of law. They’ve counseled us to pay closer attention to the American context of Louisiana’s laws, legal actors, and legal institutions. Following their suggestions will result in a much more nuanced image of our laws and better define the precise contours of our mixed tradition. But the revisionism of Billings and Fernandez is most wanting precisely where they been most critical, that is, with respect to comparative law and legal history. For all our faults, comparatists and legal historians can capture contexts that others—including talented historians—don’t. Billings and Fernandez might accomplish still more than they have with greater modesty, a closer reading of the scholarship of the old historians and their heirs, and a wider appreciation of comparative law, past and present. Perhaps in the wake of our bicentennial, we can find more constructive ways in which the old and the new historians can work together—in dialogue, collaborative projects, joint publications, etc—to the benefit of the subject we all hold dear.

\textsuperscript{42} See Fernandez’s comments on common law and custom, the \textit{ius commune} and exegetical jurisprudence, \textit{stare decisis} and \textit{jurisprudence constante} in \textit{Civil Law and Common Law}, an appendix to \textit{FROM CHAOS TO CONTINUITY}, supra note 4.
MAKING FRENCH DOCTRINE ACCESSIBLE TO THE ENGLISH-SPEAKING WORLD: THE LOUISIANA TRANSLATION SERIES

Alexandru-Daniel On*

I. INTRODUCTION

Translation theoreticians have asserted that all communication is translation.1 That means that language itself is a translation, from the non-verbal world into the world of signs, and therefore translation is in fact “translation for the second time”.2 That refers not only to language, but our gestures as well. We all had early special training in translation during our childhood, while playing charades.3 Naturally, in a game of charades, the players that are more likely to guess the right words are usually the actor's friends, the ones that know him better. This childhood game is thus a first lesson of culture-dependent translation - just like legal translation. The better you know the object that you are mimicking and the better you know the persons that have to guess it, the more successful you will be in the game.

Legal translation possesses, however, a somewhat unique feature. In law, language is both the object studied and the means of analysis, which means that for a lawyer, language is not simply

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2. Id. at 187 n.1.
3. "Charades" is a word guessing game, where one player, who is given a specific word, is acting without using sounds or words, and the others must guess that word.
a medium, but also the "raw material" to be worked on.\textsuperscript{4} It’s still a game of charades, only a bit more complicated.

All translations accomplish a double transfer: a strictly functional transfer and a cultural transfer. For some legal translations the functional element is preponderant, as it is, for example, when translating a contract. Others, however, perform primarily a cultural transfer.

When translating doctrine, the cultural transfer is preponderant. It is only logical then that the birthplace of most translations of major French doctrinal materials into English has been within the state of Louisiana, a state that is very close to the French nomos. In Louisiana, the French tradition was kept very much alive over the centuries, and the core of Louisiana's legal system, its private law, is of French and Spanish origin.\textsuperscript{5} However, the process of translating French materials in order to make them accessible within the English-speaking world has never been solely Louisianan. French doctrine has been and is still appreciated worldwide for its intellectual strength, clarity and abstraction. That is why the works of Pothier,\textsuperscript{6} Domat\textsuperscript{7} or Gény\textsuperscript{8} were translated into English prior to any Louisianan translation project.

\textsuperscript{4} Malcom Harvey, What's so Special about Legal Translation? (Jul. 12, 2012, 12:50 PM), http://id.erudit.org/iderudit/008007ar.

\textsuperscript{5} Though it is disputed if it is mainly of French origin, or Spanish [see Rodolfo Batiza, The Louisiana Civil Code of 1808: Its Actual Sources and Present Relevance, 46 Tul. L. Rev. 4 (1971); Robert A. Pascal, Sources of the Digest of 1808: A Reply to Professor Batiza, 46 Tul. L. Rev. 603 (1972); Alain Levasseur, Moreau Lisle: The Man Behind the Digest of 1808 170-206 (Claitor’s Publishing Division 2008).


\textsuperscript{7} Jean Domat, The Civil Law in Its Natural Order (Cuther S. Cushing trans., Little, Brown & Co. 1853, 2 v.).
That being said, no one can doubt the fact that Louisiana's contribution to the process of making French doctrine accessible in English is simply astonishing.

The complete volumes of translations form a long, well-crafted and influential series, named the *Louisiana Translation Series*. This series covers major French treatises and monographs, and a few doctrinal excerpts, all bound in workable, well-organized and easy-to-use volumes, the most important of which have been cross-referenced with the Louisiana civil code in an annotated series.9

This translation work can be divided in two major categories: translations made under the tutelage of the Louisiana State Law Institute (Part II), and translations sponsored by the Center of Civil Law Studies (Part III).

II. TRANSLATIONS MADE UNDER THE TUTELAGE OF THE LOUISIANA STATE LAW INSTITUTE

The first category includes translations realized by the Louisiana State Law Institute10 between 1959 and 1972, namely

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8. FRANÇOIS GÉNY, MÉTHODE D’INTERPRÉTATION ET SOURCES EN DROIT PRIVE POSITIF §155-159, 169-176, translated in ERNEST BRUNCKEN & LAYTON B. REGISTER, SCIENCE OF LEGAL METHOD – SELECT ESSAYS 2-46 (Boston Book Co. 1917); François Gény, La technique législative dans la Codification civile moderne (à propos du Centenaire du Code civil), translated in BRUNCKEN & REGISTER, id. at 498-557.

9. WEST’S LOUISIANA STATUTES ANNOTATED, CIVIL CODE SERIES (1952, 17 vols.). The translations of Planiol and Aubry & Rau are the ones that can be cross-referenced with the annotated series.

10. The legislative charter of the Louisiana State Law Institute imposes upon it the responsibility of making available translations of civil law materials and commentaries in the interest of a better understanding of the civil law of Louisiana and the philosophy upon which it is based [LA. REV. STAT. § 24:204 A(7) (1950)]. Generally, the Institute was chartered, created and organized as an official advisory law revision commission, law reform agency and legal research agency for the state of Louisiana [LA. REV. STAT. § 24:201 (1950)], with the purpose of promoting and encouraging the clarification and simplification of the law of Louisiana and its better adaptation to present social needs, securing the better administration of justice, and carrying on scholarly legal research and scientific legal work [LA. REV. STAT. § 24:204 A (1950)]. See also William E. Crawford, *The Louisiana State Law Institute—History and Progress*, 45 LA. L. REV. 1077 (1985).
three magnificent projects covering: Planiol's *Traité élémentaire de droit civil*, Gény's *Méthode d'interprétation et sources en droit privé positif* and thereafter, in the *Civil Law Translations* series, complete volumes or substantial excerpts of Aubry & Rau's *Droit civil français* and excerpts from the works of Carbonnier and Baudry-Lacantinerie & Tissier.

Planiol and Ripert's *Traité élémentaire de droit civil* is the first translation of the series and, without a shadow of a doubt, the translation project that had the most substantial influence in the state of Louisiana, and perhaps even elsewhere. Written by

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11. MARCEL PLANIOL, CIVIL LAW TREATISE (La. St. L. Inst. trans., West, 1958, 3 v.).
15. Planiol's treatise was used as authority in an unmatched number of cases. Some of the most important private law cases dealing with property or obligations were decided based on rules laid down and explained in this translation of Marcel Planiol's *TRAITE ÉLÉMENTAIRE*. Cases like Bartlett v. Calhoun, 412 So. 2d 597 (La. 1982), Gueno v. Medlenka, 238 La. 1081, 117 So. 2d 817 (1960) and Berlier v. A.P. Green Industries, 815 So. 2d 39 (La. 2002), are landmark cases and also teaching material in Louisiana universities, and in these cases excerpts from Planiol were absolutely decisive. See also Dainow, The *Planiol Treatise on the Civil Law: French and Louisiana Law for Comparative Study*, 10 AM. J. COMP. L. 175, 182 (1961). For the use of French doctrine and French Law in general, by federal courts and state courts, see Alain Levasseur, The *Use of Comparative Law by Courts*, 42 AM. J. COMP. L. SUPP. 41 (1994).
16. Proof of this vast influence is the decision to re-edit the series in 2005 by Hein (William S. Hein & Co., Inc., Buffalo) and the myriad of positive reviews: "I feel certain that this Treatise which has attained the stature of a classical work on law in France will be of immense benefit to American lawyers and to all those interested in the vital problem of comparative law today." Edouard Morot-Sir, Director of the Cultural Services of the French Embassy (1959), in PLANIOL, supra note 11, at 9; "Acquisition is recommended for all types of law libraries." Kate Wallach, *Planiol, Marcel, Treatise on the Civil Law*, 53 LAW LIBR. J. 55, 67 (1960) (book review); A fervent supporter and promoter of the Planiol translation was Joseph Dainow. See Joseph Dainow, The *Planiol Treatise on the Civil Law: French and Louisiana Law for Comparative
Planiol in his own hand without any collaboration whatsoever, this treatise was designed by the great French author as a textbook, to be used by his students, and was thereafter, for a long time, used as such in law schools throughout France. Consequently, the structure of the treatise was influenced by the law curriculum of that time, and the style adapted to the purpose of teaching law: it is concise and written with striking clarity. Based on the civil code and some satellite statutes, the treatise covers almost all areas of the civil law: a general introduction, the law of persons and family, property, successions and donations, obligations and special contracts (sale, lease, mandate, etc.), the security devices of pledge and suretyship, privileges and mortgages, and aquisitive and liberative prescription.

In the original version important passages are marked with asterisks or double asterisks, and different types and sizes of font are used to emphasize what is of great value for a student (principles, rules or law, elements of a particular doctrine), while still conveying useful information and providing persuasive explanations. The use of different fonts and asterisks was not deemed advisable by the translators, and therefore the English version does not keep these markings. The reason for this was the fact that in Louisiana, Planiol's Traité Élémentaire was never

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Study, 10 AM. J. COMP. LAW 175 (1961); Joseph Dainow, Civil Law Translations and Treatises Sponsored in Louisiana, 23 AM. J. COMP. L. 521 (1975).


intended to be used as a manual for students. In Louisiana, the treatise was designed primarily for use by courts, lawyers and law scholars, and as a source for a better understanding of Louisiana's (French) legal inheritance.22

Planiol's work is no longer teaching material, not even in France, but behind what he considered a modest manual for students lays spectacularly complex doctrinal material, laden with detailed historical accounts of how institutions evolved, statistics, economic analysis, comparative analysis, bibliography and "picturesque citations".23

Planiol is still "persuasive authority" and no serious legal scholar undertakes the study of a traditional civil law institution without first consulting his treatises. However, much of the underlying philosophy of his work is being forgotten and this is a great opportunity for a reminder. Planiol was opposed to the method of the exegetical school, mainly because he did not believe that the civil law revolves around a code. In his view, the law was a product of life as a whole.24 Such a core belief is not easy to follow, for it requires a different method of study, which takes into account not just the intrinsic logic of the code, but also the relevance of cases, history, economy, human behavior and other areas of science. Planiol was a perfect apostle for his own philosophy, his erudition allowing him to excel in his challenging methodology.

22. "It is believed that the translation of this treatise will well serve the courts, the lawyers and the law schools of Louisiana. Its publication will be accompanied by the hope that it will be a significant contribution to a better understanding of our rich legal inheritance and thereby materially improve the administration of justice in Louisiana." Smith, supra note 19, at 5.

23. Ripert, supra note 17, at 15.

24. PLANIOL, Intro to the 12th Edition of Planiol's Traité élémentaire de droit civil, supra note 11, at 19: "In this treatise I have constantly pointed out the relationship of the civil law with the whole of life, not only that of the present, but also that of the past from which it evolved". This one sentence must be remembered, for it brings more light into the way we should approach the civil law than the whole body of positivist legal literature.
Last but not least, the translators of the three volumes should be held in high esteem for what is undoubtedly a very professional and well-crafted translation. The first volume was translated by Pierre Crabites (a distinguished scholar who had formerly served on the Mixed Tribunal of Egypt) and revised by Robert L. Henry (jurist, author and scholar, who also served on the Mixed Tribunal of Egypt), the second was translated by Robert L. Henry, and the third by Jaro Mayda (graduate of Masaryk University, Professor of law at the University of Puerto Rico).25 Carlos E. Lazarus, Continuous Statutory Revisor and Director of Legal Research for the Institute, undertook the editorial preparation of the manuscript for publication.26

The second major project undertaken by the Louisiana State Law Institute was the translation of Gény’s *Méthode d’interprétation et sources en droit privé positif*.27 Gény’s *Méthode* is a “wide-horizon general work”,28 dealing with issues situated at the core of legal thinking: legal hermeneutics, kinds of law, and sources of law. He analyses different approaches on interpretation and sets forward a new theory regarding legal interpretation, named *libre recherche scientifique*, able to shed new light on the law and open the door for its progressive development. With his new theory, Gény moves away from most of the ideas of his French legalist contemporaries and, without forsaking a degree of deference to legislative authority, promotes a theory of interpretation that recognized the authority of the interpreter (judge), the scholar, and the citizen.29 Gény influenced legal

26. *Id.*
27. *See GÉNY, supra* note 12.
thinking not only in France and in other civil law jurisdictions, but also in the common law. Great common law authors like Stone,\(^\text{30}\) Pound,\(^\text{31}\) Llewellyn,\(^\text{32}\) and Cardozo\(^\text{33}\) have lengthy discussions about Gény’s legal reasoning.

The translation for this project was entrusted to Jaro Mayda, who also wrote a lengthy critical introduction in the same volume.\(^\text{34}\)

The third and final translation project released by the Louisiana State Law Institute was *The Louisiana Civil Law Translation Series*. Starting with volume 3, this project also benefitted from the expertise and resources of the Institute of Civil Law Studies.\(^\text{35}\) The series contains five translations, each dedicated to a major area of civil law. The first four volumes are translations from Aubry & Rau’s *Cours de droit civil français*.\(^\text{36}\) The first deals with the Law of Obligations, and it translates the fourth volume of the *Cours de droit civil français*, as it was edited by Étienne Bartin in the sixth

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30. JULIUS STONE, LEGAL SYSTEMS AND LAWYER'S REASONINGS 216, 220, 221, and 222 (Stanford University Press 1964).
31. ROSCOE POUND, 1 JURISPRUDENCE 183 (West 1959); Roscoe Pound, Fifty Years of Jurisprudence, 51 HARV. L. REV. 444, 464-470 (1938).
34. Jaro Mayda, Gény’s Méthode After 60 years: A Critical Introduction, in GÉNY, supra note 12, at V-LXXVI.
35. The Institute of Civil Law Studies was established in 1965 as a division of the then LSU Law School for the purpose of preserving and enhancing the civil law component of the Louisiana legal system. Since 1976, the institute operates under a different name, The Center of Civil Law Studies, and its mission is now expanded to promoting a better understanding and further development of the private law of the State of Louisiana and other civil law jurisdictions, particularly those of continental Europe and Latin America, through theoretical and practical activities, such as publications, translations, sponsorship of faculty and student exchanges, visiting scholars, seminars, and lectures. The Center of Civil Law Studies promotes legal education by sponsoring foreign students who wish to avail themselves of the opportunity of studying a mixed legal system and American students who wish to expose themselves to other legal systems. Such programs take advantage of Louisiana's natural position as an education center for international and comparative legal studies. (http://www.law.lsu.edu/index.cfm?geaux=ccls.home).
36. See AUBRY & RAU, supra note 13.
edition (1942). The translation was made by A. N. Yiannopoulos, a Greek scholar, holding advanced degrees from the University of Chicago, the University of California, and the University of Cologne, former Professor at Louisiana State University, currently Professor Emeritus at Tulane University. The second volume, regarding the Law of Property, is a translation of Volume II of the seventh edition of *Cours de droit civil*, published in 1961 and edited by Paul Esmein. The translation work was done by Jaro Mayda. The third and fourth volume deal with Testamentary Successions and Gratuitous Dispositions (vol. 3) and Intestate Successions (vol. 4). The third volume corresponds to the last half of Volume X (1954) and the whole of volume XI (1956) of *Cours de droit civil*, while the forth volume corresponds to the last half of volume IX and the first half of volume X, as they were edited by Paul Esmein. Unlike the volumes that dealt with property and obligations, where any addition to the original text was in brackets and the contents was only brought up to date, these editions contain Paul Esmein’s own critical views of texts of law or jurisprudence.37 The translation was prepared by Carlos E. Lazarus, a native of Honduras, and at that time Professor at Louisiana State University, holding degrees from the Municipal College of Commerce in Manchester and Loyola University School of Law. The fifth volume covers the subject of Prescription. Three translations have been included in this volume in order to achieve a comprehensive view of the subject: (1) Baudry-Lacantinerie & Tissier, *Traité théorique et pratique de droit civil, prescription*;38 (2) Aubry & Rau, *Cours de droit civil français, prescription*;39 and (3) Carbonnier, *Notes on Liberative*

37. Denson Smith, *Foreword to 3 Testamentary Successions & Gratuitous Dispositions*, supra note 13, at III.
38. BAUDRY-LACANTINERIE & TISSIER, 28 TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL, PRESCRIPTION (4th ed. 1924, nos. 1-815). The material was updated with over 270 references to decisions, legislation and doctrine covering the period 1924-1967.
Prescription.\textsuperscript{40} Once more, the translation project was entrusted to Jaro Mayda.

Just like the Planiol volumes, \textit{The Civil Law Translation Series} proved to be very influential in Louisiana jurisprudence.\textsuperscript{41} This comes as no surprise, considering the fact that these volumes were highly influential in France as well. Though French courts do not have the habit of citing doctrine, a great number of decisions were inspired by Aubry & Rau’s \textit{Cours de Droit Civil Français}, and some of them followed Aubry & Rau add litteram.\textsuperscript{42} The authors of the last volume enjoyed the same high esteem. In general, Baudry-Lacantinerie’s work dominated French law schools as teaching material for more than twenty years,\textsuperscript{43} the reign of the \textit{Précis élémentaire de droit civil} having ended only when Planiol’s \textit{Traité élémentaire} was published. In particular, the volume on prescription from the \textit{Traité théorique et pratique de droit civil} is considered "the most elaborate discussion regarding the subject of prescription".\textsuperscript{44} Also, Professor Carbonnier’s article is a splendid addition to the fifth volume, covering mainly post-Baudry jurisprudence (case law).

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\item \textsuperscript{40} Jean Carbonnier, \textit{Notes sur la prescription extinctive}, 50 \textit{REVUE TRIMESTRIELLE DE DROIT CIVIL} 171-181 (1952).
\item \textsuperscript{41} Aubry & Rau are cited in at least 150 Supreme Court Decisions (using Westlaw’s search engine). A few examples of important cases that cite the translation are: Liner v. Louisiana Land & Exploration Co., 319 So. 2d 766; Bartlett v. Calhoun, 412 So. 2d 597; Howard v. Administrators of Tulane Educ. Fund, 986 So. 2d 47; Lombardo v. Deshotel, 94 1172 La. 11/30/94, 647 So. 2d 1086.
\item \textsuperscript{43} Ripert, \textit{supra} note 17, at 13.
\item \textsuperscript{44} Denson Smith, \textit{Foreword} to 5 \textit{PRESCRIPTION}, \textit{supra} notes 13 and 14, at IV.
\end{itemize}
III. TRANSLATIONS SPONSORED BY THE CENTER OF CIVIL LAW STUDIES

The second group of translations was made under the tutelage of The Center of Civil Law Studies (CCLS; formerly the Institute of Civil Law studies). 45

The first translation sponsored by the CCLS was René David’s Le droit français: Les données fondamentales du droit français, published in English under the name French Law. Its Structure, Sources, and Methodology.46 The translation was entrusted to Professor Michael Kindred. René David, having read and approved the translation, also contributed with a preface to the English edition.

The other six books from this group are relatively recent additions, and they all share a common feature: they were either personally translated by or the translation project was supervised or directed by Alain Levasseur, Professor of Law at Louisiana State University. Under his tutelage the following “nutshell” books have been published: (1) Michael Alter, French Law of Business Contracts: Principles;47 (2) Bernard Chantebout, The French Constitution;48 (3) Christian Atias, The French Civil Law: An Insider’s View;49 (4) Jean-Louis Halpérin, The Civil Code;50

45. Hereinafter CCLS.
Louis Favoreau, *Constitutional Courts*;\(^{51}\) and (6) Christian Atias, *French Civil Law*.\(^{52}\)

The translations sponsored by the CCLS are ideal for scholars and lawyers interested in comparative law, and especially so for those who are new to this area of legal knowledge. René David’s book on French law is a brilliant place to start any study on comparative law. Even though the purpose of his book was to offer an overview of the French legal system, in virtually every chapter the author draws parallels between the common law and the civil law, French law and German law, and all of this in a very succinct and clear manner. Further insight into the fundamentals of French law can be attained through the two translations of Christian Atias, offering an overview of French law and French civil law, and Jean-Louis Halpérin’s book regarding the French civil code, a great contribution for all jurists, and not only for legal historians, laying down the story of its birth, an account of previous attempts of codification, the technique employed by its drafters, the innovations it brought to the law, attitudes towards the code after its enactment, different methods for interpretation, and, finally, the influence of the French code in other countries.\(^{53}\)

In the realm of public law, the overview provided by the two books regarding French Constitutional Law and European Constitutional Courts\(^{54}\) will open new horizons for those interested in a comparative study of constitutional law. The study of French constitutional law will definitely be intriguing for the American

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53. Not just in Europe, but also in other parts of the world. The author makes reference to the influence of the *Code Civil* in the Americas, with an emphasis on Louisiana and Quebec, the two North American jurisdictions influenced by the French code and the French tradition (*see* Halpérin, *supra* note 50, at 94).

54. Although Louis Favoreau’s book deals mainly with Constitutional Courts from different European countries, it is worthwhile to mention that it also dedicates a few pages to Constitutional Courts outside the European continent (*see* Favoreau, *supra* note 51, at 122-125).
reader, who will find within the French tradition a unique idiosyncrasy regarding constitutional judicial review and will discover that French jurists share quite a different view on the principle of the separation of powers than their American counterparts. Moreover, English-speaking readers will discover the traditional French approach on judicial review, where the Constitutional Council (*Conseil Constitutionnel*) – the institution charged with constitutional review in France – prior to 2008 could, in principle, declare a law unconstitutional only prior to its enactment. Although French constitutional law underwent a significant reform in 2008, \textsuperscript{55} substantially enlarging ex-post judicial review by the *Conseil Constitutionnel* and bringing the system in line with the dominating European trend, it is still worthwhile to get acquainted with this form of constitutional review, for the purpose of understanding the mindset of French lawyers and their reticence towards enlarging the scope of judicial review.

The study of Constitutional Courts helps contrast this approach with the tendency of other European countries to extend the scope of constitutional review, while establishing special Courts, distinct from the national Supreme Courts, dealing exclusively with constitutional law issues.

\textbf{IV. Final remarks}

Having enumerated and said a few words about each component of the \textit{Louisiana Translation Series}, some final remarks are in order. This series is not just a heterogeneous group of doctrinal translations. It was a catalyst for the revival of the civil law in Louisiana and its importance must be acknowledged. At the end of the 1930’s Professor Gordon Ireland had characterized

Louisiana as a common law state, and his statement was by no means an accident, or a mere provocation. Talking about jurisprudence in the 1930’s, Professor Yiannopoulos observed that “reading the decisions of the 1920’s and the 1930’s one has the feeling that the civil law was dead.” The Louisiana State Law Institute and the Center of Civil Law Studies were created with the express purpose of reviving the civil law tradition in Louisiana, and a great role was played by the translation projects initiated by the two institutions. The number of citations of French authority in Louisiana jurisprudence grew significantly during the 50’s, 60’s and 70’s. Based on these translations, through the growing respect and awareness of French civil law materials, Louisiana started developing its own doctrine, and courts soon started following solutions proposed by local scholars, in conjunction with using the translations and foreign doctrine. Thus the civil law in Louisiana was not only saved, but it is now growing and developing its own original mechanisms and legal institutions.

The future holds great promise for the law of this land. Its unique position in the legal universe, with a civil law core permanently in tension with the neighboring common law, might create a system that would benefit from both the theoretical finesse of the civil law and the much-admired pragmatism of the common law.

We must also keep in mind that the Louisiana Translation Series is the product of an evolving and continuous process. The

59. Id. at 1065.
first translations consisted of treatises, with the hope that the legal reasoning and the solutions from those treatises will be followed by courts throughout the state. But with the birth of a strong local civilian doctrine and the creation of a 23-volume *Louisiana Civil Law Treatise*, the need to translate thick volumes of doctrine is fading. For that reason, the most recent translations serve a different purpose, that of encouraging the study of comparative law. Only through comparative research can Louisiana law take advantage of its unique position in the legal universe and live up to its full potential.

61. *Louisiana Civil Law Treatise* (West, 23 vols.).


63. There is also a stringent need to develop a solid legal vocabulary of the civil law in English. To this purpose, the Association Capitant France and the Louisiana Chapter of the Association Capitant are in the process of translating approximately 2000 words (concepts) related to the civil code, selected from the famous *Vocabulaire Juridique Cornu*, the best French legal dictionary to date.
THE LOUISIANA CIVIL CODE TRANSLATION PROJECT:
AN INTRODUCTION

Shortly after the Bicentennial of the Louisiana Civil Code, in 2008,¹ the Center of Civil Law Studies at the Louisiana State University Paul M. Hébert Law Center started the vast project of translating the entire Louisiana Civil Code from English into French, and later on into Spanish.

I. WHY TRANSLATE THE LOUISIANA CIVIL CODE?

The current Louisiana Civil Code is one of few civil codes in the world exclusively drafted in the English language. One may also cite the Civil Code of Seychelles and add the civil codes of some of Louisiana’s sister states such as California, Montana, North Dakota and South Dakota, based on the draft civil code proposed just after the Civil War by David Dudley Field for the state of New York, voted by the legislature but vetoed by the governor.² However, Louisiana is the only state in the United States keeping the civil law tradition, in coexistence with the common law that governs other areas of the law.³ Civil codes of other states are seen as mere restatements of the common law and are interpreted in relation to earlier case law.⁴

Though earlier versions of the Louisiana Civil Code were drafted in French and then translated into English, the present code is in English only. The project is a major linguistic experiment of re-translation, exploring the vocabulary of the civil law in English and testing its validity and vitality. Like the Digest of 1808 (A Digest of the Civil Laws now in force in the Territory of Orleans), the Louisiana Civil Code of 1825 was drafted in French and

³. One must also add the Commonwealth of Puerto Rico, closely associated to the United States.
⁴. Id. at 188-189.
translated into English, to be published and enacted in both languages. In 1870, the Civil Code was entirely revised and, this time and from then on, drafted and published solely in English. Since then, the Louisiana Civil Code has been subject to many revisions by the Louisiana legislature mainly since the 1970s, carefully prepared by the Louisiana State Law Institute. This leaves few provisions in the original language of 1808 and 1825.

This means that since 1870, the Louisiana Civil Code has not been available in French for the French speaking population of the state. The concept of linguistic rights was then inexistent and it seems that the legislature drew conclusions from the “fading of the French language and legal culture.” The Louisiana legislature may have forgotten that civil codes are drafted for citizens, hence the need to make the code available in the language they speak, and not exclusively in the language of the educated. Or they may have regarded the Civil Code as a statute, projecting a common law vision whereby no particular effort should be made to make the law accessible to the layman except with the help of a paid, trained lawyer. Whether French speakers make 5 or 10% of the population of the state, whether the practice of French is or is not on the decline, the translation project will make the Civil Code available to francophone Louisianans. In Cajun country, French is still spoken in many households. Alongside with the promotion of French in school education (see among others the efforts of the Council for the Development of French in Louisiana, CODOFIL), the translation project meets some of the objectives of the Francophone Section of the Louisiana Bar Association. Some


7. Older citizens, especially in Cajun country, have not forgotten that children were beaten for speaking French on the school ground.
cases are argued in French in some courts in Louisiana. French speaking judges and attorneys cannot but welcome the present initiative. From a legal point of view, the history of linguistic rights in Louisiana is still to be written. As modest as it may be, this translation project might be a significant step.

Outside Louisiana, the translation into French of a substantially modernized civil code may facilitate law reform in francophone countries, offering an additional model. A number of multilingual and, in some cases, mixed jurisdictions in Africa and nearby (e.g. Cameroon, Seychelles), in Asia (e.g. Cambodia, Vietnam), or in the South Pacific (e.g. Vanuatu) should also be interested. The project may contribute to making Louisiana law and legal culture more accessible to lawyers and business people over the world and will facilitate business relations with Louisiana.

Overall, the translated civil code should serve as a guide for law reform, in civil law countries trying to bridge the divide with common law systems. This is the case of most Member States of the European Union, developing countries, countries in political and legal transition, and mixed jurisdictions all over the world. It not only favors the convergence of civil law and common law whilst keeping solutions in a codified format, but also points out linguistics solutions as to the way to express civilian concepts in the English language. In addition, it is hoped that the project will inspire other cooperative projects that may involve the Center of Civil Law Studies, the Louisiana State Law Institute, as well as other partners.

The text of the Louisiana Civil Code was never drafted nor fully translated into Spanish, though its provisions originate in Spanish law. 8 Despite the lack of a complete Spanish version, a large part of the 1825 Code appears in the Spanish version of Saint-Joseph’s Concordance (1843), also included in the Concordancias of García Goyena, explaining the early influence of

the Louisiana Civil Code on codification throughout Latin America and Spain.9

The forthcoming translation into Spanish of the current Louisiana Civil Code would revive the influence of Louisiana on code and law reform in Spain and Latin America.10

II. THE TRANSLATION PROCESS

In 2009, the undersigned project director translated the Preliminary chapter, revised by Professor David Gruning of the University of Loyola New Orleans College of Law, and at a much later stage (pending publication), by Professor Emeritus Jean-Claude Gémar of the Université de Montréal. He also started the translation of Book One. During a six-month visit in the summer 2009, Dr. Michel Séjean, now Associate Professor at the Université Panthéon-Assas (Paris 2) started the translation of Book Three, Title 4, on Conventional Obligations. He also translated the Principles of European Tort Law from English into French, a major project that was concluded in the year 2010 and published in 2011.11 In the spring of 2011, a first group of three interns from Université de Nantes, all students in a Master of Trilingual Studies program,12 visited for three months. They worked on Book One and Titles 3, 4, 7 and 11 of Book Three. Dr. Ivan Tchotourian, Associate Professor at Université de Nantes visited in the fall of

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that same year, translating the titles on Mandate and Suretyship (Book Three, Titles 15 and 16). Between April and June 2012, a second team of interns visited from Nantes, working on Book One and Book Three, Titles 4, 5, and 7.\textsuperscript{13} Alexandru-Daniel On, LL.M. candidate at LSU, and Dr. Anne Tercinet, Professor at the EM Lyon Business School, visiting at LSU Law in June, joined in the effort.

The 2012 team also worked on the translation of several entries of the \textit{Vocabulaire juridique Cornu},\textsuperscript{14} a leading French legal dictionary, joining efforts in an ambitious international venture conducted by \textit{Association Henri Capitant des amis de la culture juridiquefrançaise} and \textit{Juriscope} (Poitiers). LSU Law Professor Alain Levasseur, President of the \textit{Association Capitant} Louisiana Chapter, coordinates the translation of the Civil Code vocabulary, with the Louisiana team working to create a new database containing vocabulary of the civil law in English. The code translation and the \textit{Vocabulaire juridique Cornu} translation largely complement each other, and the English version of the \textit{Vocabulaire juridique Cornu} will make ample reference to the Louisiana Civil Code.

All these projects are the product of team work. For example, intern A translates one chapter whilst intern B translates another. Each of them cross-checks the work of the other, using the Word software track-change and comment functions. At weekly or bi-weekly revision meetings, which always include the project director (and occasionally include other visiting scholars), the translation is projected on screen, with all additions and comments. Team members agree on final versions, after discussing possible options, and doing further research in dictionaries and historical

\textsuperscript{13} Anne Perocheau and Anne-Sophie Roinsard, Master Juriste Trilingue, Université de Nantes.  
\textsuperscript{14} GÉRARD CORNU, \textit{VOCABULAIRE JURIDIQUE} (Presses Universitaires de France , 9th ed. 2011).
precedents. Additional research may be necessary, in which case the final text is vetted at a later meeting. Occasionally, other specialists are consulted, for instance to clarify bureaucratic or procedural requirements referred to in code articles. All intermediate versions are saved and recorded (with track change), so that the working process can be fully traced and remain available for further studies.

Regarding terminological choices, the translation aims to revive the original French of the Digest of 1808 and Civil Code of 1825. Whenever an article remains unchanged or when parts of its wording can be traced to the original versions of the Louisiana Civil Code, the choice is made to revert to the original language, except where there is an obvious reason to do otherwise because terminological changes have occurred in the meantime. This gives the translation a Louisiana flavor, much like the English translation of the Code civil of Québec has been said to have a Montreal sound, in the opinion of a strong supporter of the project.

Support and Dissemination

A dedicated webpage was created on the Center of Civil Law Studies website, on the model of the Digest Online project which presents the Digest of 1808 in French or in English, or in both languages simultaneously, with the French appearing below the English on a divided screen. The Louisiana Civil Code Online page was inaugurated in March 2012, with the parts of the translation work completed by then. It was updated in July the same year, with the addition of several titles, and periodical

15. 3 LOUISIANA LEGAL ARCHIVES, COMPILED EDITION OF THE CIVIL CODES OF LOUISIANA, 2 vol. (1940). This publication of the Louisiana State Law Institute, prepared by Robert A. Pascal under the supervision of Joseph Dainow, gives for each article of the 1870 Code, the corresponding or parent provision in the Code of 1825, Digest of 1808, and French Code of 1804, in French and in English.


Updates are expected in the years to come. Updates will continue once the project is concluded, to keep the database abreast of subsequent legislative change.

The translation of the Louisiana Civil Code is a joint project of the Center of Civil Law Studies, Information Technology Support and the Law Library of the Paul M. Hebert Law Center. The Center for French and Francophone Studies at Louisiana State University supported the project from its inception in 2009, also joined by the Louisiana State Law Institute and the Consulate General of France in New Orleans. The Université de Nantes (France) is the primary international institutional partner. In 2012, the translation project received very significant financial support from the Partner University Foundation (PUF), with a grant funding a *Training Multilingual Jurists* project, combining the cooperative efforts of the LSU Law Center and the Université de Nantes, over a period of three years. The PUF grant will help fund an international conference to be held at Baton Rouge and to be scheduled during the first half of 2014, where the translation work will be discussed in more detail.

In the meantime, the present bilingual publication aims to showcase the ongoing translation work, with the hope of attracting the attention of the comparative law community at large, francophone jurists, and jurilinguists alike. It has to be accepted as a work in progress, and though much care has been taken, this is not the work of professional translators. These titles, already online, have been revised and modified prior to the present publication. Subsequent revisions will take place as the work moves on and is debated.

This publication includes the Preliminary Title and the general law of obligations, namely three titles of Book Three: Obligations in General (Title 3), Conventional Obligations or Contracts (Title 4), and Obligations Arising Without Agreement (Title 5). The

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English and the French appear side by side, rather than one above the other, as on the webpage. This will facilitate research and the work of scholars who will contribute papers at the forthcoming Baton Rouge international conference, likely to focus on the law of obligations.

Olivier Moréteau
Art. 1. The sources of law are legislation and custom.

Art. 2. Legislation is a solemn expression of legislative will.

Art. 3. Custom results from practice repeated for a long time and generally accepted as having acquired the force of law. Custom may not abrogate legislation.

Art. 4. When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.

Art. 5. No one may avail himself of ignorance of the law.

Art. 6. In the absence of contrary legislative expression, substantive laws apply.
prospectively only. Procedural and interpretative laws apply both prospectively and retroactively, unless there is a legislative expression to the contrary.

Art. 7. Persons may not by their juridical acts derogate from laws enacted for the protection of the public interest. Any act in derogation of such laws is an absolute nullity.

Art. 8. Laws are repealed, either entirely or partially, by other laws.

A repeal may be express or implied. It is express when it is literally declared by a subsequent law. It is implied when the new law contains provisions that are contrary to, or irreconcilable with, those of the former law.

The repeal of a repealing law does not revive the first law.

CHAPTER 2.
INTERPRETATION OF LAWS
[Acts 1987, No. 124, §1, eff. Jan. 1, 1988]

Art. 9. When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of
the legislature.

Art. 10. When the language of the law is susceptible of different meanings, it must be interpreted as having the meaning that best conforms to the purpose of the law.

Art. 11. The words of a law must be given their generally prevailing meaning.
Words of art and technical terms must be given their technical meaning when the law involves a technical matter.

Art. 12. When the words of a law are ambiguous, their meaning must be sought by examining the context in which they occur and the text of the law as a whole.

Art. 13. Laws on the same subject matter must be interpreted in reference to each other.

CHAPTER 3. CONFLICT OF LAWS

Art. 14. Unless otherwise expressly provided by the law of this state, cases having contacts with other states are governed by the law selected in accordance with the provisions of Book IV of this Code.

peut être faite afin de rechercher l'intention du législateur.

Art. 10. Lorsque les termes de la loi sont susceptibles de significations différentes, ils doivent être interprétés dans le sens le plus conforme à l'objet de la loi.

Art. 11. Les termes de la loi doivent être entendus dans leur signification la plus usitée.
Les termes de l'art et les expressions techniques doivent être entendus dans leur sens technique lorsque la loi comprend une matière technique.

Art. 12. Lorsque les termes de la loi sont ambigus, leur sens doit être recherché en examinant le contexte dans lequel ils se trouvent et le texte de la loi dans son ensemble.

Art. 13. Les lois sur un même sujet doivent être interprétées selon le rapport qu'elles ont l'une avec l'autre.

CHAPITRE 3. CONFLITS DE LOIS
[Loi de 1991, n° 923, §1, en vigueur le 1er janvier 1992.]

Art. 14. Sauf disposition expressément contraire de la loi de cet état, les affaires présentant un lien avec d'autres états sont régies par la loi applicable en vertu des dispositions du Livre IV du
BOOK III. OF THE DIFFERENT MODES OF ACQUIRING THE OWNERSHIP OF THINGS

LIVRE III. DES DIFFÉRENTS MOYENS DONT ON ACQUIERT LA PROPRIÉTÉ DES BIENS

(…)

TITLE III. OBLIGATIONS IN GENERAL

TITRE III. DES OBLIGATIONS EN GÉNÉRAL

[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

[Loi de 1984, n° 331, §1, en vigueur le 1er janv. 1985]

CHAPTER 1. GENERAL PRINCIPLES

CHAPITRE I. PRINCIPES GÉNÉRAUX

Art. 1756. An obligation is a legal relationship whereby a person, called the obligor, is bound to render a performance in favor of another, called the obligee. Performance may consist of giving, doing, or not doing something.

Art. 1757. Obligations arise from contracts and other declarations of will. They also arise directly from the law, regardless of a declaration of will, in instances such as wrongful acts, the management of the affairs of another, unjust enrichment and other acts or facts.

Art. 1758. A. An obligation may give the obligee the right to:
(1) Enforce the performance that the obligor is bound to render;
(2) Enforce performance by causing it to be rendered by another at the obligor's expense;
(3) Recover damages for the obligor's failure to perform, or his defective or delayed performance.

B. An obligation may give the obligor the right to:
(1) Obtain the proper discharge when he has performed in full;
(2) Contest the obligee's actions when the obligation has been extinguished or modified by a legal cause.

Art. 1759. Good faith shall govern the conduct of the obligor and the obligee in whatever pertains to the obligation.

CHAPTER 2. NATURAL OBLIGATIONS

Art. 1760. A natural obligation arises from circumstances in which the law implies a particular moral duty to render a performance.

Art. 1761. A natural obligation is not enforceable by judicial action. Nevertheless, whatever has been freely performed in compliance with a natural obligation may not be reclaimed.

A contract made for the
performance of a natural obligation is onerous.

Art. 1762. Examples of circumstances giving rise to a natural obligation are:

(1) When a civil obligation has been extinguished by prescription or discharged in bankruptcy.

(2) When an obligation has been incurred by a person who, although endowed with discernment, lacks legal capacity.

(3) When the universal successors are not bound by a civil obligation to execute the donations and other dispositions made by a deceased person that are null for want of form.

CHAPTER 3. KINDS OF OBLIGATIONS

SECTION 1. REAL OBLIGATIONS

Art. 1763. A real obligation is a duty correlative and incidental to a real right.

Art. 1764. A real obligation is transferred to the universal or particular successor who acquires the movable or immovable thing to which the obligation is attached, without a special provision to that effect.

But a particular successor is not personally bound, unless he assumes the personal obligations of his transferor with respect to the thing, and he may liberate himself

l’exécution d’une obligation naturelle est à titre onéreux.

Art. 1762. Les exemples suivants sont des circonstances pouvant donner naissance à une obligation naturelle:

(1) lorsqu’une obligation civile est éteinte par prescription ou faillite du débiteur ;

(2) lorsqu’une obligation est à la charge d’une personne qui, bien que douée de discernement, ne jouit pas de la capacité légale ;

(3) lorsque les ayants cause universels ne sont pas tenus d’une obligation civile d’exécuter les donations et autres dispositions faites par le défunt et qui sont nulles pour vice de forme.

CHAPITRE 3. DES DIVERSES ESPÈCES D’OBLIGATIONS

SECTION 1. DES OBLIGATIONS RÉELLES

Art. 1763. L’obligation réelle est un devoir correspondant à un droit réel dont elle est l’accessoire.

Art. 1764. L’obligation réelle est transmise de plein droit à l’ayant cause universel ou à titre particulier qui acquiert le meuble ou l’immeuble auquel l’obligation est attachée.

Toutefois, un ayant cause à titre particulier n’est pas personnellement tenu, à moins qu’il n’assume les obligations personnelles de son auteur à l’égard de la chose ; il peut se
of the real obligation by abandoning the thing.

decharger de l’obligation réelle en abandonnant la chose.

SECTION 2. STRICTLY PERSONAL AND HERITABLE OBLIGATIONS

Art. 1765. An obligation is heritable when its performance may be enforced by a successor of the obligee or against a successor of the obligor.

Every obligation is deemed heritable as to all parties, except when the contrary results from the terms or from the nature of the contract.

A heritable obligation is also transferable between living persons.

Art. 1766. An obligation is strictly personal when its performance can be enforced only by the obligee, or only against the obligor.

When the performance requires the special skill or qualification of the obligor, the obligation is presumed to be strictly personal on the part of the obligor. All obligations to perform personal services are presumed to be strictly personal on the part of the obligor.

When the performance is intended for the benefit of the obligee exclusively, the obligation is strictly personal on the part of that obligee.

SECTION 2. DES OBLIGATIONS STRICTEMENT PERSONNELLES ET DES OBLIGATIONS TRANSMISSIBLES

Art. 1765. L’obligation est transmissible lorsque l’exécution peut en être poursuivie par un ayant cause du créancier ou à l’encontre d’un ayant cause du débiteur.

Toute obligation est réputée transmissible à l’égard de toutes les parties, sauf lorsque le contraire résulte des termes ou de la nature du contrat.

L’obligation transmissible peut aussi être cédée entre personnes vivantes.

Art. 1766. L’obligation est strictement personnelle lorsque seul le créancier peut en poursuivre l’exécution ou que celle-ci ne peut être poursuivie qu’à l’encontre du débiteur.

Lorsque la prestation requiert une aptitude ou une qualification spéciale de la part du débiteur, l’obligation est prémunie être strictement personnelle au débiteur. Toutes les obligations d’exécuter des services personnels sont prémunies être strictement personnelles au débiteur.

Lorsque la prestation est stipulée exclusivement au bénéfice du créancier, l’obligation est strictement personnelle à celui-ci.
SECTION 3. CONDITIONAL OBLIGATIONS

Art. 1767. A conditional obligation is one dependent on an uncertain event.
If the obligation may not be enforced until the uncertain event occurs, the condition is suspensive.
If the obligation may be immediately enforced but will come to an end when the uncertain event occurs, the condition is resolutory.

Art. 1768. Conditions may be either expressed in a stipulation or implied by the law, the nature of the contract, or the intent of the parties.

Art. 1769. A suspensive condition that is unlawful or impossible makes the obligation null.

Art. 1770. A suspensive condition that depends solely on the whim of the obligor makes the obligation null.
A resolutory condition that depends solely on the will of the obligor must be fulfilled in good faith.

Art. 1771. The obligee of a conditional obligation, pending fulfillment of the condition, may take all lawful measures to preserve his right.

Art. 1772. A condition is

SECTION 3. DES OBLIGATIONS CONDITIONNELLES

Art. 1767. L’obligation est conditionnelle lorsqu’elle dépend d’un événement incertain.
Lorsque l’exécution de l’obligation ne peut être poursuivie jusqu’à l’événement incertain, la condition est suspensive.
Lorsque l’exécution de l’obligation peut être poursuivie immédiatement mais prend fin lors de l’événement incertain, la condition est résolutoire.

Art. 1768. Les conditions sont expresses lorsqu’elles sont stipulées, ou implicites lorsqu’elles découlent de la loi, de la nature du contrat ou de l’intention des parties.

Art. 1769. La condition suspensive illicite ou impossible rend nulle l’obligation.

Art. 1770. La condition suspensive qui dépend du seul caprice du débiteur rend nulle l’obligation.
La condition résolutoire qui dépend de la seule volonté du débiteur doit être accomplie de bonne foi.

Art. 1771. Tant que la condition n’est pas réalisée, le créancier de l’obligation conditionnelle peut exercer tous les actes licites conservatoires de son droit.

Art. 1772. La condition est
regarded as fulfilled when it is not
fulfilled because of the fault of a
party with an interest contrary to
the fulfillment.

Art. 1773. If the condition is
that an event shall occur within a
fixed time and that time elapses
without the occurrence of the
event, the condition is considered
to have failed.

If no time has been fixed for
the occurrence of the event, the
condition may be fulfilled within a
reasonable time.

Whether or not a time has been
fixed, the condition is considered
to have failed once it is certain that
the event will not occur.

Art. 1774. If the condition is
that an event shall not occur within
a fixed time, it is considered as
fulfilled once that time has elapsed
without the event having occurred.

The condition is regarded as
fulfilled whenever it is certain that
the event will not occur, whether
or not a time has been fixed.

Art. 1775. Fulfillment of a
condition has effects that are
retroactive to the inception of the
obligation. Nevertheless, that
fulfillment does not impair the
validity of acts of administration
duly performed by a party, nor
affect the ownership of fruits
produced while the condition was
pending. Likewise, fulfillment of
censée accomplie lorsqu’elle n’est
pas réalisée par la faute d’une
partie ayant un intérêt contraire à
son accomplissement.

Art. 1773. Lorsque l’obligation
est contractée sous la condition
qu’un événement arrivera dans un
temps fixe, cette condition est
censée défaillie, lorsque le temps
est expiré, sans que l’événement
soit arrivé.

Lorsqu’aucun temps fixe n’a
été prévu pour l’occurrence de
l’événement, la condition peut être
accomplie dans un délai
raisonnable.

Qu’un temps fixe ait été prévu
ou non, la condition est censée
défaillie lorsqu’il est certain que
l’événement n’arrivera pas.

Art. 1774. Lorsque la condition
est qu’un événement n’arrivera pas
dans un temps fixe, elle est
accomplie, lorsque ce temps est
expiré sans que l’événement soit
arrivé.

La condition est censée
accomplie dès lors qu’il est certain
que l’événement n’arrivera pas,
qu’un temps fixe ait été prévu ou
non.

Art. 1775. La condition
accomplie a un effet rétroactif au
jour de la création de l’obligation.
Néanmoins, cet accomplissement
n’affecte ni la validité des actes
da’dadministration dûment exécutés
par une partie pendant que la
condition n’était pas accomplie, ni
la propriété des fruits produits
dans cette même période. De
the condition does not impair the right acquired by third persons while the condition was pending.

Art. 1776. In a contract for continuous or periodic performance, fulfillment of a resolutory condition does not affect the validity of acts of performance rendered before fulfillment of the condition.

SECTION 4. OBLIGATIONS WITH A TERM

Art. 1777. A term for the performance of an obligation may be express or it may be implied by the nature of the contract. Performance of an obligation not subject to a term is due immediately.

Art. 1778. A term for the performance of an obligation is a period of time either certain or uncertain. It is certain when it is fixed. It is uncertain when it is not fixed but is determinable either by the intent of the parties or by the occurrence of a future and certain event. It is also uncertain when it is not determinable, in which case the obligation must be performed within a reasonable time.

Art. 1779. A term is presumed to benefit the obligor unless the agreement or the circumstances show that it was intended to benefit the obligee or both parties.
Art. 1780. The party for whose exclusive benefit a term has been established may renounce it.

Art. 1781. Although performance cannot be demanded before the term ends, an obligor who has performed voluntarily before the term ends may not recover the performance.

Art. 1782. When the obligation is such that its performance requires the solvency of the obligor, the term is regarded as nonexistent if the obligor is found to be insolvent.

Art. 1783. When the obligation is subject to a term and the obligor fails to furnish the promised security, or the security furnished becomes insufficient, the obligee may require that the obligor, at his option, either perform the obligation immediately or furnish sufficient security. The obligee may take all lawful measures to preserve his right.

Art. 1784. When the term for performance of an obligation is not marked by a specific date but is rather a period of time, the term begins to run on the day after the contract is made, or on the day after the occurrence of the event that marks the beginning of the term, and it includes the last day of the period.

Art. 1785. Performance on
term must be in accordance with the intent of the parties, or with established usage when the intent cannot be ascertained.

SECTION 5. OBLIGATIONS WITH MULTIPLE PERSONS

Art. 1786. When an obligation binds more than one obligor to one obligee, or binds one obligor to more than one obligee, or binds more than one obligor to more than one obligee, the obligation may be several, joint, or solidary.

Art. 1787. When each of different obligors owes a separate performance to one obligee, the obligation is several for the obligors.

When one obligor owes a separate performance to each of different obligees, the obligation is several for the obligees.

A several obligation produces the same effects as a separate obligation owed to each obligee by an obligor or by each obligor to an obligee.

Art. 1788. When different obligors owe together just one performance to one obligee, but neither is bound for the whole, the obligation is joint for the obligors.

When one obligor owes just one performance intended for the common benefit of different obligees, neither of whom is
entitled to the whole performance, the obligation is joint for the obligees.

Art. 1789. When a joint obligation is divisible, each joint obligor is bound to perform, and each joint obligee is entitled to receive, only his portion.

When a joint obligation is indivisible, joint obligors or obligees are subject to the rules governing solidary obligors or solidary obligees.

Art. 1790. An obligation is solidary for the obligees when it gives each obligee the right to demand the whole performance from the common obligor.

Art. 1791. Before a solidary obligee brings action for performance, the obligor may extinguish the obligation by rendering performance to any of the solidary obligees.

Art. 1792. Remission of debt by one solidary obligee releases the obligor but only for the portion of that obligee.

Art. 1793. Any act that interrupts prescription for one of the solidary obligees benefits all the others.

l’intérêt commun de plusieurs créanciers et qu’aucun d’eux n’a droit à l’entière prestation, l’obligation est conjointe pour les créanciers.

Art. 1789. Lorsque l’obligation conjointe est divisible, chaque débiteur conjoint est tenu d’exécuter sa part de l’obligation, et chaque créancier conjoint n’a le droit de recevoir que sa part.

Lorsque l’obligation conjointe est indivisible, les débiteurs ou créanciers conjoints sont soumis aux règles gouvernant les relations entre les débiteurs ou créanciers solidaires.

Art. 1790. L’obligation est solidaire pour les créanciers lorsqu’elle donne à chacun d’entre eux le droit d’exiger l’entière prestation de la part du débiteur commun.

Art. 1791. Avant que l’un des créanciers solidaires n’intente une action en exécution, le débiteur peut éteindre l’obligation en exécutant la prestation au profit de l’un quelconque des créanciers solidaires.

Art. 1792. La remise de la dette par l’un des créanciers solidaires libère le débiteur uniquement pour la part due à ce créancier.

Art. 1793. Tout acte interrompant la prescription pour l’un des créanciers solidaires profite à tous les autres.
Art. 1794. An obligation is solidary for the obligors when each obligor is liable for the whole performance. A performance rendered by one of the solidary obligors relieves the others of liability toward the obligee.

Art. 1795. An obligee, at his choice, may demand the whole performance from any of his solidary obligors. A solidary obligor may not request division of the debt.

Unless the obligation is extinguished, an obligee may institute action against any of his solidary obligors even after institution of action against another solidary obligor.

Art. 1796. Solidarity of obligation shall not be presumed. A solidary obligation arises from a clear expression of the parties' intent or from the law.

Art. 1797. An obligation may be solidary though it derives from a different source for each obligor.

Art. 1798. An obligation may be solidary though for one of the obligors it is subject to a condition or term.

Art. 1799. The interruption of prescription against one solidary obligor is effective against all solidary obligors and their heirs.

Art. 1794. L'obligation est solidaire pour les débiteurs lorsque chaque débiteur est tenu d'exécuter l'entièrre prestation. L'exécution de la prestation par l'un des débiteurs solidaires libère les autres de leur responsabilité envers le créancier.

Art. 1795. Un créancier peut, à sa convenance, demander l'exécution de l'entièrre prestation à l'un quelconque de ses débiteurs solidaires. Un débiteur solidaire ne peut pas demander la division de la dette.

À moins que l'obligation ne soit éteinte, un créancier peut intenter une action contre l'un quelconque de ses débiteurs solidaires même après avoir intenté une action contre un autre débiteur solidaire.

Art. 1796. La solidarité de l'obligation ne se présume pas. L'obligation solidaire nait de la claire expression de la volonté des parties ou de la loi.

Art. 1797. L'obligation peut être solidaire même si elle provient de différentes sources pour chaque débiteur.

Art. 1798. L'obligation peut être solidaire même si elle est conditionnelle ou à terme pour l'un des débiteurs.

Art. 1799. L'interruption de la prescription à l'égard d'un débiteur solidaire vaut à l'égard de tous les débiteurs solidaires et
Art. 1800. A failure to perform a solidary obligation through the fault of one obligor renders all the obligors solidarily liable for the resulting damages. In that case, the obligors not at fault have their remedy against the obligor at fault.

Art. 1801. A solidary obligor may raise against the obligee defenses that arise from the nature of the obligation, or that are personal to him, or that are common to all the solidary obligors. He may not raise a defense that is personal to another solidary obligor.

Art. 1802. Renunciation of solidarity by the obligee in favor of one or more of his obligors must be express. An obligee who receives a partial performance from an obligor separately preserves the solidary obligation against all his obligors after deduction of that partial performance.

Art. 1803. Remission of debt by the obligee in favor of one obligor, or a transaction or compromise between the obligee and one obligor, benefits the other solidary obligors in the amount of the portion of that obligor.

Surrender to one solidary obligor of the instrument evidencing the obligation gives rise to a presumption that the remission
of debt was intended for the benefit of all the solidary obligors.

Art. 1804. Among solidary obligors, each is liable for his virile portion. If the obligation arises from a contract or quasi-contract, virile portions are equal in the absence of agreement or judgment to the contrary. If the obligation arises from an offense or quasi-offense, a virile portion is proportionate to the fault of each obligor.

A solidary obligor who has rendered the whole performance, though subrogated to the right of the obligee, may claim from the other obligors no more than the virile portion of each.

If the circumstances giving rise to the solidary obligation concern only one of the obligors, that obligor is liable for the whole to the other obligors who are then considered only as his sureties.

Art. 1805. A party sued on an obligation that would be solidary if it exists may seek to enforce contribution against any solidary co-obligor by making him a third party defendant according to the rules of procedure, whether or not that third party has been initially sued, and whether the party seeking to enforce contribution admits or denies liability on the obligation alleged by plaintiff.

Art. 1804. Entre les débiteurs solidaires, chacun est responsable pour sa part virile. Lorsque l’obligation résulte d’un contrat ou d’un quasi-contrat et en l’absence de stipulation ou de jugement contraire, les parts viriles sont égales. Lorsque l’obligation résulte d’un délit ou d’un quasi-délit, la part virile est proportionnelle à la faute de chacun des débiteurs.

Le débiteur solidaire qui a exécuté la totalité de la prestation, encore qu’il soit subrogé aux droits du créancier, ne peut demander aux autres débiteurs plus que la part virile de chacun.

Lorsque les circonstances qui font naître l’obligation solidaire ne concernent que l’un des débiteurs, celui-ci est responsable de la totalité envers les autres débiteurs qui sont alors considérés seulement comme ses cautions.

Art. 1805. Une partie poursuivie pour une obligation qui serait solidaire si elle existait peut faire valoir la contribution de tout autre codébiteur solidaire, en le faisant intervenir comme tiers défendeur conformément aux règles de procédure, qu’il ait ou non été poursuivi initialement, et que la partie cherchant à faire valoir la contribution admette ou nie toute responsabilité fondée sur l’obligation alléguée par le demandeur.
Art. 1806. A loss arising from the insolvency of a solidary obligor must be borne by the other solidary obligors in proportion to their portion.

Any obligor in whose favor solidarity has been renounced must nevertheless contribute to make up for the loss.

SECTION 6. CONJUNCTIVE AND ALTERNATIVE OBLIGATIONS

Art. 1807. An obligation is conjunctive when it binds the obligor to multiple items of performance that may be separately rendered or enforced. In that case, each item is regarded as the object of a separate obligation.

The parties may provide that the failure of the obligor to perform one or more items shall allow the obligee to demand the immediate performance of all the remaining items.

Art. 1808. An obligation is alternative when an obligor is bound to render only one of two or more items of performance.

Art. 1809. When an obligation is alternative, the choice of the item of performance belongs to the obligor unless it has been expressly or impliedly granted to the obligee.

Art. 1810. When the party who
has the choice does not exercise it after a demand to do so, the other party may choose the item of performance.

Art. 1811. An obligor may not perform an alternative obligation by rendering as performance a part of one item and a part of another.

Art. 1812. When the choice belongs to the obligor and one of the items of performance contemplated in the alternative obligation becomes impossible or unlawful, regardless of the fault of the obligor, he must render one of those that remain.

When the choice belongs to the obligee and one of the items of performance becomes impossible or unlawful without the fault of the obligor, the obligee may choose either one of those that remain, or damages for the item of performance that became impossible or unlawful.

Art. 1813. If all of the items of performance contemplated in the alternative obligation become impossible or unlawful without the obligor's fault, the obligation is extinguished.

Art. 1814. When the choice belongs to the obligor, if all the items of performance contemplated in the alternative obligation have qui a le choix ne l’exerce pas alors qu’il lui a été demandé de le faire, l’autre partie peut choisir la prestation.

Art. 1811. Un débiteur ne saurait exécuter une obligation alternative en exécutant une partie de l’une des prestations et une partie d’une autre.

Art. 1812. Lorsque le choix appartient au débiteur et que l’une des prestations visées par l’obligation alternative devient impossible ou illégale, indépendamment de toute faute du débiteur, il doit exécuter une des prestations restantes.

Lorsque le choix appartient au créancier et que l’une des prestations devient impossible ou illégale sans qu’il y ait eu faute du débiteur, le créancier doit choisir l’une des prestations restantes. Si l’impossibilité ou l’illegalité est due à une faute du débiteur, le créancier peut choisir ou bien une des prestations restantes, ou bien des dommages et intérêts pour la prestation devenue impossible ou illégale.

Art. 1813. Lorsque toutes les prestations visées par l’obligation alternative deviennent impossibles ou illégales sans qu’il y ait eu faute du débiteur, l’obligation est éteinte.

Art. 1814. Lorsque le choix appartient au débiteur, si toutes les prestations visées par l’obligation alternative sont devenues
become impossible and the impossibility of one or more is due to the fault of the obligor, he is liable for the damages resulting from his failure to render the last item that became impossible.

If the impossibility of one or more items is due to the fault of the obligee, the obligor is not bound to deliver any of the items that remain.

SECTION 7. DIVISIBLE AND INDIVISIBLE OBLIGATIONS

Art. 1815. An obligation is divisible when the object of the performance is susceptible of division.

An obligation is indivisible when the object of the performance, because of its nature or because of the intent of the parties, is not susceptible of division.

Art. 1816. When there is only one obligor and only one obligee, a divisible obligation must be performed as if it were indivisible.

Art. 1817. A divisible obligation must be divided among successors of the obligor or of the obligee.

Each successor of the obligor is liable only for his share of a divisible obligation.

Each successor of the obligee is entitled only to his share of a divisible obligation.

impossibles ou illégales et que l'impossibilité de l’une ou de plusieurs des prestations est due à la faute du débiteur, il est responsable du dommage résultant de son incapacité à exécuter la dernière prestation devenue impossible.

Si l'impossibilité de l’une ou de plusieurs des prestations est due à la faute du créancier, le débiteur n’est tenu d’exécuter aucune des prestations restantes.

SECTION 7. OBLIGATIONS DIVISIBLES ET INDIVISIBLES

Art. 1815. L’obligation est divisible lorsque l’objet de la prestation est susceptible de division.

L’obligation est indivisible lorsque l’objet de la prestation, de par sa nature, ou de par l’intention des parties, n’est pas susceptible de division.

Art. 1816. Lorsqu’il y a seulement un débiteur et seulement un créancier, l’obligation divisible doit être exécutée comme si elle était indivisible.

Art. 1817. L’obligation divisible doit être divisée entre les successeurs du débiteur ou du créancier.

Chaque successeur du débiteur est responsable uniquement pour sa part d’une obligation divisible.

Chaque successeur du créancier n’a droit qu’à sa part
divisible obligation.

Art. 1818. An indivisible obligation with more than one obligor or obligee is subject to the rules governing solidary obligations.

Art. 1819. An indivisible obligation may not be divided among the successors of the obligor or of the obligee, who are thus subject to the rules governing solidary obligors or solidary obligees.

Art. 1820. A stipulation of solidarity does not make an obligation indivisible.

CHAPTER 4. TRANSFER OF OBLIGATIONS

SECTION 1. ASSUMPTION OF OBLIGATIONS

Art. 1821. An obligor and a third person may agree to an assumption by the latter of an obligation of the former. To be enforceable by the obligee against the third person, the agreement must be made in writing.

The obligee's consent to the agreement does not effect a release of the obligor.

The unreleased obligor remains d’une obligation divisible.

Art. 1818. L’obligation indivisible ayant plusieurs débiteurs ou créanciers est régie par les règles gouvernant les obligations solidaires.

Art. 1819. L’obligation indivisible ne peut être divisée entre les successeurs du débiteur ou du créancier, auxquels les règles de la solidarité restent donc applicables.

Art. 1820. Une clause de solidarité ne rend pas l’obligation indivisible.

CHAPITRE 4. DU TRANSFERT DES OBLIGATIONS

SECTION 1. DE LA PRISE EN CHARGE DES OBLIGATIONS

Art. 1821. Le débiteur et un tiers peuvent convenir de la prise en charge par à ce dernier de l’obligation du premier. Afin que le créancier puisse l’opposer à ce tiers, l’accord doit être passé par écrit.

Le consentement du créancier ne libère pas le débiteur.

Le débiteur non libéré reste obligé solidairement avec le tiers.

1 NdT : Bien que la notion d’assumption of obligations renvoie à celle de « délégation », le mot assumption a été traduit par « prise en charge ». Outre la prise en charge à l’initiative du débiteur qui est une vraie délégation (voir art. 1886), le Code civil louisianais connaît en effet la prise en charge suite à un accord entre le créancier et un tiers acceptant de prendre en charge l’obligation du débiteur initial. Peut-on parler de délégation en pareil cas ?
solidarily bound with the third person.

Art. 1822. A person who, by agreement with the obligor, assumes the obligation of the latter is bound only to the extent of his assumption.

The assuming obligor may raise any defense based on the contract by which the assumption was made.

Art. 1823. An obligee and a third person may agree on an assumption by the latter of an obligation owed by another to the former. That agreement must be made in writing. That agreement does not effect a release of the original obligor.

Art. 1824. A person who, by agreement with the obligee, has assumed another's obligation may not raise against the obligee any defense based on the relationship between the assuming obligor and the original obligor.

The assuming obligor may raise any defense based on the relationship between the original obligor and obligee. He may not invoke compensation based on an obligation owed by the obligee to the original obligor.

SECTION 2. SUBROGATION

Art. 1825. Subrogation is the substitution of one person to the rights of another. It may be

SECTION 2. DE LA SUBROGATION

Art. 1825. La subrogation est la substitution d'une personne dans les droits d'une autre. Elle est
conventional or legal.

Art. 1826. A. When subrogation results from a person's performance of the obligation of another, that obligation subsists in favor of the person who performed it who may avail himself of the action and security of the original obligee against the obligor, but is extinguished for the original obligee.

B. An original obligee who has been paid only in part may exercise his right for the balance of the debt in preference to the new obligee. This right shall not be waived or altered if the original obligation arose from injuries sustained or loss occasioned by the original obligee as a result of the negligence or intentional conduct of the original obligor.

Art. 1827. An obligee who receives performance from a third person may subrogate that person to the rights of the obligee, even without the obligor's consent. That subrogation is subject to the rules governing the assignment of rights.

Art. 1828. An obligor who pays a debt with money or other fungible things borrowed for that purpose may subrogate the lender to the rights of the obligee, even without the obligee's consent.

The agreement for subrogation must be made in writing expressing that the purpose of the
loan is to pay the debt.

Art. 1829. Subrogation takes place by operation of law:

(1) In favor of an obligee who pays another obligee whose right is preferred to his because of a privilege, pledge, mortgage, or security interest;

(2) In favor of a purchaser of movable or immovable property who uses the purchase money to pay creditors holding any privilege, pledge, mortgage, or security interest on the property;

(3) In favor of an obligor who pays a debt he owes with others or for others and who has recourse against those others as a result of the payment;

(4) In favor of a successor who pays estate debts with his own funds; and

(5) In the other cases provided by law. [Acts 1989, No. 137, §16, eff. Sept. 1, 1989; Acts 2001, No. 572, 1]

Art. 1830. When subrogation takes place by operation of law, the new obligee may recover from the obligor only to the extent of the performance rendered to the original obligee. The new obligee may not recover more by invoking conventional subrogation.

Art. 1829. La subrogation opère de plein droit:

(1) en faveur du créancier qui paie un autre créancier dont le droit est préféré au sien en raison d’un privilège, d’un gage, d’une hypothèque ou d’une sûreté;

(2) en faveur de l’acquéreur de biens meubles ou immeubles qui emploie l’argent de l’acquisition pour payer les créanciers détenteurs d’un privilège, d’un gage, d’une hypothèque ou d’une sûreté sur le bien;

(3) en faveur du débiteur qui paie une dette à laquelle il est tenu avec d’autres ou pour d’autres et qui bénéficie d’un recours à l’encontre de ceux-ci suite au paiement;

(4) en faveur du successeur qui paie, de ses propres deniers, les dettes de la succession; et

(5) dans les autres cas prévus par la loi. [Loi de 1989, n° 137, §16, en vigueur le 1er septembre 1989 ; loi de 2001, n° 572, 1]

Art. 1830. Lorsque la subrogation opère de plein droit, le nouveau créancier ne peut recouvrer du débiteur que la prestation exécutée au bénéfice du créancier initial. Le nouveau créancier ne peut recouvrer davantage en invoquant une subrogation conventionnelle.
CHAPTER 5. PROOF OF OBLIGATIONS

Art. 1831. A party who demands performance of an obligation must prove the existence of the obligation.

A party who asserts that an obligation is null, or that it has been modified or extinguished, must prove the facts or acts giving rise to the nullity, modification, or extinction.

Art. 1832. When the law requires a contract to be in written form, the contract may not be proved by testimony or by presumption, unless the written instrument has been destroyed, lost, or stolen.

Art. 1833. A. An authentic act is a writing executed before a notary public or other officer authorized to perform that function, in the presence of two witnesses, and signed by each party who executed it, by each witness, and by each notary public before whom it was executed. The typed or hand-printed name of each person shall be placed in a legible form immediately beneath the signature of each person signing the act.

B. To be an authentic act, the writing need not be executed at one

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NdT: Comme dans les autres états et dans les pays de common law, le notary public n'est pas un officier ministériel investi du sceau de l'État. Le plus souvent, il n'a pas de formation juridique et sa fonction se limite à la certification des actes qui lui sont présentés par les parties.
time or place, or before the same notary public or in the presence of the same witnesses, provided that each party who executes it does so before a notary public or other officer authorized to perform that function, and in the presence of two witnesses and each party, each witness, and each notary public signs it. The failure to include the typed or hand-printed name of each person signing the act shall not affect the validity or authenticity of the act.

C. If a party is unable or does not know how to sign his name, the notary public must cause him to affix his mark to the writing. [Acts 2003, No. 965, §1, eff. Jan. 1, 2005]

Art. 1834. An act that fails to be authentic because of the lack of competence or capacity of the notary public, or because of a defect of form, may still be valid as an act under private signature.

Art. 1835. An authentic act constitutes full proof of the agreement it contains, as against the parties, their heirs, and successors by universal or particular title.

Art. 1836. An act under private signature is regarded prima facie as the true and genuine act of a party executing it when his signature has been acknowledged, and the act passed en un lieu ou en un moment unique, ou devant le même notaire public, ou en présence des mêmes témoins, du moment que chacune des parties le passe devant le notaire public ou l’officier public autorisé à exercer cette fonction, en présence de deux témoins, et que chaque partie, chaque témoin et chaque notaire public signe l’acte. L’absence de la mention manuscrite ou dactylographiée du nom de chacun des signataires n’affecte en rien la validité ni l’authenticité de l’acte.

C. Lorsque l’une des parties n’est pas capable de signer son nom ou ne sait pas comment le faire, le notaire doit l’amener à apposer sa marque sur l’écrit. [Loi de 2003, n° 965, §1, en vigueur le 1er janv. 2005]

Art. 1834. L’acte qui ne peut être considéré comme authentique en raison de l’incompétence ou de l’incapacité du notaire public, ou en raison d’un vice de forme, peut néanmoins être valide en tant qu’acte sous seing privé.

Art. 1835. L’acte authentique fait pleinement foi de la convention qu’il renferme, entre les parties, leurs héritiers, et leurs ayants cause à titre universel ou particulier.

Art. 1836. L’acte sous seing privé est présumé être l’acte véritable et sincère de la partie qui le passe lorsque sa signature a fait l’objet d’une reconnaissance. Dans ce cas, la valeur probatoire de
shall be admitted in evidence without further proof.

An act under private signature may be acknowledged by a party to that act by recognizing the signature as his own before a court, or before a notary public, or other officer authorized to perform that function, in the presence of two witnesses. An act under private signature may be acknowledged also in any other manner authorized by law.

Nevertheless, an act under private signature, though acknowledged, cannot substitute for an authentic act when the law prescribes such an act.

Art. 1837. An act under private signature need not be written by the parties, but must be signed by them.

Art. 1838. A party against whom an act under private signature is asserted must acknowledge his signature or deny that it is his.

In case of denial, any means of proof may be used to establish that the signature belongs to that party.

Art. 1839. A transfer of immovable property must be made by authentic act or by act under private signature. Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the
transferor recognizes the transfer when interrogated on oath.

An instrument involving immovable property shall have effect against third persons only from the time it is filed for registry in the parish where the property is located.

Art. 1840. When certified by the notary public or other officer before whom the act was passed, a copy of an authentic act constitutes proof of the contents of the original, unless the copy is proved to be incorrect.

Art. 1841. When an authentic act or an acknowledged act under private signature has been filed for registry with a public officer, a copy of the act thus filed, when certified by that officer, constitutes proof of the contents of the original.

Art. 1842. Confirmation is a declaration whereby a person cures the relative nullity of an obligation.

An express act of confirmation must contain or identify the substance of the obligation and evidence the intention to cure its relative nullity.

Tacit confirmation may result from voluntary performance of the obligation.

Art. 1843. Ratification is a declaration whereby a person gives

\[\text{que le cédant reconnait le transfert lorsqu’il est interrogé sous serment.}\]

\[\text{Un acte relatif à la propriété immobilière n’est opposable aux tiers qu’à compter du moment de son enregistrement dans la paroisse}\]
\[\text{où l’immeuble se situe.}\]

Art. 1840. Lorsqu’elle est certifiée par le notaire public ou l’officier public devant lequel l’acte a été passé, la copie d’un acte authentique constitue une preuve du contenu de l’original, sauf preuve de non-conformité de la copie.

Art. 1841. Lorsqu’un acte authentique ou un acte sous seing privé reconnu a été enregistré au registre par un officier public, une copie de l’acte enregistré, lorsqu’elle est certifiée par ce dernier, vaut preuve du contenu de l’original.

Art. 1842. La confirmation est la déclaration par laquelle une personne remédie à la nullité relative d’une obligation.

Un acte exprès de confirmation doit contenir ou identifier la substance de l’obligation et apporter la preuve de l’intention de remédier à sa nullité relative.

Une confirmation tacite peut résulter de l’exécution volontaire de l’obligation.

Art. 1843. La ratification est une déclaration par laquelle une

\[\text{3 NdT : La Louisiane a conservé la paroisse comme division territoriale. Celle-ci est l’équivalent du comté dans les autres états.}\]
his consent to an obligation incurred on his behalf by another without authority.

An express act of ratification must evidence the intention to be bound by the ratified obligation.

Tacit ratification results when a person, with knowledge of an obligation incurred on his behalf by another, accepts the benefit of that obligation.

Art. 1844. The effects of confirmation and ratification are retroactive to the date of the confirmed or ratified obligation. Neither confirmation nor ratification may impair the rights of third persons.

Art. 1845. A donation inter vivos that is null for lack of proper form may be confirmed by the donor but the confirmation must be made in the form required for a donation.

The universal successor of the donor may, after his death, expressly or tacitly confirm such a donation.

Art. 1846. When a writing is not required by law, a contract not reduced to writing, for a price or, in the absence of a price, for a value not in excess of five hundred dollars may be proved by competent evidence.

If the price or value is in excess of five hundred dollars, the contract must be proved by at least one witness and other
corroborating circumstances.

Art. 1847. Parol evidence is inadmissible to establish either a promise to pay the debt of a third person or a promise to pay a debt extinguished by prescription.

Art. 1848. Testimonial or other evidence may not be admitted to negate or vary the contents of an authentic act or an act under private signature. Nevertheless, in the interest of justice, that evidence may be admitted to prove such circumstances as a vice of consent, or to prove that the written act was modified by a subsequent and valid oral agreement. [Acts 2012, No. 277, §1, eff. Aug. 1, 2012]

Art. 1849. In all cases, testimonial or other evidence may be admitted to prove the existence or a presumption of a simulation or to rebut such a presumption. Nevertheless, between the parties, a counterletter is required to prove that an act purporting to transfer immovable property is an absolute simulation, except when a simulation is presumed or as necessary to protect the rights of forced heirs. [Added by Acts 2012, No. 277, §1, eff. Aug. 1, 2012]


concordantes.

Art. 1847. La preuve orale ne peut être admise pour établir une promesse de paiement de la dette d’un tiers, ou une promesse de paiement d’une dette éteinte par prescription.

Art. 1848. La preuve par témoin ou par autre moyen ne peut être admise pour nier ou pour modifier le contenu d’un acte authentique ou d’un acte sous seing privé. Toutefois, dans l’intérêt de la justice, cette preuve peut être admise pour établir des circonstances telles que le vice du consentement ou afin de prouver que l’acte écrit a été modifié par un accord oral valide et ultérieur. [Loi de 2012, n° 277, §1, en vigueur le 1er août 2012]

Art. 1849. Dans tous les cas, la preuve par témoin ou par autre moyen peut être admise pour prouver l’existence d’une simulation, en établir la présomption ou renverser une telle présomption. Toutefois, entre les parties, une contre-lettre est requise afin de prouver qu’un acte translatif de propriété immobilière est une simulation absolue, sauf lorsque la simulation est présumée ou lorsqu’il est nécessaire de protéger les droits des héritiers réservataires. [Ajouté par la loi de 2012, n° 277, §1, en vigueur le 1er août 2012]

Art. 1850 à 1852. [Abrogés par la loi de 1997, n° 577, §3]
Art. 1853. A judicial confession is a declaration made by a party in a judicial proceeding. That confession constitutes full proof against the party who made it.

A judicial confession is indivisible and it may be revoked only on the ground of error of fact.

CHAPTER 6. EXTINCTION OF OBLIGATIONS

SECTION 1. PERFORMANCE

Art. 1856. An obligation that may be extinguished by the transfer of a thing is not extinguished unless the thing has been validly transferred to the obligee of performance.

Art. 1857. Performance must be rendered to the obligee or to a person authorized by him.

However, a performance rendered to an unauthorized person is valid if the obligee ratifies it.

Art. 1853. L’aveu judiciaire est la déclaration faite par une partie lors d’une instance judiciaire. Cet aveu fait pleinement preuve à l’encontre de son auteur.

Un aveu judiciaire est indivisible, et ne peut être révoqué que pour cause d’erreur de fait.

CHAPITRE 6. DE L’EXTINCTION DES OBLIGATIONS

SECTION 1. DE L’EXÉCUTION

Art. 1856. Une obligation qui peut s’éteindre par le transfert d’une chose n’est éteinte que lorsque cette chose a été valablement transférée au créancier de la prestation.

Art. 1857. La prestation doit être exécutée au profit du créancier ou de la personne que ce dernier a autorisée.

Cependant, la prestation exécutée au profit d’une personne
In the absence of ratification, a performance rendered to an unauthorized person is valid if the obligee has derived a benefit from it, but only for the amount of the benefit.

Art. 1858. Performance rendered to an obligee without capacity to receive it is valid to the extent of the benefit he derived from it.

Art. 1859. A performance rendered to an obligee in violation of a seizure is not valid against the seizing creditor who, according to his right, may force the obligor to perform again.

In that case, the obligor may recover the first performance from the obligee.

Art. 1860. When the performance consists of giving a thing that is determined as to its kind only, the obligor need not give one of the best quality but he may not tender one of the worst.

Art. 1861. An obligee may refuse to accept a partial performance.

Nevertheless, if the amount of an obligation to pay money is disputed in part and the obligor is willing to pay the undisputed part, non autorisée est valable si le créancier la ratifie.

En l’absence de ratification, la prestation exécutée au profit d’une personne non autorisée est valable si le créancier en a tiré un avantage, mais seulement à hauteur de cet avantage.

Art. 1858. La prestation exécutée au profit d’un créancier qui n’a pas la capacité de la recevoir ne vaut que dans la mesure de l’avantage qu’il en a tiré.

Art. 1859. La prestation exécutée au profit d’un créancier en violation d’une saisie n’est pas opposable au créancier saisissant qui, selon ses droits, peut de nouveau contraindre le débiteur à l’exécution.

Dans un tel cas, le débiteur peut recouvrer la première prestation du créancier qui l’a perçue.

Art. 1860. Lorsque la prestation consiste à donner une chose déterminée en fonction de son espèce uniquement, le débiteur n’est pas tenu d’en donner une de la meilleure qualité mais il ne peut pas en proposer de la plus mauvaise.

Art. 1861. Le créancier peut refuser d’accepter une exécution partielle.

Néanmoins, si le montant d’une obligation de payer une somme d’argent est en partie contesté et que le débiteur est...
the obligee may not refuse to accept that part. If the obligee is willing to accept the undisputed part, the obligor must pay it. In either case, the obligee preserves his right to claim the disputed part.

Art. 1862. Performance shall be rendered in the place either stipulated in the agreement or intended by the parties according to usage, the nature of the performance, or other circumstances.

In the absence of agreement or other indication of the parties' intent, performance of an obligation to give an individually determined thing shall be rendered at the place the thing was when the obligation arose. If the obligation is of any other kind, the performance shall be rendered at the domicile of the obligor.

Art. 1863. Expenses that may be required to render performance shall be borne by the obligor.

Art. 1864. An obligor who owes several debts to an obligee has the right to impute payment to the debt he intends to pay.

The obligor's intent to pay a certain debt may be expressed at

Art. 1862. La prestation doit être exécutée soit à l’endroit stipulé dans la convention, soit à l’endroit voulu par les parties conformément à l’usage, à la nature de la prestation, ou à d’autres circonstances.

En l’absence d’accord ou d’autre indication de l’intention des parties, l’exécution d’une obligation de donner un corps certain doit être exécutée à l’endroit où il se trouvait au moment de la naissance de l’obligation. Si l’obligation est de toute autre nature, la prestation doit être exécutée au domicile du débiteur.

Art. 1863. Les dépenses qui peuvent être nécessaires à l’exécution de la prestation sont à la charge du débiteur.

Art. 1864. Le débiteur de plusieurs dettes envers un créancier a le droit d’imputer le paiement sur la dette qu’il entend payer.

L’intention du débiteur de
the time of payment or may be inferred from circumstances known to the obligee.

Art. 1865. An obligor may not, without the obligee's consent, impute payment to a debt not yet due.

Art. 1866. An obligor of a debt that bears interest may not, without the obligee's consent, impute a payment to principal when interest is due.

A payment made on principal and interest must be imputed first to interest.

Art. 1867. An obligor who has accepted a receipt that imputes payment to one of his debts may no longer demand imputation to another debt, unless the obligee has acted in bad faith.

Art. 1868. When the parties have made no imputation, payment must be imputed to the debt that is already due.

If several debts are due, payment must be imputed to the debt that bears interest.

If all, or none, of the debts that are due bear interest, payment must be imputed to the debt that is secured.

If several unsecured debts bear interest, payment must be imputed to the debt that, because of the rate of interest, is most burdensome to the obligor.
If several secured debts bear no interest, payment must be imputed to the debt that, because of the nature of the security, is most burdensome to the obligor. If the obligor had the same interest in paying all debts, payment must be imputed to the debt that became due first. If all debts are of the same nature and became due at the same time, payment must be proportionally imputed to all.

SUBSECTION B. TENDER AND DEPOSIT

Art. 1869. When the object of the performance is the delivery of a thing or a sum of money and the obligee, without justification, fails to accept the performance tendered by the obligor, the tender, followed by deposit to the order of the court, produces all the effects of a performance from the time the tender was made if declared valid by the court.

A valid tender is an offer to perform according to the nature of the obligation.

Art. 1870. If the obligor knows or has reason to know that the obligee will refuse the performance, or when the object of the performance is the delivery of a thing or a sum of money at a place...
other than the obligee's domicile, a
notice given to the obligee that the
obligor is ready to perform has the
same effect as a tender.

Art. 1871. After the tender has
been refused, the obligor may
deposit the thing or the sum of
money to the order of the court in a
place designated by the court for
that purpose, and may demand
judgment declaring the
performance valid.

If the deposit is accepted by
the obligee, or if the court declares
the performance valid, all expenses
of the deposit must be borne by the
obligee.

Art. 1872. If performance
consists of the delivery of a
perishable thing, or of a thing
whose deposit and custody are
excessively costly in proportion to
its value, the court may order the
sale of the thing under the
conditions that it may direct, and
the deposit of the proceeds.

SECTION 2. IMPOSSIBILITY OF
PERFORMANCE

Art. 1873. An obligor is not
liable for his failure to perform
when it is caused by a fortuitous
event that makes performance
impossible.

An obligor is, however, liable
for his failure to perform when he
has assumed the risk of such a
fortuitous event.

endroit que le domicile du
créancier, une notification donnée
au créancier que le débiteur est
prêt à exécuter a le même effet que
l’offre.

Art. 1871. Suite au refus de
l’offre le débiteur peut déposer la
chose ou la somme d’argent à
l’endroit désigné à cet effet par le
juge, et peut exiger un jugement
déclarant l’exécution valable.

Lorsque le dépôt est accepté
par le créancier, ou lorsque le juge
déclare l’exécution valable, les
frais de consignation sont
totièrement à la charge du
créancier.

Art. 1872. Lorsque la
prestation consiste en la livraison
d’une chose périssable, ou d’une
chose dont la consignation ou la
garde sont excessivement
onéreuses par rapport à sa valeur,
le juge peut ordonner la vente de
la chose dans les conditions qu’il
ordonne, ainsi que la consignation
du prix.

SECTION 2. DE
L’IMPOSSIBILITÉ
D’EXÉCUTION

Art. 1873. Le débiteur n’est
pas responsable de son défaut
d’exécution lorsqu’il est causé par
un cas fortuit rendant l’exécution
impossible.

Le débiteur est, cependant,
responsable de son défaut
d’exécution lorsqu’il a accepté le
risque de ce cas fortuit.
An obligor is liable also when the fortuitous event occurred after he has been put in default.

An obligor is likewise liable when the fortuitous event that caused his failure to perform has been preceded by his fault, without which the failure would not have occurred.

Art. 1874. An obligor who had been put in default when a fortuitous event made his performance impossible is not liable for his failure to perform if the fortuitous event would have likewise destroyed the object of the performance in the hands of the obligee had performance been timely rendered.

That obligor is, however, liable for the damage caused by his delay.

Art. 1875. A fortuitous event is one that, at the time the contract was made, could not have been reasonably foreseen.

Art. 1876. When the entire performance owed by one party has become impossible because of a fortuitous event, the contract is dissolved.

The other party may then recover any performance he has already rendered.

Art. 1877. When a fortuitous event has made a party's performance impossible in part, the court may reduce the other party's counterperformance proportionally, or, according to the
circumstances, may declare the contract dissolved.

Art. 1878. If a contract is dissolved because of a fortuitous event that occurred after an obligor has performed in part, the obligee is bound but only to the extent that he was enriched by the obligor's partial performance.

SECTION 3. NOVATION

Art. 1879. Novation is the extinguishment of an existing obligation by the substitution of a new one.

Art. 1880. The intention to extinguish the original obligation must be clear and unequivocal. Novation may not be presumed.

Art. 1881. Novation takes place when, by agreement of the parties, a new performance is substituted for that previously owed, or a new cause is substituted for that of the original obligation. If any substantial part of the original performance is still owed, there is no novation.

Novation takes place also when the parties expressly declare their intention to novate an obligation.

Mere modification of an obligation, made without intention to extinguish it, does not effect a novation. The execution of a new writing, the issuance or renewal of a negotiable instrument, or the
giving of new securities for the performance of an existing obligation are examples of such a modification.

Art. 1882. Novation takes place when a new obligor is substituted for a prior obligor who is discharged by the obligee. In that case, the novation is accomplished even without the consent of the prior obligor, unless he had an interest in performing the obligation himself.

Art. 1883. Novation has no effect when the obligation it purports to extinguish does not exist or is absolutely null. If the obligation is only relatively null, the novation is valid, provided the obligor of the new one knew of the defect of the extinguished obligation.

Art. 1884. Security given for the performance of the extinguished obligation may not be transferred to the new obligation without agreement of the parties who gave the security.

Art. 1885. A novation made by the obligee and one of the obligors of a solidary obligation releases the other solidary obligors. In that case, the security given for the performance of the extinguished obligation may be retained by the obligee only on effet de commerce, ou la remise de nouvelles sûretés en vue de l'exécution d'une obligation existante sont des exemples de telle modification.

Art. 1882. Il y a novation lorsqu’un nouveau débiteur se substitue à un débiteur antérieur qui est libéré par le créancier. Dans ce cas, la novation est accomplie même en l’absence du consentement du débiteur antérieur, à moins que celui-ci n’ait un intérêt à exécuter l’obligation lui-même.

Art. 1883. La novation n’a aucun effet lorsque l’obligation qu’elle prétend éteindre est inexistante ou est entachée de nullité absolue. Si l’obligation n’est entachée que de nullité relative, la novation est valable, à condition que le débiteur de la nouvelle obligation ait eu connaissance du vice de l’obligation éteinte.

Art. 1884. La sûreté donnée en vue de l’exécution de l’obligation éteinte ne peut être transférée à la nouvelle obligation sans l’accord des parties qui l’ont fournie.

Art. 1885. La novation effectuée par le créancier et le codébiteur d’une obligation solidaire libère les autres débiteurs solidaire.
property of that obligor with whom the novation has been made.

If the obligee requires that the other co-obligors remain solidarily bound, there is no novation unless the co-obligors consent to the new obligation.

Art. 1886. A delegation of performance by an obligor to a third person is effective when that person binds himself to perform.

A delegation effects a novation only when the obligee expressly discharges the original obligor.

Art. 1887. If the new obligor has assumed the obligation and acquired the thing given as security, the discharge of any prior obligor by the obligee does not affect the security or its rank

SECTION 4. REMISSION OF DEBT

Art. 1888. A remission of debt by an obligee extinguishes the obligation. That remission may be express or tacit.

Art. 1889. An obligee's voluntary surrender to the obligor of the instrument evidencing the obligation gives rise to a presumption that the obligee intended to remit the debt.

Art. 1890. A remission of debt is effective when the obligor
receives the communication from the obligee. Acceptance of a remission is always presumed unless the obligor rejects the remission within a reasonable time.

Art. 1891. Release of a real security given for performance of the obligation does not give rise to a presumption of remission of debt.

Art. 1892. Remission of debt granted to the principal obligor releases the sureties.
Remission of debt granted to the sureties does not release the principal obligor.
Remission of debt granted to one surety releases the other sureties only to the extent of the contribution the other sureties might have recovered from the surety to whom the remission was granted.

If the obligee grants a remission of debt to a surety in return for an advantage, that advantage will be imputed to the debt, unless the surety and the obligee agree otherwise.

SECTION 5. COMPENSATION

Art. 1893. Compensation takes place by operation of law when two persons owe to each other sums of money or quantities of fungible things identical in kind, and these sums or quantities are liquidated and presently due.

In such a case, compensation extinguishes both obligations to the
extent of the lesser amount. Delays of grace do not prevent compensation.

Art. 1894. Compensation takes place regardless of the sources of the obligations.
Compensation does not take place, however, if one of the obligations is to return a thing of which the owner has been unjustly dispossessed, or is to return a thing given in deposit or loan for use, or if the object of one of the obligations is exempt from seizure.

Art. 1895. Compensation takes place even though the obligations are not to be performed at the same place, but allowance must be made in that case for the expenses of remittance.

Art. 1896. If an obligor owes more than one obligation subject to compensation, the rules of imputation of payment must be applied.

Art. 1897. Compensation between obligee and principal obligor extinguishes the obligation of a surety.
Compensation between obligee and surety does not extinguish the obligation of the principal obligor.

Art. 1898. Compensation between the obligee and one solidary obligor extinguishes the obligation of the other solidary obligors only for the portion of that compensation éteint les deux obligations jusqu’à hauteur de la valeur moindre.
Un délai de grâce ne fait pas obstacle à la compensation.

Art. 1894. La compensation a lieu quelle que soit la source des obligations.
Cependant, la compensation ne peut avoir lieu, si l’une des obligations consiste à rendre une chose dont le propriétaire a été injustement dépossédé, ou bien à rendre une chose donnée en dépôt ou prêt à usage, ou encore si l’objet de l’une des obligations est insaisissable.

Art. 1895. Il y a compensation même lorsque les obligations ne sont pas exécutoires au même endroit, mais il faut dans ce cas tenir compte des frais de versement.

Art. 1896. Si le débiteur est tenu à plus d’une obligation sujette à compensation, les règles relatives à l’imputation de paiement doivent être appliquées.

Art. 1897. La compensation entre le créancier et le débiteur principal éteint l’obligation de la caution.
La compensation entre le créancier et la caution n’éteint pas l’obligation du débiteur principal.

Art. 1898. La compensation entre le créancier et l’un des débiteurs solidaires n’éteint l’obligation des codébiteurs solidaires que pour la part de ce
Compensation between one solidary obligee and the obligor extinguishes the obligation only for the portion of that obligee. The compensation provided in this Article does not operate in favor of a liability insurer.

Art. 1899. Compensation can neither take place nor may it be renounced to the prejudice of rights previously acquired by third parties.

Art. 1900. An obligor who has consented to an assignment of the credit by the obligee to a third party may not claim against the latter any compensation that otherwise he could have claimed against the former.

An obligor who has been given notice of an assignment to which he did not consent may not claim compensation against the assignee for an obligation of the assignor arising after that notice.

Art. 1901. Compensation of obligations may take place also by agreement of the parties even though the requirements for compensation by operation of law are not met.

Art. 1902. Although the obligation claimed in compensation is unliquidated, the court can declare compensation as to that part of the obligation that is susceptible of prompt and easy liquidation.
SECTION 6. CONFUSION

Art. 1903. When the qualities of obligee and obligor are united in the same person, the obligation is extinguished by confusion.

Art. 1904. Confusion of the qualities of obligee and obligor in the person of the principal obligor extinguishes the obligation of the surety.

Confusion of the qualities of obligee and obligor in the person of the surety does not extinguish the obligation of the principal obligor.

Art. 1905. If a solidary obligor becomes an obligee, confusion extinguishes the obligation only for the portion of that obligor.

If a solidary obligee becomes an obligor, confusion extinguishes the obligation only for the portion of that obligee.

SECTION 6. DE LA CONFUSION

Art. 1903. Lorsque les qualités de débiteur et de créancier sont réunies en la même personne, l’obligation est éteinte par confusion.

Art. 1904. La confusion des qualités de créancier et de débiteur en la personne du débiteur principal éteint l’obligation de la caution.

La confusion des qualités de créancier et de débiteur en la personne de la caution n’éteint pas l’obligation du débiteur principal.

Art. 1905. Lorsque le débiteur solidaire devient créancier, la confusion n’éteint l’obligation qu’à hauteur de la part de ce débiteur.

Si le créancier devient débiteur, la confusion n’éteint l’obligation qu’à hauteur de la part de ce créancier.

TITLE IV. CONVENTIONAL OBLIGATIONS OR CONTRACTS
[Acts 1984, No. 331, §1, eff. Jan. 1, 1985]

CHAPTER 1. GENERAL PRINCIPLES

Art. 1906. A contract is an agreement by two or more parties whereby obligations are created, modified, or extinguished.

TITRE IV. DES OBLIGATIONS CONVENTIONNELLES OU DES CONTRATS
[Loi de 1984, n° 331, §1, en vigueur le 1er janvier 1985.]

CHAPITRE I. PRINCIPES GÉNÉRAUX

Art. 1906. Le contrat est un accord entre deux ou plusieurs parties qui crée, modifie, ou met fin à des obligations.
Art. 1907. A contract is unilateral when the party who accepts the obligation of the other does not assume a reciprocal obligation.

Art. 1908. A contract is bilateral, or synallagmatic, when the parties obligate themselves reciprocally, so that the obligation of each party is correlative to the obligation of the other.

Art. 1909. A contract is onerous when each of the parties obtains an advantage in exchange for his obligation.

Art. 1910. A contract is gratuitous when one party obligates himself towards another for the benefit of the latter, without obtaining any advantage in return.

Art. 1911. A contract is commutative when the performance of the obligation of each party is correlative to the performance of the other.

Art. 1912. A contract is aleatory when, because of its nature or according to the parties' intent, the performance of either party's obligation, or the extent of the performance, depends on an uncertain event.

Art. 1913. A contract is accessory when it is made to provide security for the performance of an obligation.

Art. 1907. Le contrat est unilatéral lorsque la partie qui accepte l'obligation de l'autre n'assume pas d'obligation réciproque.

Art. 1908. Le contrat est bilatéral ou synallagmatique lorsque les parties s'obligent réciiproquement les unes envers les autres, de sorte que l'obligation de chacune des parties soit correlative à l'obligation de l'autre.

Art. 1909. Le contrat est à titre onéreux lorsque chaque partie obtient un avantage en échange de son obligation.

Art. 1910. Le contrat est à titre gratuit lorsque l'une des parties s'oblige elle-même envers l'autre pour le bénéfice de cette dernière, sans obtenir d'avantage en retour.

Art. 1911. Le contrat est commutatif lorsque l'exécution de l'obligation de chaque partie est correlative à l'exécution de l'obligation de l'autre.

Art. 1912. Le contrat est aléatoire lorsque, de par sa nature ou selon la volonté des parties, l'exécution de l'obligation de l'une des parties ou l'étendue de cette exécution, dépend d'un événement incertain.

Art. 1913. Le contrat est accessoire lorsqu'il est passé en vue de fournir une sûreté pour l'exécution d'une obligation. Le cautionnement, l'hypothèque, le
Suretyship, mortgage, pledge, and other types of security agreements are examples of such a contract. When the secured obligation arises from a contract, either between the same or other parties, that contract is the principal contract. [Acts 1989, No. 137, §16, eff. Sept. 1, 1989]

Art. 1914. Nominate contracts are those given a special designation such as sale, lease, loan, or insurance. Innominat contracts are those with no special designation.

Art. 1915. All contracts, nominate and innominate, are subject to the rules of this title.

Art. 1916. Nominate contracts are subject to the special rules of the respective titles when those rules modify, complement, or depart from the rules of this title.

Art. 1917. The rules of this title are applicable also to obligations that arise from sources other than contract to the extent that those rules are compatible with the nature of those obligations.

CHAPTER 2. CONTRACTUAL CAPACITY AND EXCEPTIONS

Art. 1918. All persons have capacity to contract, except

nantissement et les autres types de sûretés en sont des exemples.
Lorsque l’obligation assortie d’une sûreté résulte d’un contrat, ou entre les mêmes parties, ou avec d’autres, ce contrat est le contrat principal. [Modifiée par la loi de 1989, n° 137, §16, en vigueur le 1er septembre 1989.]

Art. 1914. Les contrats nommés sont ceux auxquels une dénomination spécifique est donnée, telle que vente, louage, prêt ou assurance.
Les contrats innomés sont ceux qui n’ont aucune dénomination spécifique.

Art. 1915. Tous les contrats, nommés et innomés, sont soumis aux règles du présent titre.

Art. 1916. Les contrats nommés sont soumis aux règles particulières des titres relatifs à chacun d’eux lorsque ces règles modifient, complètent, ou diffèrent des règles du présent titre.

Art. 1917. Les règles du présent titre sont également applicables aux obligations résultant d’une source autre que le contrat dans la mesure où ces règles sont compatibles avec la nature de ces obligations.

CHAPTER 2. DE LA CAPACITÉ À CONTRACTER ET DES EXCEPTIONS

Art. 1918. Toute personne a la capacité de contracter, à
unemancipated minors, interdicts, and persons deprived of reason at the time of contracting.

Art. 1919. A contract made by a person without legal capacity is relatively null and may be rescinded only at the request of that person or his legal representative.

Art. 1920. Immediately after discovering the incapacity, a party, who at the time of contracting was ignorant of the incapacity of the other party, may require from that party, if the incapacity has ceased, or from the legal representative if it has not, that the contract be confirmed or rescinded.

Art. 1921. Upon rescission of a contract on the ground of incapacity, each party or his legal representative shall restore to the other what he has received thereunder. When restoration is impossible or impracticable, the court may award compensation to the party to whom restoration cannot be made.

Art. 1922. A fully emancipated minor has full contractual capacity.

NdT : Le substantif interdict, traduit par « interdit », désigne les majeurs privés de la capacité d’exercice et placés sous un régime de protection.
NdT : Le mot rescission est traduit par annulation, le français tendant à limiter l’usage du terme « rescision », synonyme de nullité relative, à l’hypothèse de la lésion.
Art. 1923. A contract by an unemancipated minor may be rescinded on grounds of incapacity except when made for the purpose of providing the minor with something necessary for his support or education, or for a purpose related to his business.

Art. 1924. The mere representation of majority by an unemancipated minor does not preclude an action for rescission of the contract. When the other party reasonably relies on the minor's representation of majority, the contract may not be rescinded.

Art. 1925. A noninterdicted person, who was deprived of reason at the time of contracting, may obtain rescission of an onerous contract upon the ground of incapacity only upon showing that the other party knew or should have known that person's incapacity.

Art. 1926. A contract made by a noninterdicted person deprived of reason at the time of contracting may be attacked after his death, on the ground of incapacity, only when the contract is gratuitous, or it evidences lack of understanding, or was made within thirty days of his death, or when application for interdiction was filed before his death.

Art. 1923. Le contrat passé par un mineur non émancipé peut être annulé pour cause d’incapacité sauf s’il a été conclu dans le but de fournir au mineur une chose nécessaire à son entretien ou à son éducation, ou dans un but lié à son activité professionnelle.

Art. 1924. La simple déclaration de majorité par un mineur non-émancipé n’interdit pas une action en annulation du contrat. Lorsque l’autre partie se fie raisonnablement à la déclaration de majorité faite par le mineur, le contrat ne peut être annulé.

Art. 1925. Une personne non-interdite, qui était privée de raison au moment de la conclusion du contrat, ne peut obtenir l’annulation d’un contrat à titre onéreux pour incapacité qu’en démontrant que l’autre partie connaissait ou aurait dû connaître cette incapacité.

Art. 1926. Un contrat passé par une personne non-interdite privée de raison au moment de la conclusion peut, après son décès, être attaqué pour cause d’incapacité, seulement si le contrat est à titre gratuit, ou s’il manifeste un manque de compréhension, ou s’il a été conclu dans les trente jours précédant le décès, ou si la demande d’interdiction avait été déposée avant le décès.
CHAPTER 3. CONSENT

Art. 1927. A contract is formed by the consent of the parties established through offer and acceptance.

Unless the law prescribes a certain formality for the intended contract, offer and acceptance may be made orally, in writing, or by action or inaction that under the circumstances is clearly indicative of consent.

Unless otherwise specified in the offer, there need not be conformity between the manner in which the offer is made and the manner in which the acceptance is made.

Art. 1928. An offer that specifies a period of time for acceptance is irrevocable during that time.

When the offeror manifests an intent to give the offeree a delay within which to accept, without specifying a time, the offer is irrevocable for a reasonable time.

Art. 1929. An irrevocable offer expires if not accepted within the time prescribed in the preceding Article.

Art. 1930. An offer not irrevocable under Civil Code Article 1928 may be revoked before it is accepted.

Art. 1931. A revocable offer expires if not accepted within a reasonable time.

CHAPITRE 3. DU CONSENTEMENT

Art. 1927. Le contrat est formé par le consentement des parties manifesté par l’offre et l’acceptation.

À moins que la loi ne prévoie une forme particulière pour le contrat envisagé, l’offre et l’acceptation peuvent être formulées oralement, par écrit, ou par action ou inaction qui, selon les circonstances, indique clairement le consentement.

Sauf indication contraire dans l’offre, il n’est pas nécessaire que l’offre et l’acceptation soient formulées de façon identique.

Art. 1928. L’offre assortie d’un délai d’acceptation est irrévocable durant ledit délai.

Lorsque l’offrant manifeste l’intention de donner au destinataire un délai d’acceptation, sans en préciser la durée, l’offre est irrévocable durant un délai raisonnable.

Art. 1929. L’offre irrévocable devient caduque lorsqu’elle n’est pas acceptée dans le délai prescrit à l’article précédent.

Art. 1930. L’offre non irrévocable aux termes de l’article 1928 du présent Code peut être révoquée avant son acceptation.

Art. 1931. Une offres révocable devient caduque lorsqu’elle n’est pas acceptée dans un délai raisonnable.
Art. 1932. An offer expires by the death or incapacity of the offeror or the offeree before it has been accepted.

Art. 1933. An option is a contract whereby the parties agree that the offeror is bound by his offer for a specified period of time and that the offeree may accept within that time.

Art. 1934. An acceptance of an irrevocable offer is effective when received by the offeror.

Art. 1935. Unless otherwise specified by the offer or the law, an acceptance of a revocable offer, made in a manner and by a medium suggested by the offer or in a reasonable manner and by a reasonable medium, is effective when transmitted by the offeree.

Art. 1936. A medium or a manner of acceptance is reasonable if it is the one used in making the offer or one customary in similar transactions at the time and place the offer is received, unless circumstances known to the offeree indicate otherwise.

Art. 1937. A revocation of a revocable offer is effective when received by the offeree prior to acceptance.


Art. 1933. L’option est le contrat par lequel les parties conviennent que l’offrant est tenu par son offre pendant le délai convenu et que le destinataire peut l’accepter durant ce délai.

Art. 1934. L’acceptation d’une offre irrévocable prend effet lorsqu’elle est reçue par l’offrant.

Art. 1935. Sauf indication contraire spécifiée dans l’offre ou par la loi, l’acceptation d’une offre révocable, formulée d’une manière et selon un moyen suggérés dans l’offre ou d’une manière et selon un moyen raisonnables, prend effet lorsqu’elle est transmise par le destinataire.

Art. 1936. Un moyen ou une manière d’accepter l’offre est raisonnable si l’offre a été faite de la même façon ou si les transactions similaires sont habituellement effectuées ainsi au moment et au lieu où l’offre est reçue, à moins que des circonstances connues du destinataire n’indiquent le contraire.

Art. 1937. La révocation d’une offre révocable ne prend effet que lorsqu’elle est reçue par le destinataire avant l’acceptation.
Art. 1938. A written revocation, rejection, or acceptance is received when it comes into the possession of the addressee or of a person authorized by him to receive it, or when it is deposited in a place the addressee has indicated as the place for this or similar communications to be deposited for him.

Art. 1939. When an offeror invites an offeree to accept by performance and, according to usage or the nature or the terms of the contract, it is contemplated that the performance will be completed if commenced, a contract is formed when the offeree begins the requested performance.

Art. 1940. When, according to usage or the nature of the contract, or its own terms, an offer made to a particular offeree can be accepted only by rendering a completed performance, the offeror cannot revoke the offer, once the offeree has begun to perform, for the reasonable time necessary to complete the performance. The offeree, however, is not bound to complete the performance he has begun.

The offeror's duty of performance is conditional on completion or tender of the requested performance.

Art. 1938. La communication écrite de la révocation, du rejet, ou de l’acceptation est reçue lorsqu’elle vient en possession du destinataire ou d’une personne autorisée par lui à la recevoir, ou lorsqu’elle est déposée à l’endroit indiqué par le destinataire comme celui où cet écrit ou toute communication similaire doit lui être remis.

Art. 1939. Lorsque l’offrant invite le destinataire de l’offre à l’accepter par l’exécution et que, selon l’usage ou la nature ou les termes du contrat, il est considéré que l’exécution sera achevée du moment qu’elle est commencée, le contrat est formé lorsque le destinataire commence l’exécution requise.

Art. 1940. Lorsque, selon l’usage ou la nature du contrat, ou selon les termes de celui-ci, l’offre faite à un destinataire déterminé ne peut être acceptée que par une exécution complète, l’offrant ne peut révoquer l’offre durant la période raisonnable nécessaire à l’exécution complète une fois que le destinataire a commencé l’exécution. Toutefois, le destinataire de l’offre n’est pas tenu d’achever l’exécution commencée.

Le devoir d’exécution de l’offrant est conditionnel à l’exécution complète ou à l’offre réelle d’exécution de la prestation requise.
Art. 1941. When commencement of the performance either constitutes acceptance or makes the offer irrevocable, the offeree must give prompt notice of that commencement unless the offeror knows or should know that the offeree has begun to perform. An offeree who fails to give the notice is liable for damages.

Art. 1942. When, because of special circumstances, the offeree's silence leads the offeror reasonably to believe that a contract has been formed, the offer is deemed accepted.

Art. 1943. An acceptance not in accordance with the terms of the offer is deemed to be a counteroffer.

Art. 1944. An offer of a reward made to the public is binding upon the offeror even if the one who performs the requested act does not know of the offer.

Art. 1945. An offer of reward made to the public may be revoked before completion of the requested act, provided the revocation is made by the same or an equally effective means as the offer.

Art. 1946. Unless otherwise stipulated in the offer made to the public, or otherwise implied from the nature of the act, when several persons have performed the requested act, the reward belongs to the first one giving notice of his completion of performance to the
Art. 1947. When, in the absence of a legal requirement, the parties have contemplated a certain form, it is presumed that they do not intend to be bound until the contract is executed in that form.

CHAPTER 4. VICES OF CONSENT

SECTION 1. ERROR

Art. 1948. Consent may be vitiated by error, fraud, or duress.

Art. 1949. Error vitiates consent only when it concerns a cause without which the obligation would not have been incurred and that cause was known or should have been known to the other party.

Art. 1950. Error may concern a cause when it bears on the nature of the contract, or the thing that is the contractual object or a substantial quality of that thing, or the person or the qualities of the other party, or the law, or any other circumstance that the parties regarded, or should in good faith have regarded, as a cause of the obligation.

Art. 1951. A party may not avail himself of his error if the other party is willing to perform the contract as intended by the offeror.

qui informe l’offrant de son achèvement de l’exécution.

Art. 1947. Lorsque, en l’absence d’exigence légale, les parties ont envisagé une certaine forme, il est présumé qu’elles n’ont pas l’intention d’être liées tant que le contrat n’est pas conclu selon cette forme.

CHAPITRE 4. DES VICES DU CONSENTEMENT

SECTION 1. DE L’ERREUR

Art. 1948. Le consentement peut être vicié par l’erreur, le dol ou la violence.

Art. 1949. L’erreur vicie le consentement seulement lorsqu’elle porte sur une cause sans laquelle l’obligation n’aurait pas été contractée et que cette cause était connue ou aurait dû être connue de l’autre partie.

Art. 1950. Il y a erreur sur la cause lorsqu’elle porte sur la nature du contrat, ou sur la chose objet du contrat ou sur une qualité substantielle de cette chose, ou la personne ou les qualités de l’autre partie, ou le droit, ou toute autre circonstance prise en compte par les parties, ou qui aurait dû être prise en compte de bonne foi, comme cause de l’obligation.

Art. 1951. Une partie ne peut se prévaloir de son erreur lorsque l’autre partie est disposée à exécuter le contrat tel qu’il a été
party in error.

Art. 1952. A party who obtains rescission on grounds of his own error is liable for the loss thereby sustained by the other party unless the latter knew or should have known of the error.

The court may refuse rescission when the effective protection of the other party's interest requires that the contract be upheld. In that case, a reasonable compensation for the loss he has sustained may be granted to the party to whom rescission is refused.

SECTION 2. FRAUD

Art. 1953. Fraud is a misrepresentation or a suppression of the truth made with the intention either to obtain an unjust advantage for one party or to cause a loss or inconvenience to the other. Fraud may also result from silence or inaction.

Art. 1954. Fraud does not vitiate consent when the party against whom the fraud was directed could have ascertained the truth without difficulty, inconvenience, or special skill.

This exception does not apply when a relation of confidence has reasonably induced a party to rely on the other's assertions or prévu par la partie dans l’erreur.

Art. 1952. La partie qui obtient l’annulation sur le fondement de sa propre erreur est de ce fait responsable de la perte subie par l’autre partie, sauf lorsque cette dernière avait connaissance ou aurait dû avoir connaissance de cette erreur.

Le juge peut refuser l’annulation lorsque la protection effective des intérêts de l’autre partie requiert le maintien du contrat. Dans ce cas, une indemnisation raisonnable pour la perte subie peut être attribuée à la partie à laquelle l’annulation est refusée.

SECTION 2. DU DOL

Art. 1953. Le dol est une fausse déclaration ou une dissimulation de la vérité faite dans l’intention ou bien de procurer un avantage injuste à l’une des parties ou bien de causer une perte ou un inconvénient à l’autre. Le dol peut également résulter du silence ou de l’inaction.

Art. 1954. Le dol ne vicie pas le consentement lorsque la partie à l’encontre de laquelle le dol était dirigé aurait pu établir la vérité sans difficulté, inconvénient, ou compétence particulière.

Cette exception ne s’applique pas lorsqu’une relation de confiance a raisonnablement conduit une partie à se fier aux affirmations ou déclarations de
representations.

Art. 1955. Error induced by fraud need not concern the cause of the obligation to vitiate consent, but it must concern a circumstance that has substantially influenced that consent.

Art. 1956. Fraud committed by a third person vitiates the consent of a contracting party if the other party knew or should have known of the fraud.

Art. 1957. Fraud need only be proved by a preponderance of the evidence and may be established by circumstantial evidence.

Art. 1958. The party against whom rescission is granted because of fraud is liable for damages and attorney fees.

SECTION 3. DURESS

Art. 1959. Consent is vitiating when it has been obtained by duress of such a nature as to cause a reasonable fear of unjust and considerable injury to a party's person, property, or reputation.

Age, health, disposition, and other personal circumstances of a party must be taken into account in determining reasonableness of the fear.

SECTION 3. DE LA VIOLENCE

Art. 1959. The consentement est vicié lorsqu'il a été obtenu par l'effet d'une violence d'une nature telle qu'elle ait pu causer la crainte raisonnable d'un mal injuste et considérable envers la personne, les biens ou la réputation d'une partie.

L'âge, la santé, le tempérament et toute autre circonstance personnelle d'une partie doivent être pris en compte dans la détermination du caractère
Art. 1960. Duress vitiates consent also when the threatened injury is directed against the spouse, an ascendant, or descendant of the contracting party.

If the threatened injury is directed against other persons, the granting of relief is left to the discretion of the court.

Art. 1961. Consent is vitiated even when duress has been exerted by a third person.

Art. 1962. A threat of doing a lawful act or a threat of exercising a right does not constitute duress.

A threat of doing an act that is lawful in appearance only may constitute duress.

Art. 1963. A contract made with a third person to secure the means of preventing threatened injury may not be rescinded for duress if that person is in good faith and not in collusion with the party exerting duress.

Art. 1964. When rescission is granted because of duress exerted or known by a party to the contract, the other party may recover damages and attorney fees.

When rescission is granted because of duress exerted by a third person, the parties to the transaction are reasonable de la crainte.

Art. 1960. La violence vicie également le consentement lorsque le mal dont il est fait menace est dirigé à l’encontre du conjoint, de l’ascendant ou du descendant du cocontractant.

Si le mal dont il est fait menace est dirigé à l’encontre d’autres personnes, l’octroi d’une réparation est laissé à l’appréciation du juge.

Art. 1961. Le consentement est également vicié lorsque la violence a été exercée par un tiers.

Art. 1962. La menace d’accomplir un acte licite ou d’exercer un droit n’est pas constitutive de violence.

La menace d’accomplir un acte qui n’est licite qu’en apparence peut être constitutive de violence.

Art. 1963. Le contrat conclu avec un tiers afin d’assurer les moyens de prévenir le mal dont il est fait menace ne peut être annulé pour violence lorsque ce tiers est de bonne foi et n’est pas de connivence avec la partie exerçant la violence.

contract who are innocent of the duress may recover damages and attorney fees from the third person.

SECTION 4. LESION

Art. 1965. A contract may be annulled on grounds of lesion only in those cases provided by law.

CHAPTER 5. CAUSE


Art. 1967. Cause is the reason why a party obligates himself. A party may be obligated by a promise when he knew or should have known that the promise would induce the other party to rely on it to his detriment and the other party was reasonable in so relying. Recovery may be limited to the expenses incurred or the damages suffered as a result of the promisee's reliance on the promise. Reliance on a gratuitous promise made without required formalities is not reasonable.

Art. 1968. The cause of an obligation is unlawful when the enforcement of the obligation would produce a result prohibited by law or against public policy.

accordée pour cause de violence exercée par un tiers, les parties au contrat qui ne sont pas coupables de violence peuvent recouvrer de ce tiers des dommages et intérêts ainsi que les frais d’avocats.

SECTION 4. DE LA LÉSION

Art. 1965. Un contrat peut être annulé pour cause de lésion dans les seuls cas prévus par la loi.

CHAPITRE 5. DE LA CAUSE

Art. 1966. Une obligation ne peut exister sans une cause licite.

Art. 1967. La cause est la raison pour laquelle une partie s’oblige.

Une partie peut s’obliger par une promesse lorsqu’elle savait ou aurait dû savoir que la promesse conduirait l’autre partie à se fier à celle-ci à ses dépens et que cette autre partie s’y est fiée raisonnablement. Le recouvrement peut être limité aux dépenses engagées ou aux dommages subis du fait de la confiance que le bénéficiaire de la promesse avait placée en celle-ci. La confiance en une promesse gratuite faite sans les formalités requises n’est pas raisonnable.

Art. 1968. La cause de l’obligation est illicite lorsque la mise en œuvre de l’obligation produirait un résultat prohibé par la loi ou contraire à l’ordre public.
Art. 1969. An obligation may be valid even though its cause is not expressed.

Art. 1970. When the expression of a cause in a contractual obligation is untrue, the obligation is still effective if a valid cause can be shown.

CHAPTER 6. OBJECT AND MATTER OF CONTRACTS

Art. 1971. Parties are free to contract for any object that is lawful, possible, and determined or determinable.

Art. 1972. A contractual object is possible or impossible according to its own nature and not according to the parties' ability to perform.

Art. 1973. The object of a contract must be determined at least as to its kind.

The quantity of a contractual object may be undetermined, provided it is determinable.

Art. 1974. If the determination of the quantity of the object has been left to the discretion of a third person, the quantity of an object is determinable.

If the parties fail to name a person, or if the person named is unable or unwilling to make the determination, the quantity may be determined by the court.

Art. 1969. L’obligation n’est pas moins valable quoi que la cause n’en soit pas exprimée.

Art. 1970. Lorsque la cause d’une obligation contractuelle est exprimée de manière erronée, l’obligation reste effective si une cause valable peut être démontrée.

CHAPITRE 6. DE L’OBJET ET DE LA MATIÈRE DES CONTRATS


Art. 1972. L’objet du contrat est possible ou impossible en fonction de sa propre nature et non en fonction de la capacité des parties à l’exécuter.


La quantité de l’objet du contrat peut être indéterminée, pourvu qu’elle soit déterminable.


Lorsque les parties n’ont pas nommé de tiers, ou si le tiers nommé est dans l’incapacité ou ne veut pas effectuer la détermination, la quantité peut être déterminée par le juge.
Art. 1975. The quantity of a contractual object may be determined by the output of one party or the requirements of the other.
In such a case, output or requirements must be measured in good faith.

Art. 1976. Future things may be the object of a contract.
The succession of a living person may not be the object of a contract other than an antenuptial agreement. Such a succession may not be renounced.

Art. 1977. The object of a contract may be that a third person will incur an obligation or render a performance.
The party who promised that obligation or performance is liable for damages if the third person does not bind himself or does not perform.

CHAPTER 7. THIRD PARTY BENEFICIARY

Art. 1978. A contracting party may stipulate a benefit for a third person called a third party beneficiary.
Once the third party has manifested his intention to avail himself of the benefit, the parties may not dissolve the contract by mutual consent without the beneficiary's agreement.

Art. 1979. The stipulation may be revoked only by the stipulator
and only before the third party has manifested his intention of availing himself of the benefit.

If the promisor has an interest in performing, however, the stipulation may not be revoked without his consent.

Art. 1980. In case of revocation or refusal of the stipulation, the promisor shall render performance to the stipulator.

Art. 1981. The stipulation gives the third party beneficiary the right to demand performance from the promisor.

Also the stipulator, for the benefit of the third party, may demand performance from the promisor.

Art. 1982. The promisor may raise against the beneficiary such defenses based on the contract as he may have raised against the stipulator.

CHAPTER 8. EFFECTS OF CONVENTIONAL OBLIGATION

SECTION 1. GENERAL EFFECTS OF CONTRACTS

Art. 1983. Contracts have the effect of law for the parties and may be dissolved only through the consent of the parties or on grounds provided by law. Contracts must be performed in good faith.
Art. 1984. Rights and obligations arising from a contract are heritable and assignable unless the law, the terms of the contract or its nature preclude such effects.

Art. 1985. Contracts may produce effects for third parties only when provided by law.

SECTION 2. SPECIFIC PERFORMANCE

Art. 1986. Upon an obligor's failure to perform an obligation to deliver a thing, or not to do an act, or to execute an instrument, the court shall grant specific performance plus damages for delay if the obligee so demands. If specific performance is impracticable, the court may allow damages to the obligee.

Upon a failure to perform an obligation that has another object, such as an obligation to do, the granting of specific performance is at the discretion of the court.

Art. 1987. The obligor may be restrained from doing anything in violation of an obligation not to do.

Art. 1988. A failure to perform an obligation to execute an instrument gives the obligee the right to a judgment that shall stand for the act.

Art. 1984. Les droits et obligations nés d'un contrat sont transmissibles et cessibles à moins que la loi, les termes ou la nature du contrat n'excluent de tels effets.

Art. 1985. Les contrats ne peuvent produire d'effets à l'égard des tiers que dans les cas prévus par la loi.

SECTION 2. DE L’EXÉCUTION EN NATURE

Art. 1986. Lorsque le débiteur manque à l’exécution d’une obligation de délivrer une chose, de ne pas faire ou de signer un acte, le juge doit accorder au créancier qui en fait la demande l’exécution en nature ainsi que des dommages et intérêts moratoires. Lorsque l’exécution en nature est irréalisable, le juge peut attribuer des dommages et intérêts au créancier.

En cas de manquement à l’exécution d’une obligation ayant un autre objet, telle qu’une obligation de faire, l’octroi de l’exécution en nature est laissé à l’appréciation du juge.

Art. 1987. Le débiteur peut se voir interdire tout agissement qui violerait une obligation de ne pas faire.

Art. 1988. Le défaut d’exécution d’une obligation de signer un acte donne au créancier le droit à un jugement qui tiendra lieu de titre.
SECTION 3. PUTTING IN DEFAULT

Art. 1989. Damages for delay in the performance of an obligation are owed from the time the obligor is put in default.
Other damages are owed from the time the obligor has failed to perform.

Art. 1990. When a term for the performance of an obligation is either fixed, or is clearly determinable by the circumstances, the obligor is put in default by the mere arrival of that term. In other cases, the obligor must be put in default by the obligee, but not before performance is due.

Art. 1991. An obligee may put the obligor in default by a written request of performance, or by an oral request of performance made before two witnesses, or by filing suit for performance, or by a specific provision of the contract.

Art. 1992. If an obligee bears the risk of the thing that is the object of the performance, the risk devolves upon the obligor who has been put in default for failure to deliver that thing.

Art. 1993. In case of reciprocal obligations, the obligor of one may not be put in default unless the obligor of the other has failed to perform.
obligor of the other has performed en demeure à moins que le
or is ready to perform his own débiteur de l’autre ait exécuté ou
obligation. soit prêt à exécuter sa propre

SECTION 4. DAMAGES

Art. 1994. An obligor is liable for the damages caused by his failure to perform a conventional obligation.

A failure to perform results from nonperformance, defective performance, or delay in performance.

Art. 1995. Damages are measured by the loss sustained by the obligee and the profit of which he has been deprived.

Art. 1996. An obligor in good faith is liable only for the damages that were foreseeable at the time the contract was made.

Art. 1997. An obligor in bad faith is liable for all the damages, foreseeable or not, that are a direct consequence of his failure to perform.

Art. 1998. Damages for nonpecuniary loss may be recovered when the contract, because of its nature, is intended to gratify a nonpecuniary interest and, because of the circumstances surrounding the formation or the nonperformance of the contract, the obligor knew, or should have known, that his failure to perform

SECTION 4. DES DOMMAGES ET INTÉRÊTS


Le défaut d’exécution s’entend de l’inexécution, de la mauvaise exécution ou du retard dans l’exécution.

Art. 1995. Les dommages et intérêts sont calculés à hauteur de la perte subie par le créancier et du gain dont il a été privé.

Art. 1996. Le débiteur de bonne foi n’est responsable que des dommages qui étaient prévisibles au moment où le contrat a été conclu.

Art. 1997. Le débiteur de mauvaise foi est responsable de tous les dommages, prévisibles ou non, qui sont la conséquence directe de son défaut d’exécution.

Art. 1998. Les dommages et intérêts pour une perte non pécuniaire peuvent être recouvrés lorsque le contrat, de par sa nature, a été conclu pour satisfaire un intérêt non pécuniaire et que, à cause des circonstances qui ont encadré la formation ou l’inexécution du contrat, le débiteur savait, ou aurait dû
would cause that kind of loss.

Regardless of the nature of the contract, these damages may be recovered also when the obligor intended, through his failure, to aggrieve the feelings of the obligee.

Art. 1999. When damages are insusceptible of precise measurement, much discretion shall be left to the court for the reasonable assessment of these damages.

Art. 2000. When the object of the performance is a sum of money, damages for delay in performance are measured by the interest on that sum from the time it is due, at the rate agreed by the parties or, in the absence of agreement, at the rate of legal interest as fixed by R.S. 9:3500.

The obligee may recover these damages without having to prove any loss, and whatever loss he may have suffered he can recover no more. If the parties, by written contract, have expressly agreed that the obligor shall also be liable for the obligee's attorney fees in a fixed or determinable amount, the obligee is entitled to that amount as well. Acts 1984, No. 331, §1, eff. Jan. 1, 1985; Acts 1985, No. 137, §1, eff. July 3, 1985; Acts 1987, §1, eff. July 3, 1985.

NdT: Les Revised Statutes (R.S.), littéralement « lois révisées », sont la compilation des lois de l’état de Louisiane, classées thématiquement dans l’ordre alphabétique.
Art. 2001. Interest on accrued interest may be recovered as damages only when it is added to the principal by a new agreement of the parties made after the interest has accrued.

Art. 2002. An obligee must make reasonable efforts to mitigate the damage caused by the obligor's failure to perform. When an obligee fails to make these efforts, the obligor may demand that the damages be accordingly reduced.

Art. 2003. An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

If the obligee's negligence contributes to the obligor's failure to perform, the damages are reduced in proportion to that negligence.

Art. 2004. Any clause is null that, in advance, excludes or limits déterminable, le créancier a aussi droit à ce montant. [Loi de 1985, n° 137, §1, en vigueur le 3 juillet 1985 ; loi de 1987, n° 883, §1 ; loi de 2004, n° 743, §3, en vigueur le 1er janvier 2005.]

NB : Voir la loi de 1985, n° 137, §2.

Art. 2001. L'intérêt sur les intérêts courus peut être recouvré au titre de dommages et intérêts seulement lorsqu'il s'ajoute au principal par un nouvel accord des parties, conclu après que l'intérêt a commencé à courir.

Art. 2002. Le créancier doit faire des efforts raisonnables pour atténuer le dommage causé par le défaut d'exécution du débiteur. Lorsque le créancier manque à faire ces efforts, le débiteur peut demander que les dommages et intérêts soient réduits en conséquence.

Art. 2003. Le créancier ne peut recouvrer de dommages et intérêts lorsque sa propre mauvaise foi a causé le défaut d'exécution du débiteur ou lorsque, au moment de la conclusion du contrat, il a dissimulé au débiteur des faits dont il savait ou aurait dû savoir qu'ils causeraient un défaut d'exécution.

Lorsque la négligence du créancier contribue au défaut d'exécution du débiteur, les dommages et intérêts sont réduits en proportion de cette négligence.

Art. 2004. Toute clause qui exclut ou limite par avance la
the liability of one party for intentional or gross fault that causes damage to the other party. Any clause is null that, in advance, excludes or limits the liability of one party for causing physical injury to the other party.

SECTION 5. STIPULATED DAMAGES

Art. 2005. Parties may stipulate the damages to be recovered in case of nonperformance, defective performance, or delay in performance of an obligation. That stipulation gives rise to a secondary obligation for the purpose of enforcing the principal one.


Art. 2007. An obligee may demand either the stipulated damages or performance of the principal obligation, but he may not demand both unless the damages have been stipulated for mere delay.

responsabilité de l’une des parties, en cas de faute intentionnelle ou de faute lourde causant un dommage à l’autre partie, est nulle. Toute clause qui exclut ou limite par avance la responsabilité de l’une des parties, pour cause de dommage corporel à l’autre partie, est nulle.

SECTION 5. DES DOMMAGES ET INTÉRÊTS CONVENTIONNELS


Art. 2006. La nullité de l’obligation principale entraîne la nullité de la clause stipulant les dommages et intérêts. La nullité de la clause stipulant les dommages et intérêts n’entraîne pas la nullité de l’obligation principale.

Art. 2007. Le créancier peut demander ou bien l’application de la clause stipulant les dommages et intérêts ou bien l’exécution de l’obligation principale, mais il ne peut demander les deux, à moins que les dommages et intérêts n’aient été stipulés pour simple
Art. 2008. An obligor whose failure to perform the principal obligation is justified by a valid excuse is also relieved of liability for stipulated damages.

Art. 2009. An obligee who avails himself of a stipulated damages clause need not prove the actual damage caused by the obligor's nonperformance, defective performance, or delay in performance.

Art. 2010. An obligee may not avail himself of a clause stipulating damages for delay unless the obligor has been put in default.

Art. 2011. Stipulated damages for nonperformance may be reduced in proportion to the benefit derived by the obligee from any partial performance rendered by the obligor.

Art. 2012. Stipulated damages may not be modified by the court unless they are so manifestly unreasonable as to be contrary to public policy.

CHAPTER 9. DISSOLUTION

Art. 2013. When the obligor fails to perform, the obligee has a right to the judicial dissolution of retard.

Art. 2008. Le débiteur dont le défaut d'exécution de l'obligation principale est justifié par une excuse valable est également libéré de sa responsabilité pour les dommages et intérêts conventionnels.

Art. 2009. Le créancier qui se prévaut de la clause stipulant les dommages et intérêts n’a pas à prouver l’existence du dommage causé par la non-exécution, la mauvaise exécution ou l’exécution tardive par le débiteur.

Art. 2010. Le créancier ne peut se prévaloir de la clause stipulant les dommages et intérêts pour cause de retard à moins que le débiteur n’ait été mis en demeure.

Art. 2011. Les dommages et intérêts conventionnels pour non-exécution peuvent être réduits proportionnellement au bénéfice tiré par le créancier de toute exécution partielle par le débiteur.

Art. 2012. Les dommages et intérêts conventionnels ne peuvent être modifiés par le juge à moins qu’ils soient si manifestement déraisonnables qu’ils en sont contraires à l’ordre public.

CHAPTER 9. DE LA DISSOLUTION

Art. 2013. Lorsque le débiteur n’exécute pas, le créancier peut prétendre à la dissolution
the contract or, according to the circumstances, to regard the contract as dissolved. In either case, the obligee may recover damages.

In an action involving judicial dissolution, the obligor who failed to perform may be granted, according to the circumstances, an additional time to perform.

Art. 2014. A contract may not be dissolved when the obligor has rendered a substantial part of the performance and the part not rendered does not substantially impair the interest of the obligee.

Art. 2015. Upon a party's failure to perform, the other may serve him a notice to perform within a certain time, with a warning that, unless performance is rendered within that time, the contract shall be deemed dissolved. The time allowed for that purpose must be reasonable according to the circumstances.

The notice to perform is subject to the requirements governing a putting of the obligor in default and, for the recovery of damages for delay, shall have the same effect as a putting of the obligor in default.

Art. 2016. When a delayed performance would no longer be of value to the obligee or when it is evident that the obligor will not perform, the obligee may regard the contract as dissolved without

judiciaire du contrat ou, selon les circonstances, considérer le contrat dissous. Dans un cas comme dans l’autre, le créancier peut recouvrer des dommages et intérêts.

Lors d’une action en dissolution judiciaire, le débiteur qui n’a pas exécuté peut se voir accorder, selon les circonstances, un délai supplémentaire d’exécution.

Art. 2014. Le contrat ne peut être dissous lorsque le débiteur en a exécuté une partie substantielle et que la partie non exécutée n’affecte pas substantiellement l’intérêt du créancier.

Art. 2015. En cas d’inexécution par l’une des parties, l’autre peut lui notifier un avis d’exécuter dans un certain délai, avec un avertissement précisant que le contrat sera réputé dissous, à moins que l’exécution ne soit rendue dans ce délai. Le délai accordé à cette fin doit être raisonnable compte tenu des circonstances.

L’avis d’exécution est soumis aux conditions gouvernant la mise en demeure du débiteur défaillant et a le même effet s’agissant du recouvrement de dommages et intérêts pour retard.

Art. 2016. Lorsque l’exécution tardive n’a plus de valeur pour le créancier ou lorsqu’il est évident que le débiteur n’exécutera pas, le créancier peut considérer le contrat dissous, sans notification
any notice to the obligor.

Art. 2017. The parties may expressly agree that the contract shall be dissolved for the failure to perform a particular obligation. In that case, the contract is deemed dissolved at the time it provides for or, in the absence of such a provision, at the time the obligee gives notice to the obligor that he avails himself of the dissolution clause.

Art. 2018. Upon dissolution of a contract, the parties shall be restored to the situation that existed before the contract was made. If restoration in kind is impossible or impracticable, the court may award damages.

If partial performance has been rendered and that performance is of value to the party seeking to dissolve the contract, the dissolution does not preclude recovery for that performance, whether in contract or quasi-contract.

Art. 2019. In contracts providing for continuous or periodic performance, the effect of the dissolution shall not be extended to any performance already rendered.

Art. 2020. When a contract has been made by more than two parties, one party's failure to perform may not cause dissolution of the contract for the other parties, unless the performance that failed was essential to the contract.

Art. 2017. Les parties peuvent convenir expressément que le contrat sera dissous en cas d’inexécution d’une obligation particulière. Dans ce cas, le contrat est réputé dissous au moment convenu ou, à défaut, au moment où le créancier fait savoir au débiteur qu’il invoque la clause de dissolution.

Art. 2018. Lors de la dissolution du contrat, les parties sont remises dans la situation qui existait avant sa conclusion. Lorsque la restitution en nature est impossible ou irréalisable, le juge peut octroyer des dommages et intérêts.

En cas d’exécution partielle et si celle-ci a de la valeur pour la partie qui cherche à dissoudre le contrat, la dissolution n’interdit pas un recours contractuel ou quasi-contractuel relatif à cette exécution.

Art. 2019. Dans les contrats à exécution continue ou périodique, l’effet de la dissolution ne s’étend pas à ce qui a déjà été exécuté.

Art. 2020. Lorsqu’un contrat a été conclu entre plus de deux parties, le défaut d’exécution de l’une ne peut causer la dissolution du contrat à l’égard des autres parties, à moins que l’exécution qui n’a pas eu lieu soit essentielle
Art. 2021. Dissolution of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title. [Acts 2005, No. 169, §2, eff. Jan. 1, 2006; Acts 2005, 1st Ex. Sess., No. 13, §1, eff. Nov. 29, 2005]

Art. 2022. Either party to a commutative contract may refuse to perform his obligation if the other has failed to perform or does not offer to perform his own at the same time, if the performances are due simultaneously.

Art. 2023. If the situation of a party, financial or otherwise, has become such as to clearly endanger his ability to perform an obligation, the other party may demand in writing that adequate security be given and, upon failure to give that security, that party may withhold or discontinue his own performance.

Art. 2024. A contract of unspecified duration may be terminated at the will of either party by giving notice, reasonable in time and form, to the other party.
CHAPTER 10. SIMULATION

Art. 2025. A contract is a simulation when, by mutual agreement, it does not express the true intent of the parties. If the true intent of the parties is expressed in a separate writing, that writing is a counterletter.

Art. 2026. A simulation is absolute when the parties intend that their contract shall produce no effects between them. That simulation, therefore, can have no effects between the parties.

Art. 2027. A simulation is relative when the parties intend that their contract shall produce effects between them though different from those recited in their contract. A relative simulation produces between the parties the effects they intended if all requirements for those effects have been met.

Art. 2028. A. Any simulation, either absolute or relative, may have effects as to third persons. B. Counterletters can have no effects against third persons in good faith. Nevertheless, if the counterletter involves immovable property, the principles of recordation apply with respect to third persons. [Acts 2012, No. 277, §1, eff. Aug. 1, 2012]
CHAPTER 11. NULLITY

Art. 2029. A contract is null when the requirements for its formation have not been met.

Art. 2030. A contract is absolutely null when it violates a rule of public order, as when the object of a contract is illicit or immoral. A contract that is absolutely null may not be confirmed.

Absolute nullity may be invoked by any person or may be declared by the court on its own initiative.

Art. 2031. A contract is relatively null when it violates a rule intended for the protection of private parties, as when a party lacked capacity or did not give free consent at the time the contract was made. A contract that is only relatively null may be confirmed.

Relative nullity may be invoked only by those persons for whose interest the ground for nullity was established, and may not be declared by the court on its own initiative.

Art. 2032. Action for annulment of an absolutely null contract does not prescribe.

Action of annulment of a relatively null contract must be brought within five years from the time the ground for nullity either ceased, as in the case of incapacity

CHAPITRE 11. DE LA NULLITÉ

Art. 2029. Le contrat est nul lorsque les conditions nécessaires à sa formation ne sont pas réunies.

Art. 2030. Le contrat est frappé de nullité absolue lorsqu’il viole une règle d’ordre public ; il en est ainsi lorsque l’objet du contrat est illicite ou immoral. Le contrat frappé de nullité absolue n’est pas susceptible de confirmation.

La nullité absolue peut être invoquée par toute personne ou peut être soulevée d’office par le juge.

Art. 2031. Le contrat est frappé de nullité relative lorsqu’il viole une règle protectrice des intérêts particuliers des parties ; il en est ainsi lorsqu’une partie était privée de capacité ou n’a pas donné de consentement libre au moment de la conclusion du contrat. Le contrat frappé de nullité relative est susceptible de confirmation.

La nullité relative ne peut être invoquée que par les personnes en faveur desquelles la cause de nullité est établie et ne peut être soulevée d’office par le juge.

Art. 2032. L’action en nullité visant un contrat frappé de nullité absolue est imprescriptible.

L’action en nullité visant un contrat frappé de nullité relative doit être exercée dans un délai de cinq ans à compter du moment où
or duress, or was discovered, as in the case of error or fraud.

Nullity may be raised at any time as a defense against an action on the contract, even after the action for annulment has prescribed.

Art. 2033. An absolutely null contract, or a relatively null contract that has been declared null by the court, is deemed never to have existed. The parties must be restored to the situation that existed before the contract was made. If it is impossible or impracticable to make restoration in kind, it may be made through an award of damages.

Nevertheless, a performance rendered under a contract that is absolutely null because its object or its cause is illicit or immoral may not be recovered by a party who knew or should have known of the defect that makes the contract null. The performance may be recovered, however, when that party invokes the nullity to withdraw from the contract before its purpose is achieved and also in exceptional situations when, in the discretion of the court, that recovery would further the interest of justice.

Absolute nullity may be raised as a defense even by a party who, at the time the contract was made, knew or should have known of the cause de nullité ou bien a cessé, comme dans le cas de l’incapacité ou de la violence, ou bien a été découverte, comme dans le cas de l’erreur ou du dol.

La nullité peut être soulevée à tout moment comme moyen de défense lors d’une action ayant trait au contrat, même lorsque l’action en nullité est prescrite.

Art. 2033. Le contrat frappé de nullité absolue, ou le contrat frappé de nullité relative déclaré nul par le juge, est réputé n’avoir jamais existé. Les parties doivent être remises en l’état dans lequel elles se trouvaient avant la conclusion du contrat. Si une telle remise en l’état est impossible ou irréalisable en nature, elle peut se faire par le versement de dommages et intérêts.

Toutefois, l’exécution faite au titre d’un contrat frappé de nullité absolue pour illicéité ou immoralité de l’objet ou de la cause ne peut donner lieu à restitution à la partie qui connaissait ou aurait dû connaître la cause de nullité du contrat. Cependant, l’exécution peut donner lieu à restitution lorsque cette partie invoque la nullité pour se retirer du contrat avant qu’il ait atteint son but, et aussi en cas de circonstances exceptionnelles lorsque le juge estime que cette restitution sert l’intérêt de la justice.

La nullité absolue peut être soulevée comme moyen de défense même par la partie qui, au moment
defect that makes the contract null.

Art. 2034. Nullity of a provision does not render the whole contract null unless, from the nature of the provision or the intention of the parties, it can be presumed that the contract would not have been made without the null provision.

Art. 2035. Nullity of a contract does not impair the rights acquired through an onerous contract by a third party in good faith.

If the contract involves immovable property, the principles of recordation apply to a third person acquiring an interest in the property whether by onerous or gratuitous title. [Acts 2005, No. 169, §2, eff. July 1, 2006; Acts 2005, 1st Ex. Sess., No. 13, §1, eff. Nov. 29, 2005]

CHAPTER 12. REVOCATORY ACTION AND OBLIQUE ACTION

SECTION 1. REVOCATORY ACTION

Art. 2036. An obligee has a right to annul an act of the obligor, or the result of a failure to act of the obligor, made or effected after the right of the obligee arose, that causes or increases the obligor's insolvency. [Acts 2003, No. 552, de la conclusion du contrat, connaissait ou aurait dû connaître la cause de nullité du contrat.

Art. 2034. La nullité d'une clause ne rend pas le contrat nul dans son intégralité à moins qu'il puisse être présumé, de par la nature de la clause ou l'intention des parties, que le contrat n'aurait pas été conclu en l'absence de celle-ci.

Art. 2035. La nullité du contrat n'affecte pas les droits acquis par un tiers de bonne foi en vertu d'un contrat à titre onéreux.

Lorsque le contrat est relatif à un bien immobilier, les principes de la publicité foncière s'appliquent au tiers acquéreur d'un droit sur ce bien, que ce soit à titre onéreux ou gratuit. [Loi de 2005, n° 169, §2, en vigueur le 1er janvier 2006 ; loi de 2005, 1re session extraordinaire, n° 13, §1, en vigueur le 29 novembre 2005.]

CHAPTER 12. DE L’ACTION PAULIENNE ET DE L’ACTION OBLIQUE

SECTION 1. DE L’ACTION PAULIENNE

Art. 2036. Le créancier a le droit d’annuler un acte du débiteur, ou le résultat d’un manquement du débiteur, commis ou réalisé après l’apparition du droit du créancier, qui cause ou aggrave l’insolvabilité du débiteur. [Loi de 2003, n° 552, §1 ; loi de
Art. 2037. An obligor is insolvent when the total of his liabilities exceeds the total of his fairly appraised assets. [Acts 2003, No. 552, §1; Acts 2004, No. 447, §1]

Art. 2038. An obligee may annul an onerous contract made by the obligor with a person who knew or should have known that the contract would cause or increase the obligor's insolvency. In that case, the person is entitled to recover what he gave in return only to the extent that it has inured to the benefit of the obligor's creditors.

An obligee may annul an onerous contract made by the obligor with a person who did not know that the contract would cause or increase the obligor's insolvency, but in that case that person is entitled to recover as much as he gave to the obligor. That lack of knowledge is presumed when that person has given at least four-fifths of the value of the thing obtained in return from the obligor.

Art. 2039. An obligee may attack a gratuitous contract made by the obligor whether or not the other party knew that the contract would cause or increase the obligor's insolvency.
Art. 2040. An obligee may not annul a contract made by the obligor in the regular course of his business.

Art. 2041. The action of the obligee must be brought within one year from the time he learned or should have learned of the act, or the result of the failure to act, of the obligor that the obligee seeks to annul, but never after three years from the date of that act or result.

Art. 2042. In an action to annul either his obligor's act, or the result of his obligor's failure to act, the obligee must join the obligor and the third persons involved in that act or failure to act.

A third person joined in the action may plead discussion of the obligor's assets.

Art. 2043. If an obligee establishes his right to annul his obligor's act, or the result of his obligor's failure to act, that act or result shall be annulled only to the extent that it affects the obligee's right.

SECTION 2. OBLIQUE ACTION

Art. 2044. If an obligor causes or increases his insolvency by failing to exercise a right, the

Art. 2040. Le créancier ne peut pas annuler un contrat conclu par le débiteur dans le cadre habituel de son activité professionnelle.

Art. 2041. L’action du créancier cherchant à annuler le contrat doit être intentée dans un délai d’un an à compter du moment où il a eu connaissance ou aurait dû avoir connaissance de l’acte ou du résultat du manquement du débiteur, sans que cela ne puisse excéder trois ans à compter de la date de cet acte ou de ce résultat.

Art. 2042. Lors d’une action en annulation de l’acte de son débiteur ou du résultat du manquement de son débiteur, le créancier doit joindre à l’action le débiteur et les tiers impliqués dans cet acte ou ce manquement.

Le tiers intervenant à cette action peut demander le bénéfice de discussion des actifs du débiteur.

Art. 2043. Lorsque le créancier fait valoir son droit d’annuler l’acte du débiteur ou le résultat du manquement du débiteur, cet acte ou ce résultat sera annulé seulement dans la mesure où cela affecte le droit du créancier.

SECTION 2. DE L’ACTION OBLIQUE

Art. 2044. Lorsque le débiteur cause ou aggrave son insolvabilité en n’exerçant pas un droit, le
obligee may exercise it himself, unless the right is strictly personal to the obligor.

For that purpose, the obligee must join in the suit his obligor and the third person against whom that right is asserted.

CHAPTER 13.
INTERPRETATION OF CONTRACTS

Art. 2045. Interpretation of a contract is the determination of the common intent of the parties.

Art. 2046. When the words of a contract are clear and explicit and lead to no absurd consequences, no further interpretation may be made in search of the parties' intent.

Art. 2047. The words of a contract must be given their generally prevailing meaning. Words of art and technical terms must be given their technical meaning when the contract involves a technical matter.

Art. 2048. Words susceptible of different meanings must be interpreted as having the meaning that best conforms to the object of the contract.

Art. 2049. A provision susceptible of different meanings must be interpreted with a meaning that renders it effective and not
with one that renders it ineffective.

Art. 2050. Each provision in a contract must be interpreted in light of the other provisions so that each is given the meaning suggested by the contract as a whole.

Art. 2051. Although a contract is worded in general terms, it must be interpreted to cover only those things it appears the parties intended to include.

Art. 2052. When the parties intend a contract of general scope but, to eliminate doubt, include a provision that describes a specific situation, interpretation must not restrict the scope of the contract to that situation alone.

Art. 2053. A doubtful provision must be interpreted in light of the nature of the contract, equity, usages, the conduct of the parties before and after the formation of the contract, and of other contracts of a like nature between the same parties.

Art. 2054. When the parties made no provision for a particular situation, it must be assumed that they intended to bind themselves not only to the express provisions of the contract, but also to whatever the law, equity, or usage regards as implied in a contract of that kind or necessary for the contract to achieve its purpose.

Art. 2050. Chaque stipulation du contrat doit être interprétée à la lumière des autres stipulations de façon à donner à chacune le sens suggéré par le contrat dans son ensemble.

Art. 2051. Même si le contrat est rédigé en des termes généraux, il doit être interprété de façon à couvrir seulement ce qu’il paraît que les parties entendaient inclure.

Art. 2052. Lorsque les parties entendent donner au contrat une portée générale mais, pour éliminer le doute, incluent une stipulation décrivant une situation particulière, l’interprétation ne saurait restreindre la portée du contrat à cette seule situation.

Art. 2053. Une stipulation douteuse doit être interprétée à la lumière de la nature du contrat, de l’équité, des usages, de la conduite des parties avant et après la conclusion du contrat, et des autres contrats de même nature entre les mêmes parties.

Art. 2054. Lorsque les parties n’ont prévu aucune stipulation pour une situation particulière, il doit être présumé qu’elles entendaient s’obligier non seulement aux stipulations expresses du contrat, mais aussi à tout ce que la loi, l’équité, ou les usages considèrent comme implicite dans un contrat de ce type ou nécessaire pour que le
Art. 2055. Equity, as intended in the preceding articles, is based on the principles that no one is allowed to take unfair advantage of another and that no one is allowed to enrich himself unjustly at the expense of another.

Usage, as intended in the preceding articles, is a practice regularly observed in affairs of a nature identical or similar to the object of a contract subject to interpretation.

Art. 2056. In case of doubt that cannot be otherwise resolved, a provision in a contract must be interpreted against the party who furnished its text.

A contract executed in a standard form of one party must be interpreted, in case of doubt, in favor of the other party.

Art. 2057. In case of doubt that cannot be otherwise resolved, a contract must be interpreted against the obligee and in favor of the obligor of a particular obligation.

Yet, if the doubt arises from lack of a necessary explanation that one party should have given, or from negligence or fault of one party, the contract must be interpreted in a manner favorable to the other party whether obligee or obligor.

Arts. 2058 à 2291. [Abrogés par la loi de 1984, n° 331, §1, en vigueur le 1er janvier 1985.]

TITLE V. OBLIGATIONS ARISING WITHOUT AGREEMENT

CHAPTER 1. MANAGEMENT OF AFFAIRS (NEGOTIORUM GESTIO)

Art. 2292. There is a management of affairs when a person, the manager, acts without authority to protect the interests of another, the owner, in the reasonable belief that the owner would approve of the action if made aware of the circumstances.

Art. 2293. A management of affairs is subject to the rules of mandate to the extent those rules are compatible with management of affairs.

Art. 2294. The manager is bound, when the circumstances so warrant, to give notice to the owner that he has undertaken the management and to wait for the directions of the owner, unless there is immediate danger.

Art. 2295. The manager must exercise the care of a prudent administrator and is answerable for any loss that results from his
failure to do so. The court, considering the circumstances, may reduce the amount due the owner on account of the manager's failure to act as a prudent administrator.

Art. 2296. An incompetent person or a person of limited legal capacity may be the owner of an affair, but he may not be a manager. When such a person manages the affairs of another, the rights and duties of the parties are governed by the law of enrichment without cause or the law of delictual obligations.

Art. 2297. The owner whose affair has been managed is bound to fulfill the obligations that the manager has undertaken as a prudent administrator and to reimburse the manager for all necessary and useful expenses.

CHAPTER 2. ENRICHMENT WITHOUT CAUSE

SECTION 1. GENERAL PRINCIPLES

Art. 2298. A person who has been enriched without cause at the expense of another person is bound to compensate that person. The term "without cause" is used in this context to exclude cases in which the enrichment results from a valid juridical act or the law. The
remedy declared here is subsidiary and shall not be available if the law provides another remedy for the impoverishment or declares a contrary rule.

The amount of compensation due is measured by the extent to which one has been enriched or the other has been impoverished, whichever is less.

The extent of the enrichment or impoverishment is measured as of the time the suit is brought or, according to the circumstances, as of the time the judgment is rendered.

SECTION 2. PAYMENT OF A THING NOT OWED

Art. 2299. A person who has received a payment or a thing not owed to him is bound to restore it to the person from whom he received it.

Art. 2300. A thing is not owed when it is paid or delivered for the discharge of an obligation that does not exist.

Art. 2301. A thing is not owed when it is paid or delivered for discharge of an obligation that is subject to a suspensive condition.

Art. 2302. A person who paid the debt of another person in the erroneous belief that he was himself the obligor may reclaim the payment from the obligee. The payment may not be reclaimed to the extent that the obligee, because of the payment, disposed of the

juridique valable ou de la loi. Le recours envisagé ici est subsidiaire et n’est pas ouvert lorsque la loi prévoit un autre recours pour l’appauvrissement ou une disposition contraire.

Le montant de la compensation est calculé compte tenu de l’enrichissement de l’un ou de l’appauvrissement de l’autre, le plus petit des deux étant retenu.

L’étendue de l’enrichissement ou de l’appauvrissement est calculée au moment où le procès est intenté ou, selon les circonstances, au moment où le jugement est rendu.

SECTION 2. DU PAIEMENT DE L’INDU

Art. 2299. Celui qui reçoit un paiement ou une chose qui ne lui est pas dû est tenu d’en faire restitution à celui de qui il l’a reçu.

Art. 2300. Une chose n’est pas due lorsqu’elle est payée ou remise en vue de l’extinction d’une obligation qui n’existe pas.

Art. 2301. Une chose n’est pas due lorsqu’elle est payée ou remise en vue de l’extinction d’une obligation soumise à une condition suspensive.

Art. 2302. La personne qui a payé la dette d’une autre en se croyant par erreur débiteur peut réclamer répétition auprès du créancier. La répétition ne peut être demandée dans la mesure où le créancier, en raison du paiement, a disposé du titre ou a
instrument or released the securities relating to the claim. In such a case, the person who made the payment has a recourse against the true obligor.

Art. 2303. A person who in bad faith received a payment or a thing not owed to him is bound to restore it with its fruits and products.

Art. 2304. When the thing not owed is an immovable or a corporeal movable, the person who received it is bound to restore the thing itself, if it exists. If the thing has been destroyed, damaged, or cannot be returned, a person who received the thing in good faith is bound to restore its value if the loss was caused by his fault. A person who received the thing in bad faith is bound to restore its value even if the loss was not caused by his fault.

Art. 2305. A person who in good faith alienated a thing not owed to him is only bound to restore whatever he obtained from the alienation. If he received the thing in bad faith, he owes, in addition, damages to the person to whom restoration is due.


Art. 2314. [Repealed. Acts 1979, No. 180, §3]
CHAPTER 3. OF OFFENSES AND QUASI OFFENSES

Art. 2315. A. Every act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.

B. Damages may include loss of consortium, service, and society, and shall be recoverable by the same respective categories of persons who would have had a cause of action for wrongful death of an injured person. Damages do not include costs for future medical treatment, services, surveillance, or procedures of any kind unless such treatment, services, surveillance, or procedures are directly related to a manifest physical or mental injury or disease. Damages shall include any sales taxes paid by the owner on the repair or replacement of the property damaged. [Amended by Acts 1884, No. 71; Acts 1908, No. 120, §1; Acts 1918, No. 159, §1; Acts 1932, No. 159, §1; Acts 1948, No. 333, §1; Acts 1960, No. 30, §1; Acts 1982, No. 202, §1; Acts 1984, No. 397, §1; Acts 1986, No. 211, §1; Acts 1999, No. 989, §1, eff. July 9, 1999; Acts 2001, No. 478, §1]

Art. 2315.1. A. If a person who has been injured by an offense or quasi offense dies, the right to

CHAPITRE 3. DES DÉLITS ET QUASI-DÉLITS

Art. 2315. A. Tout fait quelconque de l’homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé à le réparer.

B. Les dommages et intérêts peuvent inclure la perte de la compagnie, de l’affectation et des services conjuguels ou familiaux et peuvent être recouvrés par les mêmes catégories de personnes qui auraient le droit d’agir du fait d’un acte délictuel ayant entraîné la mort de la victime d’un dommage. Les dommages et intérêts n’incluent pas le coût des traitements, des services, du suivi, ou des actes médicaux à venir, quelle que soit leur nature, sauf lorsqu’ils sont directement et manifestement liés à une atteinte à l’intégrité physique ou mentale, ou à une maladie physique ou mentale. Les dommages et intérêts doivent inclure toutes les taxes payées par le propriétaire pour la réparation ou le remplacement du bien endommagé. [Amendé par la Loi de 1884, n° 71 ; Loi de 1908, n° 120, §1 ; Loi de 1918, n° 159, §1 ; Loi de 1932, n° 159, §1 ; Loi de 1948, n° 333, §1 ; Loi de 1960, n° 30, §1 ; Loi de 1982, n° 202, § ; Loi de 1984, n° 397, §1 ; Loi de 1986, n° 211, §1 ; Loi de 1999, n° 989, §1, en vigueur le 9 juillet 1999 ; Loi de 2001, n° 478, §1.]

Art. 2315.1. A. Lorsqu’une personne qui a été victime d’un
recover all damages for injury to that person, his property or otherwise, caused by the offense or quasi offense, shall survive for a period of one year from the death of the deceased in favor of:

(1) The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

(2) The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

(3) The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

(4) The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

B. In addition, the right to recover all damages for injury to the deceased, his property or otherwise, caused by the offense or quasi offense, may be urged by the deceased's succession representative in the absence of any class of beneficiary set out in Paragraph A.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this
D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. [Acts 1986, No. 211, §2; Acts 1987, No. 675, §1; Acts 1997, No. 1317, §1, eff. July 15, 1997]

Art. 2315.2. A. If a person dies due to the fault of another, suit may be brought by the following persons to recover damages which they sustained as a result of the death:

1. The surviving spouse and child or children of the deceased, or either the spouse or the child or children.

2. The surviving father and mother of the deceased, or either of them if he left no spouse or child surviving.

3. The surviving brothers and sisters of the deceased, or any of them, if he left no spouse, child, or parent surviving.

4. The surviving grandfathers and grandmothers of the deceased, or any of them, if he left no spouse, child, parent, or sibling surviving.

E. Aux fins du présent article, le père ou la mère qui a abandonné le défunt pendant sa minorité est réputé ne pas lui avoir survécu. [Loi de 1986, n° 211, §2 ; Loi de 1987, n° 675, §1 ; Loi de 1997, n° 1317, §1, en vigueur le 15 juillet 1997.]
B. The right of action granted by this Article prescribe one year from the death of the deceased.

C. The right of action granted under this Article is heritable, but the inheritance of it neither interrupts nor prolongs the prescriptive period defined in this Article.

D. As used in this Article, the words "child", "brother", "sister", "father", "mother", "grandfather", and "grandmother" include a child, brother, sister, father, mother, grandfather, and grandmother by adoption, respectively.

E. For purposes of this Article, a father or mother who has abandoned the deceased during his minority is deemed not to have survived him. [Acts 1986, No. 211, §2; Acts 1997, No. 1317, §1, eff. July 15, 1997]

Art. 2315.3. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through an act of pornography involving juveniles, as defined by R.S. 14:81.1, regardless of whether the defendant was prosecuted for

parent, ni frère, ni sœur survivant.
B. Le droit d’action accordé par cet article se prescrit par un délai d’un an à compter de la date du décès du défunt.
C. Le droit d’action accordé en vertu de cet article est transmissible, mais sa transmission n’interrompt ni ne prolonge le délai de prescription prévu par le présent article.
E. Aux fins du présent article, le père ou la mère qui a abandonné le défunt pendant sa minorité est réputé ne pas lui avoir survécu. [Loi de 1986, n° 211, §2 ; Loi de 1997, n° 1317, §1, en vigueur le 15 juillet 1997.]

Art. 2315.3. Des dommages et intérêts exemplaires peuvent être alloués en plus des dommages et intérêts généraux et spéciaux s’il est prouvé que les préjudices sur lesquels l’action est fondée ont été causés par une ignorance délibérée et imprudente des droits et de la sécurité de la personne du fait d’un acte de pornographie impliquant des jeunes, tel que défini par les Revised Statutes\(^7\),

\(^7\) NdT : supra note 6.
his acts. [Acts 2009, No. 382, §1]

Art. 2315.4. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton or reckless disregard for the rights and safety of others by a defendant whose intoxication while operating a motor vehicle was a cause in fact of the resulting injuries. [Acts 1984, No. 511, §1]

Art. 2315.5. Notwithstanding any other provision of law to the contrary, the surviving spouse, parent, or child of a deceased, who has been convicted of a crime involving the intentional killing or attempted killing of the deceased, or, if not convicted, who has been judicially determined to have participated in the intentional, unjustified killing or attempted killing of the deceased, shall not be entitled to any damages or proceeds in a survival action or an action for wrongful death of the deceased, or to any proceeds distributed in settlement of any such cause of action. In such case, the other child or children of the deceased, or if the deceased left no

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8 NdT : Le texte cité est applicable aux mineurs de moins de dix-sept ans.
other child surviving, the other survivors enumerated in the applicable provisions of Articles 2315.1(A) and 2315.2(A), in order of preference stated, may bring a survival action against such surviving spouse, parent, or child, or an action against such surviving spouse, parent, or child for the wrongful death of the deceased.

An executive pardon shall not restore the surviving spouse's, parent's, or child's right to any damages or proceeds in a survival action or an action for wrongful death of the deceased. [Acts 1987, No. 690, §1; Acts 1991, No. 180, §1]

Art. 2315.6. A. The following persons who view an event causing injury to another person, or who come upon the scene of the event soon thereafter, may recover damages for mental anguish or emotional distress that they suffer as a result of the other person's injury:

(1) The spouse, child or children, and grandchild or grandchildren of the injured person, or either the spouse, the child or children, or the grandchild or grandchildren of the injured person.

Art. 2315.6. A. Les personnes suivantes, lorsqu'elles sont témoins d'un événement causant un dommage à une autre personne, ou qu'elles se trouvent sur le lieu de l'événement peu de temps après, peuvent obtenir des dommages et intérêts pour le traumatisme mental ou la détresse émotionnelle dont elles souffrent du fait du préjudice subi par cette autre personne:

(1) Le conjoint, l'enfant ou les enfants, et les petits-enfants de la victime, ou soit le conjoint, l'enfant ou les enfants, soit les petits-
(2) The father and mother of the injured person, or either of them.

(3) The brothers and sisters of the injured person or any of them.

(4) The grandfather and grandmother of the injured person, or either of them.

B. To recover for mental anguish or emotional distress under this Article, the injured person must suffer such harm that one can reasonably expect a person in the claimant's position to suffer serious mental anguish or emotional distress from the experience, and the claimant's mental anguish or emotional distress must be severe, debilitating, and foreseeable.

Damages suffered as a result of mental anguish or emotional distress for injury to another shall be recovered only in accordance with this Article. [Acts 1991, No. 782, §1]

Art. 2315.7. In addition to general and special damages, exemplary damages may be awarded upon proof that the injuries on which the action is based were caused by a wanton and reckless disregard for the rights and safety of the person through criminal sexual activity which occurred when the victim was seventeen years old or

enfants de la victime.

(2) Le père et la mère de la victime ou l’un des deux.

(3) Les frères et sœurs de la victime ou l’un d’entre eux.

(4) Les grand-père et grand-mère de la victime ou l’un des deux.

B. Afin d’obtenir réparation du traumatisme mental ou de la détresse émotionnelle aux termes du présent article, la victime du dommage doit souffrir d’un préjudice tel qu’on puisse raisonnablement s’attendre à ce qu’une personne dans la position du demandeur subisse un traumatisme mental ou une détresse émotionnelle suite à cette expérience. De plus, le traumatisme mental ou la détresse émotionnelle du demandeur doit être sévère, invalidante et prévisible.

Le préjudice résultant du traumatisme mental ou de la détresse émotionnelle pour dommage subi par autrui ne peut être réparé que sur la base du présent article. [Loi de 1991, no 782, §1.]

Art. 2315.7. Des dommages et intérêts exemplaires peuvent être alloués en plus des dommages et intérêts généraux et spéciaux s’il est prouvé que les préjudices sur lesquels l’action est fondée ont été causés par une ignorance délibérée et imprudente des droits et de la sécurité de la personne du fait d’une infraction de nature sexuelle qui a eu lieu alors que la
younger, regardless of whether the defendant was prosecuted for his or her acts. The provisions of this Article shall be applicable only to the perpetrator of the criminal sexual activity. [Acts 1993, No. 831, §1, eff. June 22, 1993]

Art. 2316. Every person is responsible for the damage he occasions not merely by his act, but by his negligence, his imprudence, or his want of skill.

Art. 2317. We are responsible, not only for the damage occasioned by our own act, but for that which is caused by the act of persons for whom we are answerable, or of the things which we have in our custody. This, however, is to be understood with the following modifications.

Art. 2317.1. The owner or custodian of a thing is answerable for damage occasioned by its ruin, vice, or defect, only upon a showing that he knew or, in the exercise of reasonable care, should have known of the ruin, vice, or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 831, §1, eff. June 22, 1993]
Art. 2318. The father and the mother are responsible for the damage occasioned by their minor child, who resides with them or who has been placed by them under the care of other persons, reserving to them recourse against those persons. However, the father and mother are not responsible for the damage occasioned by their minor child who has been emancipated by marriage, by judgment of full emancipation, or by judgment of limited emancipation that expressly relieves the parents of liability for damages occasioned by their minor child.

The same responsibility attaches to the tutors of minors. [Acts 1984, No. 578, §1; Acts 2008, No. 786, §1, eff. Jan. 1, 2009]

Art. 2319. Neither a curator nor an undercurator is personally responsible to a third person for a delictual obligation of the interdict in his charge solely by reason of his office. [Acts 2000, 1st Ex. Sess., No. 25, §2, eff. July 1, 2001]

Art. 2320. Masters and employers are answerable for the damage occasioned by their servants and overseers, in the exercise of the functions in which they are employed.

Teachers and artisans are answerable for the damage caused extraordinary, n° 1, §1, en vigueur le 16 avril 1996.]

Art. 2318. Le père et la mère sont responsables du dommage causé par leur enfant mineur, qui réside avec eux ou qui a été placé par eux sous la garde d’autres personnes, sauf leur recours contre ces personnes. Cependant, le père et la mère ne sont pas responsables du dommage causé par leur enfant mineur qui a été émancipé par mariage, par jugement de pleine émancipation ou par jugement d’émancipation limitée, relevant expressément les parents de leur responsabilité pour les dommages causés par leur enfant mineur.

La même responsabilité a lieu à l’égard des tuteurs des mineurs. [Loi de 1984, n° 578, §1 ; Loi de 2008, n° 786, §1, en vigueur le 1er janvier 2009.]

Art. 2319. Ni un curateur ni un subrogé curateur ne peut être personnellement responsable auprès d’un tiers du fait délictuel de l’incapable dont il a la charge, au seul motif de sa fonction. [Loi de 2000, 1re session extraordinaire, n° 25, §2, en vigueur le 1er juillet 2001.]

Art. 2320. Les maîtres et les commettants sont responsables du dommage causé par leurs domestiques et préposés, dans l’exercice actuel des fonctions auxquelles ils les emploient.

Les enseignants et les artisans sont responsables du dommage causé par leurs élèves et apprentis,
by their scholars or apprentices, while under their superintendence.

In the above cases, responsibility only attaches, when the masters or employers, teachers and artisans, might have prevented the act which caused the damage, and have not done it.

The master is answerable for the offenses and quasi-offenses committed by his servants, according to the rules which are explained under the title: *Of quasi-contracts, and of offenses and quasi-offenses*.

Art. 2321. The owner of an animal is answerable for the damage caused by the animal. However, he is answerable for the damage only upon a showing that he knew or, in the exercise of reasonable care, should have known that his animal's behavior would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nonetheless, the owner of a dog is strictly liable for damages for injuries to persons or property caused by the dog and which the owner could have prevented and which did not result from the injured person's provocation of the dog. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an

pending le temps qu’ils sont sous leur surveillance.

La responsabilité ci-dessus n’a lieu que quand les maîtres ou commettants, enseignants ou artisans, ont pu empêcher le fait qui a causé le dommage, et ne l’ont point empêché.

Le maître est responsable des délits et quasi-délits commis par ses domestiques, en vertu des règles exposées sous le titre : des quasi-contrats, et des délits et quasi-délits.

Art. 2321. Le propriétaire d’un animal est responsable du dommage que l’animal a causé. Cependant, il n’est responsable du dommage que s’il est démontré : qu’il savait ou aurait dû savoir en agissant avec une diligence raisonnable que le comportement de son animal causerait un dommage ; que le dommage aurait pu être évité avec une diligence raisonnable ; et qu’il n’a pas agi avec la diligence raisonnable requise. Néanmoins, le propriétaire d’un chien est présumé responsable du préjudice matériel et corporel causé par le chien dès lors que le propriétaire aurait pu l’éviter et qu’il ne résultait pas de la provocation du chien par la victime. Le cas échéant, rien dans le présent article n’interdit au juge d’appliquer la règle *res ipsa*

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Art. 2322. The owner of a building is answerable for the damage occasioned by its ruin, when this is caused by neglect to repair it, or when it is the result of a vice or defect in its original construction. However, he is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known of the vice or defect which caused the damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case. [Acts 1996, 1st Ex. Sess., No. 1, §1, eff. April 16, 1996]

Art. 2322. Le propriétaire d’un bâtiment est responsable du dommage causé par sa ruine, lorsqu’elle est arrivée par une suite du défaut d’entretien, ou par le vice de sa construction. Cependant, il n’est responsable du dommage que s’il est démontré : qu’il connaissait ou aurait dû connaître en agissant avec une diligence raisonnable, le vice ou le défaut qui a causé le dommage ; que le dommage aurait pu être évité en agissant avec une diligence raisonnable ; et qu’il n’a pas agi avec la diligence raisonnable requise. Le cas échéant, rien dans le présent article n’interdit au juge d’appliquer la règle res ipsa loquitur. [Loi de 1996, 1ère session extraordinaire, n° 1, §1, en vigueur le 16 avril 1996.]

Art. 2322.1. A. The screening, procurement, processing, distribution, transfusion, or medical use of human blood and blood components of any kind and the transplantation or medical use of any human organ, human tissue, or approved animal tissue by physicians, dentists, hospitals, hospital blood banks, and nonprofit

NdT : Le mot original n’est pas traduit. Absent de la version française d’origine, ce mot fut ajouté dans la version anglaise par le traducteur du Code civil de 1825, « construction » ayant un sens plus large en anglais, recouvrant construction et rénovation. Il a été maintenu par la suite.
community blood banks is declared
to be, for all purposes whatsoever,
the rendition of a medical service
by each and every physician,
dentist, hospital, hospital blood
bank, and nonprofit community
blood bank participating therein,
and shall not be construed to be
and is declared not to be a sale.
Strict liability and warranties of
any kind without negligence shall
not be applicable to the
aforementioned who provide these
medical services.

B. In any action based in
whole or in part on the use of
blood or tissue by a healthcare
provider, to which the provisions
of Paragraph A do not apply, the
plaintiff shall have the burden of
proving all elements of his claim,
including a defect in the thing sold
and causation of his injuries by the
defect, by a preponderance of the
evidence, unaided by any
presumption.

C. The provisions of
Paragraphs A and B are procedural
and shall apply to all alleged
causes of action or other act,
omission, or neglect without regard
to the date when the alleged cause
of action or other act, omission, or
neglect occurred.
D. As used in this Article:
(1) "Healthcare provider" includes all individuals and entities listed in R.S. 9:2797, this Article, R.S. 40:1299.39 and R.S. 40:1299.41 whether or not enrolled with the Patient's Compensation Fund.

(2) "The use of blood or tissue" means the screening, procurement, processing, distribution, transfusion, or any medical use of human blood, blood products, and blood components of any kind and the transplantation or medical use of any human organ, human or approved animal tissue, and tissue products or tissue components by any healthcare provider. [Added by Acts 1981, No. 611, §1; Acts 1990, No. 1091, §1; Acts 1999, No. 539, §2, eff. June 30, 1999]

Art. 2323. A. In any action for damages where a person suffers injury, death, or loss, the degree or percentage of fault of all persons causing or contributing to the injury, death, or loss shall be determined, regardless of whether the person is a party to the action or a nonparty, and regardless of the person's insolvency, ability to pay, immunity by statute, including but not limited to the provisions of article :


(2) « L'utilisation de sang ou tissu » s'entend comme le dépistage, l'approvisionnement, le conditionnement, la distribution, la transfusion, ou toute utilisation médicale de sang humain ou de composants sanguins de toute sorte ainsi que la transplantation ou l'utilisation médicale de tout organe ou tissu humain, ou tissu animal approuvé, et produits à base de tissu ou composants de tissu par tout professionnel de santé. [Ajouté par la Loi de 1981, n° 611, §1 ; Loi de 1990, n° 1091, §1 ; Loi de 1999, n° 539, §2, en vigueur le 30 juin 1999.

Art. 2323. A. Dans toute action en réparation suite à un dommage, un décès ou une perte, le degré ou le pourcentage de faute de toute personne ayant causé le dommage, le décès ou la perte, ou y ayant contribué, doit être déterminé, que la personne soit partie à l'action ou non, et sans tenir compte de son insolvabilité, de sa capacité à payer, d'une immunité prévue par la loi, qu'elle relève ou non des dispositions de l'article 23:1032.

11 NdT : supra note 6.
R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable. If a person suffers injury, death, or loss as the result partly of his own negligence and partly as a result of the fault of another person or persons, the amount of damages recoverable shall be reduced in proportion to the degree or percentage of negligence attributable to the person suffering the injury, death, or loss.

B. The provisions of Paragraph A shall apply to any claim for recovery of damages for injury, death, or loss asserted under any law or legal doctrine or theory of liability, regardless of the basis of liability.

C. Notwithstanding the provisions of Paragraphs A and B, if a person suffers injury, death, or loss as a result partly of his own negligence and partly as a result of the fault of an intentional tortfeasor, his claim for recovery of damages shall not be reduced.


Art. 2324. A. He who conspires with another person to commit an intentional or willful act

[12 NdT : supra note 6.]
is answerable, in solido, with that person, for the damage caused by such act.

B. If liability is not solidary pursuant to Paragraph A, then liability for damages caused by two or more persons shall be a joint and divisible obligation. A joint tortfeasor shall not be liable for more than his degree of fault and shall not be solidarily liable with any other person for damages attributable to the fault of such other person, including the person suffering injury, death, or loss, regardless of such other person's insolvency, ability to pay, degree of fault, immunity by statute or otherwise, including but not limited to immunity as provided in R.S. 23:1032, or that the other person's identity is not known or reasonably ascertainable.

C. Interruption of prescription against one joint tortfeasor is effective against all joint tortfeasors. [Amended by Acts 1979, No. 431, §1; Acts 1987, No. 373, §1; Acts 1988, No. 430, §1; Acts 1996, 1st Ex. Sess., No. 3, §1, eff. April 16, 1996]
Art. 2324.1. In the assessment of damages in cases of offenses, quasi offenses, and quasi contracts, much discretion must be left to the judge or jury. [Acts 1984, No. 331, §3, eff. Jan. 1, 1985]

Art. 2324.2. A. When the recovery of damages by a person suffering injury, death, or loss is reduced in some proportion by application of Article 2323 or 2324 and there is a legal or conventional subrogation, then the subrogee's recovery shall be reduced in the same proportion as the subrogor's recovery.

B. Nothing herein precludes such persons and legal or conventional subrogees from agreeing to a settlement which would incorporate a different method or proportion of subrogee recovery for amounts paid by the legal or conventional subrogee under the Louisiana Worker's Compensation Act, R.S. 23:1021, et seq. [Acts 1989, No. 771, §1, eff. July 9, 1989]

extraordinaire, n° 3, §1, en vigueur le 16 avril 1996.]

Art. 2324.1. Un large pouvoir d’appréciation est laissé au juge ou au jury lors de l’évaluation des dommages et intérêts en cas de délit, quasi-délit et quasi-contrat. [Loi de 1984, n° 331, §3, en vigueur le 1er janvier 1985.]

Art. 2324.2. A. Lorsque l’obtention de dommages et intérêts par la victime d’un dommage, d’un décès ou d’une perte est réduite dans la proportion prévue aux articles 2323 ou 2324 et qu’il y a subrogation légale ou conventionnelle, l’indemnisation du subrogé est alors réduite dans la même proportion que celle du subrogant.

B. Rien dans le présent article n’interdit auxdites personnes ni aux subrogés légaux ou conventionnels de convenir d’une transaction reposant sur une autre méthode ou une autre proportion d’indemnisation subrogatoire pour les montants payés par les subrogés légaux ou conventionnels en application du Louisiana Worker’s Compensation Act (articles 23:1021 et suivants des Revised Statutes)14. [Loi de 1989, n° 771, §1, en vigueur le 9 juillet 1989.]

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14 NdT : Loi louisianaise sur l’indemnisation des accidentés du travail, figurant aux Revised Statutes (R.S.), supra note 6.
THE CASE FOR AN ACTION IN TORT TO RESTRICT THE EXCESSIVE PUMPING OF GROUNDWATER IN LOUISIANA

John B. Tarlton*

Water is the oil of the 21st century.1 It is a vital resource in the global economy with a multitude of uses, and the demand for water continues to increase worldwide.2 Almost all of the planet’s freshwater readily available for human use is groundwater.3

Louisiana, along with the rest of the United States, is heavily dependent on groundwater as a natural resource.4 Louisiana’s public policy regarding its natural resources is that they should be “protected, conserved, and replenished insofar as possible and consistent with the health, safety, and welfare of the people.”5

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* Candidate, J.D. and Graduate Diploma in Comparative Law, LSU Law Center (2013); B.S., Texas A&M University (2008). I send my deepest thanks and gratitude to the following people for their support and helpful comments: Professor Olivier Moréteau, Professor John Randall Trahan, Daniel On, Jennifer Lane, and Joseph Manning.

2. Running Dry, THE ECONOMIST, id.
4. Louisiana uses approximately 1.6 billion gallons of groundwater every day for various uses. Louisiana Governor Bobby Jindal and the Louisiana Department of Natural Resources have recently taken steps to emphasize the importance of groundwater as a natural resource in the state and to encourage groundwater conservation. Louisiana Department of Natural Resources, DNR Secretary Angelle Commemorates 2011 Ground Water Awareness Week (Mar. 7, 2011), http://dnr.louisiana.gov/index.cfm?md=newsroom&tmp=detail&aid=841; “In the United States [groundwater] is the source of drinking water for about half the total population and nearly all of the rural population, and it provides over 50 billion gallons per day for agricultural needs.” United States Geological Survey, USGS Fact Sheet-103-03: Ground-Water Depletion Across the Nation at 1 (November 2003), http://pubs.usgs.gov/fs/fs-103-03/JBartolinoFS%28282.13.04%29.pdf
5. LA. CONST. art. IX, §1.
Achieving the goals of protection, conservation, and replenishment of natural resources such as groundwater requires a balancing of interests. These interests include the private interests involved in using groundwater for productive industrial, agricultural, and domestic purposes, as well as the public interests in using groundwater for municipal purposes and in maintaining groundwater as a renewable resource for future generations. As groundwater consumption increases, these interests will be increasingly brought into conflict with each other as they compete for the same resource.

Groundwater depletion has been a serious problem in Louisiana for years. The current legal regime in Louisiana does not adequately protect against this problem. It is necessary for the legal system in Louisiana to develop a more effective means of resolving disputes regarding shared groundwater resources in order to protect the long-term sustainability of the state’s aquifers. Part of the solution may be to recognize a cause of action that enables private individuals and businesses negatively affected by a neighbor’s excessive groundwater withdrawal to enjoin and/or impose liability for the excessive use. This cause of action is

6. As of the year 2000, the USGS estimated that Louisiana used groundwater in the following ways: Municipal use - 349 million gal./day, Domestic use - 41.2 million gal./day, Irrigation - 791 million gal./day, Livestock - 4.03 million gal./day, Aquaculture - 128 million gal./day, Industrial - 285 million gal./day, Thermo-electric power - 28.4 million gal./day. Susan S. Hutson, Nancy L. Barber et al., USGS, Estimated Use of Water in the United States in 2000 Table 4 at 9 (2004), http://pubs.usgs.gov/circ/2004/circ1268/pdf/circular1268.pdf,

grounded in Louisiana Civil Code articles 667-669, which place limitations on certain uses of property which cause injury to one’s neighbors.

Part I of this Essay explores the problem of groundwater depletion in Louisiana and explains why current regulatory law is insufficient to deal with this problem. Part II begins by highlighting two different concerns: who owns the groundwater, and who has the right to explore and pump for groundwater. Part II concludes by demonstrating that the right to explore and pump groundwater from underneath one’s land is clearly established by the Louisiana Mineral Code and that this right is being jeopardized by the current unsustainable rate of groundwater decline. With a view towards curtailing unsustainable use of groundwater, Part III outlines the various ways in which uses of property can be legally restricted in order to protect the rights of others. Part III pays special attention to Louisiana Civil Code articles 667-669, which provide some basic guidelines for when uses of property can be restricted in Louisiana. Part IV explains how these Code articles can be interpreted so as to establish a tort claim for excessive pumping of groundwater, and describes what remedies might be available to a plaintiff who is successful in bringing such a claim. This Essay concludes by arguing that a tort action for excessive pumping of groundwater is both well-founded in Louisiana law and much needed to slow down the alarming rate of groundwater decline in the state.

I. BACKGROUND OF THE GROUNDWATER PROBLEM

Although Louisiana is typically considered a water-rich state, there has been growing concern in recent years that increased water consumption will threaten the quality and sustainability of the state’s water resources.8 Scientific studies have confirmed that

water use in Louisiana has grown significantly in recent decades.9 This growth in water use has had substantial effects on groundwater.10 Most groundwater used by humans is stored in aquifers, which are underground layers of porous rock, sand, or gravel.11 Aquifers are naturally recharged as surface water percolates down through the soil and flows into the aquifer.12 Thus, the amount of water in an aquifer will naturally vary based on seasonal climate patterns, and the water table in an aquifer will naturally rise and fall.13

Human activities, however, also affect groundwater levels.14 When groundwater is pumped from a well, “water levels in the aquifer are drawn down, and a cone-shaped depression is formed on the water-level surface of the aquifer.”15 If groundwater withdrawals in an area exceed the amount of water that is naturally recharged, water levels will inevitably decline. The decline in groundwater levels may be so significant that shallower wells suffer from a loss of well productivity, or even dry up entirely.16 When the operator of a shallow well sees his production go down due to aquifer decline, he is faced with two unpleasant options: 1) increase the depth of his own well, thereby incurring significant

9. Id.
10. Id. at 6. Several large and important aquifer systems in Louisiana have experienced declines in groundwater levels of 1ft/yr or more in recent years.
12. Id.
14. Id. at 6. Seasonal patterns in agriculture and industry, as well as long-term changes in pumping patterns may affect groundwater levels.
15. Id. at 6. The so-called cone of depression may be very localized, or it may extend for many miles in an area where several high capacity wells are operating.
16. Id. at 6. “When water levels continuously decline, a level may be reached that affects well use; shallower wells in the area can go dry or, more likely, the water level drops below the pump inlet. When this happens, even though the situation may be temporary, concern about the use, allocation, and availability of ground-water resources dramatically increases.”
expense and further contributing to the overall problem of aquifer decline, or 2) do nothing and watch his well slowly dry up.

Recognizing the importance of maintaining the health and productivity of Louisiana’s aquifers, the legislature in 2001 gave the Department of Natural Resources (“DNR”), through the Office of Conservation (“Office”), authority to regulate groundwater use on a statewide-basis. The Office’s activities to date concerning groundwater conservation have focused on identifying “Areas of Ground Water Concern.” The Office has also begun to develop a statewide “ground water resources management program” with an emphasis on “alternative supplies and technologies.”

Statewide regulations issued by the Office allow someone who is negatively affected by groundwater pumping in his area to file an application with the Commissioner of Conservation to declare an area of groundwater concern. Upon reviewing the application, other available data, and after the opportunity for a public hearing, if the Commissioner determines that “unacceptable environmental, economic, social, or health impacts” have been caused by water level decline, he has the authority to designate an area of groundwater concern. If the Commissioner chooses to do so, he will then issue a “recommended plan to preserve and manage the groundwater resources” of the designated area. To date, only certain areas of the Sparta Aquifer in north Louisiana have been recognized as areas of groundwater concern.

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18. Id.
19. Id.
20. LA. ADMIN. CODE tit. 43, §301. “Any owner of a well that is significantly and adversely affected as a result of the movement of salt water front, water level decline, or subsidence in or from the aquifer drawn on by such well shall have the right to file an application to request the commissioner to declare that an area underlain by such aquifer(s) is a an area of ground water concern.”
22. LA. ADMIN. CODE tit. 43, §505.
23. Areas of Ground Water Concerns, supra note 17.
This regulatory regime does not sufficiently protect the state’s groundwater. State regulatory agencies like the DNR have limited financial resources with which to handle numerous responsibilities. As a result, protection of the state’s aquifers is not always given top priority. This problem is illustrated by the fact that only the Sparta Aquifer has so far been declared an area of groundwater concern, while significant decline in groundwater levels has continued to be a problem in many other parts of the state.24 The problem of limited governmental resources can be addressed in part by shifting some of the responsibility for groundwater protection to private parties. Moreover, while the DNR has the ability to declare an area of groundwater concern, this remedy is unlikely to apply to those landowners who find themselves in a very localized area of groundwater decline. Even if a landowner is able to successfully petition the DNR to declare an area of concern, it remains to be seen whether the management strategies employed by the department in such an area will adequately protect all interests involved.

Recognizing a cause of action in tort to enjoin a neighbor’s excessive use of groundwater would allow private parties to play a more active role in protecting the public interest while simultaneously pursuing their own interests in conserving groundwater resources. Furthermore, the potential for tort liability may prove to be a more effective deterrent to excessive use of groundwater than the current regulatory regime.25

II. LEGAL RIGHTS IN GROUNDWATER

Groundwater is a valuable resource for municipal, agricultural, industrial, and domestic uses.26 Encouraging the sustainable use of

25. Although beyond the scope of this essay, improvements in the regulatory regime that go hand-in-hand with tort law could go far in solving the groundwater problem.
26. See discussion supra part I.
this resource is good policy. With this in mind, it is important to emphasize the distinction between two separate legal issues: the question of who owns groundwater in Louisiana, and the question of who has the right to pump for groundwater in Louisiana. These two inquiries do not result in identical answers. As will be shown, one need not own groundwater located in an aquifer in order to have a right to pump for it. On the contrary, the right to pump for groundwater creates the potential to eventually become the owner of groundwater by reducing it to one’s possession.

A. Ownership of Groundwater in Louisiana: The Rule of Capture

Louisiana is a state where the ownership of groundwater is determined by the “rule of capture.”27 The rule of capture is defined as a principle of water law whereby a surface landowner can extract and appropriate all the groundwater beneath the land, even if doing so drains away groundwater to the point of drying up springs and wells from which other landowners benefit.28 Under the rule of capture, a landowner has no claim of ownership over the groundwater underlying his land until he pumps the water or otherwise reduces it to his possession. In this regard the legal regime governing ownership of groundwater differs from the doctrine of riparian rights which governs ownership of running surface water. In Louisiana, all running surface water is owned by the state,29 and riparian land owners are only given a right to the reasonable use of that water.30 When a landowner appropriates surface water that runs through or adjacent to his land, he does not thereby become the owner and is required to return the water to its channel after its use has been served.31 A landowner who acquires

29. LA. CIV. CODE art. 450.
31. See, e.g., Klebba, supra note 27 at 1793; LA. CIV. CODE art. 657-58.
ownership over groundwater by extracting it owes no corresponding duty to return the used water to the aquifer for the benefit of neighboring landowners.

The rule of capture has its origins in the common law where it is often referred to as the “English Rule,” although it has been adopted by Louisiana courts dating at least as far back as the Second Circuit’s decision in *Adams v. Grigsby.* In *Adams,* plaintiff landowners complained of damage resulting from reduced access to groundwater because of the neighboring defendant’s heavy pumping, but were denied injunctive relief and damages because the court determined they had no claim of ownership over the water while it remained in the ground. As one scholar has already pointed out, the *Adams* court did not satisfactorily explain the legal basis for adopting this common law rule in Louisiana. Nevertheless, for the time being it appears that Louisiana courts are willing to treat groundwater as a “fugitive mineral,” which is not owned until it is reduced to one’s possession. Thus, groundwater in Louisiana is best classified as a *res nullius* susceptible of occupation. In effect, the rule of capture gives rise to the “Rule of the Biggest Pump,” whereby one’s ability to establish a claim of ownership over groundwater is limited only by one’s ability to pump it, without regard to the use to which the water is being put or the rights of neighboring landowners.

**B. The Right to Explore and Produce Groundwater From Beneath One’s Land**

*Adams* was decided before the adoption of the Louisiana Mineral Code in 1976. The Mineral Code codified the rule announced in *Adams* that treated groundwater as a “fugitive

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33. *Adams,* 152 So. 2d 619.
mineral” or a res nullius, the ownership of which is subject to the rule of capture. However, the Mineral Code does more than just define when fugitive minerals become privately owned; it protects a landowner’s right to explore and produce liquid and gaseous minerals from beneath his land, and also provides that landowners with rights in a common reservoir have correlative rights and duties with respect to one another.

The right to explore and develop fugitive minerals (including groundwater) from beneath one’s land is clearly established by the Mineral Code. A situation in which neighboring landowners have rights in a common reservoir would arise whenever such a reservoir extends across those neighbors’ boundary lines. The official comment to the relevant Mineral Code articles indicates that one purpose of the correlative rights and duties established by the Mineral Code is to assure landowners “the opportunity to produce a fair share of the common reservoir.” Thus, while no one owns groundwater as long as it remains in the aquifer, surface landowners nonetheless have rights in that water which are recognized by the Mineral Code. It is unclear to what extent, if any, the Mineral Code’s reference to correlative rights can be

36. LA. REV. STAT. ANN. § 31:4 (2005), “The provisions of this [Mineral] Code are applicable to . . . rights to explore for or mine or remove from land the soil itself, gravel, shells, subterranean water, or other substances occurring naturally in or as a part of the soil or geological formations on or underlying the land.” (emphasis added); LA. REV. STAT. ANN. § 31:8 (2005), “A landowner may use and enjoy his property in the most unlimited manner for the purpose of discovering and producing minerals . . . . He may reduce to possession and ownership all of the minerals occurring naturally in a liquid or gaseous state that can be obtained by operations on or beneath his land even though his operations may cause their migration from beneath the land of another.”

37. LA. REV. STAT. ANN. § 31:9 (2005), “Landowners and others with rights in a common reservoir or deposit of minerals have correlative rights and duties with respect to one another in the development and production of the common source of minerals.”; LA. REV. STAT. ANN. § 31:10 (2005), “A person with rights in a common reservoir or deposit of minerals may not make works, operate, or otherwise use his rights so as to deprive another intentionally or negligently of the liberty of enjoying his rights, or that may intentionally or negligently cause damage to him . . . .”


squared with the rule of capture as it pertains to groundwater in Louisiana. The most likely explanation for this apparent discrepancy is that the Mineral Code merely codified the rule of capture as articulated in *Adams* and left the further development of the correlative rights doctrine to the courts.40 Accordingly, the problems associated with the common law rule of capture as it pertains to groundwater are not adequately addressed by application of the Mineral Code alone.

It is clear that the right to explore and produce groundwater from beneath one’s land is not dependent on ownership. In this respect, Louisiana’s groundwater regime more closely resembles the riparian rights doctrine in that landowners who cannot claim to be owners of the water in question nonetheless have legally-protected rights in that water. The right to explore and pump for groundwater beneath one’s land, like the right to use surface water that runs through or adjacent to one’s land, is vested automatically by operation of law and is distinct from the question of who owns the water.

**C. Inadequacy of the Current Legal Regime Governing Groundwater in Louisiana**

The right to explore and produce groundwater from beneath one’s land is clearly established by the Mineral Code and deserves legal protection. The *Adams* holding, which denied relief to the plaintiffs because they did not own the groundwater located in the aquifer, overlooks the fact that landowners have rights in groundwater other than outright ownership.41 Landowners must be given a realistic opportunity to actually explore and produce groundwater from beneath their land if that right is to have any

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41. Considering that the right to explore and produce groundwater was established by the mineral code after the decision in *Adams*, this oversight only exists in retrospect.
significance. However, the right to explore and produce groundwater will soon become meaningless if the current rate of aquifer decline in Louisiana continues unchecked. The rule of capture, standing alone, does not provide any incentive for the conservation of groundwater nor does it provide any deterrent to its unsustainable or irresponsible use. Louisiana courts should entertain claims which seek to restrict the unsustainable use of groundwater if the right of every landowner to explore and produce this resource is taken seriously.

1. Uncertainties regarding rights of landowners

Under the current regime, landowners cannot be certain that the right to explore and pump for groundwater under their land will receive any legal protection. If a neighboring landowner is able to install a larger, deeper, or more powerful pump, then it is entirely possible that the groundwater reservoir will be drawn down or depleted to the point where his neighbors are no longer able to access that reservoir. This system creates incentives for landowners to pump more water than they might legitimately need. The doctrine of riparian rights addresses this problem in the surface water context by limiting landowners to a reasonable use of the disputed water resource.\footnote{Klebba, \textit{supra} note 27 at 1798-1800.} A similar “reasonable use” limitation would be well-advised in the context of disputed groundwater rights as a means of protecting all interests involved.

The current system also creates an incentive for neighboring landowners to engage in a “race to the bottom,” without regard for the long-term health of the aquifer. Usually, large commercial operations will be able to win this “race” against individual landowners for use of a shared groundwater reservoir, with devastating effects to those individual landowners who rely on that groundwater for their livelihoods. The right of every landowner in Louisiana to explore and pump for groundwater under their land
provides justification for the courts to prevent the inequity of allowing large users to trample the rights of smaller users.

2. Law and economics—the efficient allocation of natural resources

From a macro-economic perspective, the best way to manage a natural resource is to provide for the most efficient allocation of the resource among competing uses. This involves a balancing between the scarcity of the resource on the one hand, and the enforcement costs of protecting rights in that resource on the other.\(^{43}\) This means that if the market value of a natural resource is less than the cost of enforcing rights in that resource, these rights should not be protected because it is more efficient for consumers to acquire the resource through the market.\(^{44}\) If, however, the market value of a natural resource is greater than the cost of enforcing rights in that resource, these rights should receive legal protection because it is more efficient for consumers to maintain control over the resource through legal means.\(^{45}\) In other words, the greater the scarcity of a natural resource, the larger the enforcement costs society is willing to tolerate.

Applying these principles to Louisiana’s groundwater situation, it is clear that the more groundwater levels are depleted, the scarcer this resource becomes. As groundwater becomes scarcer, we should become more willing to accept stricter legal protections on rights in groundwater.\(^{46}\) Assuming the costs of prosecuting a tort action in Louisiana remain relatively constant, the more that groundwater levels are depleted, the more efficient tort suits will be as a means of allocating groundwater to beneficial uses.


\(^{44}\) Id.

\(^{45}\) Id.

\(^{46}\) For an argument that increased restrictions on groundwater use may produce greater economic benefits, see J. David Aiken, *Ground Water Mining Law and Policy*, 53 U. COLO. L. R. 505, 507 n.16 (1982).
III. THE LEGAL BASIS FOR RESTRICTING THE PUMPING OF GROUNDWATER: LIMITATIONS ON THE USE OF PROPERTY UNDER THE CIVIL LAW

The long-term solution to the problem of unsustainable use of groundwater is probably a more comprehensive regulatory regime than that currently employed by the DNR. To be effective, this regulatory regime would require sufficient financial backing so that DNR is able to carry out the more extensive regulatory duties likely to be required under such a system. This system might resemble the process of pooling and unitization, which the Commissioner of Conservation already uses to regulate the production of other subsurface minerals. Until this is realized, however, the courts of Louisiana should play a more active role in upholding the constitutionally declared policy of natural resource conservation. In upholding this constitutional mandate, courts should apply well-established legal principles regarding use of property in order to determine the circumstances under which the pumping of groundwater should be restricted. The civil law of Louisiana contains several guiding principles for when certain uses of property can be restricted, principles that may be readily adapted to this purpose.

A. Limitations on the Use of Property Generally: Sic Utere

As the Latin maxim sic utere indicates, the freedom to use one’s property in any manner one pleases is usually not absolute. Rather, one should use one’s property in such a manner so as not to injure that of another. This Roman law precept has been recognized in many civil law systems as well as in the Louisiana Civil Code. The various limitations on property use may be organized into three broad categories, each discussed below.

48. LA. CONST. art. IX, §1.
Generally, one may not use his property in such a manner as might constitute 1) an illicit use of property; 2) an abuse of rights; or 3) a nuisance.

1. Illicit use of property

The first general limitation on the use of property is so obvious it need not be discussed in great detail. One may not use his property in a manner that is contrary to law. Thus, while one has the right to drive his car on a public road, one may not drive his car in a negligent manner which causes injury to another. 50 Such an illicit use of property may give rise to an obligation to pay damages or even criminal liability.

2. Abuse of rights

The concept of absolute rights has seen a gradual decline in most Western systems of law over the past few centuries. 51 As even the staunchest supporters of absolute rights concede, in certain circumstances, such as disagreements between neighbors, a regime of absolute rights may result in unfavorable outcomes. 52 The doctrine of abuse of rights has developed in both common law and civil law jurisdictions, although oftentimes implicitly and unsystematically, as a response to situations where the rigidity of absolute rights would dictate unjust or inequitable outcomes. 53 At least two kinds of abusive actions are condemned by the doctrine of abuse of rights: a) the predominant motive for the action is to cause harm; b) the exercise is totally unreasonable given the lack of any legitimate interest in the exercise of the right, and its exercise harms another. 54

52. Id. at 49.
53. Id. at 40-44.
54. Id. at 47.
a) Predominant motive for the use of the right is to cause harm

The first embodiment of the abuse of rights doctrine is sometimes described as a use of a right which is motivated by a malicious desire to cause damage to another.\(^{55}\) Examples of this type of abuse of right include the erection of fences or buildings out of spite for one’s neighbor. A French case from the mid-1800s recognized that in such a situation, even though no law or regulation may bar a landowner from making such a construction, nevertheless a malevolent exercise of a right should be prohibited.\(^{56}\) Louisiana courts have also explicitly recognized this limitation in the context of mineral rights.\(^{57}\) The principle that a landowner may not exercise his rights for the sole purpose of maliciously causing harm to his neighbor was incorporated into the Louisiana Mineral Code.\(^{58}\)

A “malicious use” limitation on the use of property is dependent on the defendant’s subjective mental state; a defendant’s subjective motivations are crucial to determining when he is abusing his right as opposed to exercising his right legitimately. This leads to situations in which a plaintiff must be forced to suffer harm because the defendant did not have the requisite mental state. For example, in the case of *McCoy v. Arkansas Natural Gas Co.*, the court held that a defendant who negligently allowed large quantities of natural gas to escape from his well was not liable to his neighbors because the loss was the result of “a mere exercise of bad judgment on the part of the [defendant] in drilling on his own land.”\(^{59}\) While it makes sense to provide harsher punishments to


\(^{56}\) Perillo, supra note 51 at 44.

\(^{57}\) Higgins Oil & Fuel Co. v. Guaranty Oil Co., 82 So. 206 (La. 1919) (a defendant may be prevented from leaving a well uncapped where the purpose was to decrease the pumping efficiency of a neighbor’s well).

\(^{58}\) See LA. REV. STAT. ANN. § 31:9 (2005); LA. REV. STAT. ANN. § 31:10(2005), and comments.

\(^{59}\) McCoy v. Arkansas Natural Gas Co., 143 So. 383, 386 (La. 1932).
those who have more culpable mental states, it does not necessarily make sense to deny any and all recovery to innocent plaintiffs who suffer injury just because the defendant was acting negligently rather than maliciously.

b) Use of right without legitimate interest whose exercise causes harm

The second embodiment of the abuse of rights doctrine is stated as a prohibition against a use of a right which is not motivated by a serious and legitimate interest. Examples of this type of abuse of right include wasteful extraction of groundwater or other minerals beyond that which the landowner is able to legitimately use.60 Once again, a French case from the mid-1800s is illustrative: the owner of a spring installed a powerful pump that extracted far more water than the owner could market or use; it was determined to be an abuse of right.61

The Adams court also recognized this limitation as being applicable in the context of groundwater extraction when it postulated that the defendant might be liable “if he simply opened his own well and allowed it to pour out the water as waste without benefit to himself.”62 The principal that an abuse of right occurs when a right is exercised without a legitimate interest is necessary because in not all situations will it be possible to show a malicious intent on the part of one who is abusing a right. As the Supreme Court of Louisiana held in Morse v. J. Ray McDermott & Co., “the exercise of a right [...] without legitimate and serious interest, even where there is neither alleged nor proved an intent to harm, constitutes an abuse of right which courts should not countenance.”63

60. Perillo, supra note 51 at 43-44.
61. Id.
62. Adams, 152 So. 2d at 624.
c) Nuisance

The last category of limitations on the use of property is of more recent vintage. Certain uses of property, even if they are conducted with due diligence and in accordance with other rules of law, may nonetheless cause damage to others situated nearby. Since the onset of the industrial revolution, the magnitude of this problem has increased. This type of property use may be restricted or give rise to an obligation to pay damages not because it is illicit or abusive, but because it is “excessive” in the sense that the use is not “normal” or “regular” according to the circumstances. Determining when a use of property is excessive by reason of circumstances or surroundings is obviously a factually dependent inquiry.

B. Louisiana Civil Code Articles 667-669

Louisiana Civil Code articles 667-669 are the primary source of law in Louisiana regarding general limitations on the use of property. They provide:

Art. 667. Limitations on use of property:

Although a proprietor may do with his estate whatever he pleases, still he cannot make any work on it, which may deprive his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him. However, if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable for damages only upon a showing that he knew or, in the

64. See Yiannopoulos, supra note 49, at 200. In France, the law of nuisance is referred to as Trouble du Voisinage. Id.

65. Id.

66. Id.

67. Cueto-Rua, supra note 55, at 977. Common law jurisdictions have also developed their own body of nuisance law. Although modern Louisiana courts may be unwilling to analogize to the common law of nuisance, the concepts embodied therein have been utilized by Louisiana courts in the past, especially when interpreting Civil Code articles 667-669. See, e.g., Robichaux v. Huppenbauer, 245 So. 2d 385 (La. 1971).

68. See LA. CIV. CODE art. 1-3. Legislation and custom are the sources of law in Louisiana. When the two conflict, custom may not abrogate legislation.
exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of *res ipsa loquitur* in an appropriate case. Nonetheless, the proprietor is answerable for damages without regard to his knowledge or his exercise of reasonable care, if the damage is caused by an ultrahazardous activity. An ultrahazardous activity as used in this Article is strictly limited to pile driving or blasting with explosives.\textsuperscript{69}

Art. 668. Inconvenience to neighbor

Although one be not at liberty to make any work by which his neighbor's buildings may be damaged, yet every one has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor. Thus he who is not subject to any servitude originating from a particular agreement in that respect, may raise his house as high as he pleases, although by such elevation he should darken the lights of his neighbors' house, because this act occasions only an inconvenience, but not a real damage.\textsuperscript{70}

Art. 669. Regulation of inconvenience

If the works or materials for any manufactory or other operation, cause an inconvenience to those in the same or in the neighboring houses, by diffusing smoke or nauseous smell, and there be no servitude established by which they are regulated, their sufferance must be determined by the rules of the police, or the customs of the place.\textsuperscript{71}

These three articles have been a part of Louisiana law since the Code of 1808.\textsuperscript{72} Because these three articles derive from a common source and govern the basic limitations on the use of

\textsuperscript{69} LA. CIV. CODE art. 667.

\textsuperscript{70} LA. CIV. CODE art. 668.

\textsuperscript{71} LA. CIV. CODE art. 669.

property in Louisiana, they are often discussed and interpreted in conjunction with each other. Generally, article 667 prohibits uses of property which cause damage or deprive neighbors of the enjoyment of their property, while article 668 allows uses of property that only cause “some inconvenience” to neighbors. Article 669 provides that certain inconveniences which must be allowed under article 668 “may be [either] tolerated or suppressed, depending on police regulations and local customs.” Essentially, these three code articles establish the following legal regime. First, one may not use property so as to cause actual damage or substantial interference with the enjoyment of another’s property. Second, most other types of interferences are considered to be lesser inconveniences which must be tolerated. Third, certain specific types of lesser inconveniences (i.e., the diffusion of smoke or odors from “manufactory or other operations”) may be prohibited by local regulations or customs.

The broad language of these articles has often created confusion as to which uses of property are prohibited and which are allowed, but the scope of these articles is sufficiently broad to encompass all three types of general limitations on the use of property discussed above. These articles have been applied by Louisiana courts to restrict or impose liability on illicit uses of property, abusive uses of property, and nuisances.

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73. See, e.g., Yiannopoulos, supra note 49, at 204. “Articles 667-69 form a unit in the Louisiana Civil Code of 1870, and, for a proper understanding, they must be read together.”
74. Id. at 204-05.
75. L.A. CIV. CODE art. 669.
78. Cueto-Rúa, supra note 55, at 1012-13. See also Yiannopoulos, supra note 49, at 203. “Articles 667-69 of the Louisiana Civil Code were apparently conceived as an application of the sic utere doctrine.”
79. Langlois v. Allied Chemical Corporation, 249 So. 2d 133 (La. 1971) (holding defendant chemical plant liable for personal injuries sustained by a firefighter as a result of exposure to gas that escaped from the plant). In imposing liability, the court looked in part to the duty imposed by Civil Code articles 667 and 669. The court held, “The defendant has injured this plaintiff by
In 1996, the Louisiana Legislature undertook broad-based revision of the Civil Code articles relating to delicts and quasi-delicts, including article 667. The purpose of these amendments was to change from a strict liability standard to one of negligence. Thus, it is clear that a defendant will not be liable under article 667 based on a theory of strict liability, except for specific ultrahazardous activities. Although the current standard of care imposed on proprietors by article 667 is to act reasonably (i.e., to avoid acting negligently), there is no reason to doubt that this article along with articles 668 and 669 still embody the concept of sic utere in Louisiana law. In other words, while a plaintiff seeking to invoke liability under article 667 now must prove the defendant’s negligence, the types of activities from its fault as analogized from the conduct required under Civil Code Article 669 and others . . .”

80. Higgins Oil, 82 So. 206 (La. 1919) (a defendant may be prevented from leaving a well uncapped where the purpose was to decrease the pumping efficiency of a neighbor’s well).

81. Salter v. B.W.S. Corporation, Inc., 290 So. 2d 821 (La. 1974) (defendant corporation was enjoined from disposing industrial waste on its property in a manner which would cause harm to neighbors, even though the corporation was granted a disposal permit from the state department of health to carry on its disposal operations at the site); Robichaux, 245 So. 2d 385 (La. 1971) (owner of horse stable was enjoined from operating the stable in such a manner as to cause harm to neighbors, even though the stable did not violate the city’s ordinances or regulations); Devoke v. Yazoo & Mississippi Valley Railroad Company, 30 So. 2d 816 (La. 1947) (railroad company may not cause injury to those residing in the vicinity, even though it was engaged in the pursuit of a lawful trade, and was held liable for damages).

82. The language added to article 667 in 1996 includes the following: “. . . if the work [the proprietor] makes on his estate deprives his neighbor of enjoyment or causes damage to him, [the proprietor] is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage, that the damage could have been prevented by the exercise of reasonable care, and that he failed to exercise such reasonable care. Nothing in this Article shall preclude the court from the application of the doctrine of res ipsa loquitur in an appropriate case.” LA. CIV. CODE art. 667.

83. An ultrahazardous activity in the context of article 667 is “strictly limited to pile driving or blasting with explosives.” LA. CIV. CODE art. 667. This essay is not concerned with strict liability for ultrahazardous activities, and the ultrahazardous activity exception to article 667 will be disregarded as inapplicable.
which the plaintiff may seek redress remain unchanged from prior law.

If articles 667-669 are to be applied to restrict the pumping of groundwater, then this activity must be classified as either an illicit act, an abusive act, or a nuisance. Otherwise, pumping of groundwater would not properly fall within the ambit of these articles. Pumping groundwater is not by itself illegal; the right to explore and produce groundwater from underneath one’s land is clearly established by the Mineral Code.\textsuperscript{84} Therefore, a proprietor cannot be limited from pumping groundwater on his land on the basis that this would constitute an illicit act. Neither does pumping groundwater in most circumstances constitute an abuse of property rights. Most proprietors who pump groundwater have a legitimate reason for doing so and are not acting maliciously to cause harm to others. Therefore, a proprietor usually cannot be limited from pumping groundwater on his land on the basis that this would constitute an abuse of rights. However, it is possible that a proprietor may be held liable for nuisance under the current version of these articles for negligently causing damage or a loss of enjoyment to his neighbors through excessive pumping of groundwater.

IV. APPLICABILITY OF LOUISIANA CIVIL CODE ARTICLES 667-669 TO EXCESSIVE PUMPING OF GROUNDWATER

A thorough analysis of the language of Louisiana Civil Code articles 667-669, along with the jurisprudence interpreting these articles, reveals that they are fully applicable to a tort claim for excessive pumping of groundwater.

\textsuperscript{84} See discussion \textit{supra} part III.B; LA. REV. STAT. ANN. § 31:4 (2005); LA. REV. STAT. ANN. § 31:8 (2005).
A. Codal Source of Liability

The first step in applying articles 667-669 to a claim for excessive pumping of groundwater is to determine which article is the source of liability. Some scholars have sought to draw a distinction between articles 667 and 668 on the one hand and article 669 on the other.85 According to this understanding, articles 667 and 668 establish reciprocal duties that neighboring landowners owe each other, while article 669 specifically governs those inconveniences that correspond to the law of nuisance.86 This approach suggests that excessive uses of property—those that are neither illicit nor abusive but nevertheless go beyond what is normal according to the circumstances—can only be restricted or regulated under article 669. However, Louisiana courts have apparently declined to adopt this interpretation. This is probably because the types of excessive inconveniences which are subject to potential regulation under article 669 are very limited and have been interpreted as exclusive rather than illustrative.87 The original version of article 669 which appeared in the Code of 1808 contained a reference to “other different inconveniences,” but this language is absent from the current article.88 As a result, the restrictions placed on excessive uses of property are very limited under the current version of article 669. The courts have responded to this problem by allowing excessive use of property claims to be brought under article 667.89 Article 669, in turn, has been

86. Id.
87. Robichaux, 245 So. 2d 385 (La. 1971) (Article 669 speaks only of “smoke” and “nauseous smell.”)
88. Robichaux, 245 So. 2d 385 (La. 1971); The Editor’s note to the 2011 edition of the Louisiana Civil Code article 669 states that “[t]he English text of CC 1808 is a more complete and preferable translation of the French text that the present English text.”
89. Robichaux, 245 So. 2d 385 (La. 1971). “Despite the apparent failure of these articles to deal explicitly with the standards to be followed in operations which may cause inconvenience to neighboring property or the failure of these articles to more comprehensively enumerate the ‘other inconveniences’, they have nevertheless been employed by this Court together with the common-law
interpreted as establishing the legal restrictions which can be placed on those types of “mere inconveniences” which are not regulated under articles 667 and 668. Considering the limited scope of article 669, a claim for excessive pumping of groundwater probably can’t be brought under this article. In light of the broad application that article 667 has been given by the courts, such a claim is best brought under this article instead.

B. Preliminary Concerns

Before determining when a claim for excessive pumping of groundwater can be brought under article 667, it is necessary to define some key terms as they are used in the article. First, the jurisprudence is clear that the use of the word “work” in article 667 applies to activities as well as structures. It cannot therefore be argued that drilling a well and pumping groundwater is not a “work” within the meaning of this code article. Also, damage need not be caused by actual physical invasion of property in order to be compensable under article 667. For example, it has been held that the presence of a hazardous high pressure gas pipeline adjacent to a plaintiff’s property gave rise to damages caused by the proximity of the pipeline, which impaired the market value and the full use of

theory of nuisance to grant relief where a use of property causes inconvenience to a neighbor.”; See also Dean, 328 So. 2d 69 (La. 1976) (allowing a claim for damages allegedly suffered as a result of chemical emissions to be brought under article 667 although there were no allegations that the defendant acted either illegally or maliciously towards his neighbors).

90. See Rodrigue v. Copeland 475 So. 2d 1071, 1075 (La. 1985) (“a mere inconvenience [is] subject to regulation by the ‘rules of the police’ [under] C.C. 669.”)

91. Yokum v. 615 Bourbon St., L.L.C., 977 So. 2d 859, 875 (La. 2008) (“the ‘work’ to which Article 667 refers includes not only constructions but also activities that may cause damage.”)

92. Hero Lands Co. v. Texaco, Inc., 310 So. 2d 93, 98 (La. 1975) (“... damage may well be intrinsic in nature, a combination of facts and conditions which, taken together, do not involve a physical invasion but which, under the circumstances, are nevertheless by their nature the very refinement of injury and damage.”)
the estate. 93 Thus, defendants cannot avoid liability on the basis that no physical intrusion onto the plaintiff’s land occurred. Although the text of article 667 refers to proprietors, Louisiana jurisprudence has interpreted the article to apply to a broader category of persons than just landowners. 94 The article has been applied to lessees, including holders of mineral leases. 95

**C. Distinguishing Between Excessive and Non-Excessive Uses of Property**

In applying article 667 to complaints against excessive uses of property, Louisiana courts have drawn an analogy to the common law theory of nuisance. 96 Generally, there are two types of nuisances—nuisances at law and nuisances in fact. 97 A nuisance at law is “an act, occupation, or structure which is a nuisance at all times and under any circumstances, regardless of location or surroundings.” 98 Pumping groundwater is not a nuisance at law, because the right to explore and produce groundwater from one’s own land is clearly established by the Mineral Code. 99 A nuisance in fact is an act, occupation, or structure which becomes a nuisance by reason of circumstances or surroundings. 100 Pumping groundwater can only be considered excessive by reference to the circumstances under which it is being withdrawn. If, according to the circumstances, groundwater pumping went beyond what is normal and became excessive, this would be considered a nuisance in fact under article 667. Determining what is normal and what is

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93. *Id.*
94. Butler v. Baber, 529 So. 2d 374 (La. 1988); *See also* Yokum, 977 So. 2d 859, 874-75 (La. 2008).
95. *Id.* While the proper definition of the term “proprietor” under article 667 may be open to debate, it should be understood that this essay’s use of that term is not limited to landowners.
96. Robichaux, 245 So. 2d 385 (La. 1971).
97. *Id.*
98. *Id.* at 389, n.4-5.
100. Robichaux, 245 So. 2d 385 (La. 1971).
excessive is a highly fact-sensitive inquiry, so it is difficult to make generalizations about this distinction. The best principle that can be extracted from the jurisprudence is a test of “reasonability.” 101 When applying a reasonability test to a claim for excessive pumping of groundwater, reference could be made to the relative size of the cone of depression caused by the pumping at issue. If this cone of depression is much larger or more extensive than those created by pre-existing water wells in the area, the pumping might be unreasonable, i.e., excessive under the circumstances. However, even if a use of property is determined to be unreasonable or excessive under the circumstances, this does not automatically entitle the plaintiff to relief under article 667. 102 Rather, the threshold for relief under article 667 is whether one has suffered actual compensable injury in the form of either damage or loss of enjoyment.

D. Distinguishing Between Compensable and Non-Compensable Injuries

To state a claim under article 667, a plaintiff must demonstrate that the conduct in question causes actual damage or deprivation of the liberty to enjoy one’s own property. 103 Conduct which merely occasions some inconvenience is not compensable. 104 The distinction that must be drawn between real injury and mere inconvenience appears at first glance to correspond closely to the distinction between a use of property that is excessive and a use of property that must be tolerated because it is normal according to the circumstances. Upon closer inspection of the codal language, however, it appears that not all excessive uses of property give rise

101. Id. at 389 (“Thus the principle is enunciated . . . that within reasonable limits the individual citizen has to submit to some annoyance and inconvenience from the legal exercise of the rights of others.”).
102. See L.A. CIV. CODE art. 668. “ . . . everyone has the liberty of doing on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.” (emphasis added).
103. L.A. CIV. CODE art. 667.
104. L.A. CIV. CODE art. 668.
to compensable injury. After all, articles 667 and 668 do not state that only normal uses of property are allowed. To the contrary, article 668 states that one may do “on his own ground whatsoever he pleases, although it should occasion some inconvenience to his neighbor.”\textsuperscript{105} This provision would seem to indicate that even abnormal or excessive uses of property must be tolerated under some circumstances. The focus of articles 667 and 668 is on the effect which certain uses of property have on neighbors.\textsuperscript{106} Simply determining that a certain use of property is excessive according to the circumstances is not enough. Rather, the crucial inquiry is whether the plaintiff has been deprived of the enjoyment of his own property or has suffered damage. If the plaintiff has only been exposed to “some inconvenience,” he has not suffered a compensable injury.

Distinguishing between real injury and mere inconvenience proves difficult in real-world situations. The Code articles themselves do not provide much guidance on where to draw the line. As a result, it is not surprising that Louisiana courts have treated this determination as a factual inquiry.\textsuperscript{107} In making this factual determination, courts have considered the nature and degree of the intrusion on plaintiff’s property, the character of the neighborhood, and the extent or degree of the damage including the effect on the health and safety of the plaintiffs.\textsuperscript{108}

Applying these factors to an excessive pumping of groundwater claim, a plaintiff must be able to show more than just

\textsuperscript{105} Id.

\textsuperscript{106} The focus of articles 667 and 668 on the effect of certain uses of property in order to determine when a neighbor is entitled to legal protection is entirely consistent with civilian doctrine. See Aubrey et Rau, Property § 194 et seq. “Although in principle it is not prohibited to cause nuisances to a neighbor... such a damage becomes illegal when the source exceeds certain intensity... for one cannot expect to live in a group without causing some inconvenience to neighbors.”

\textsuperscript{107} Barrett v. T.L. James, 671 So. 2d 1186 (La. Ct. App. 1996) (“When the actions or work cease to be inconveniences and become damaging is a question of fact.”).

\textsuperscript{108} Barrett, 671 So. 2d 1186.
mere inconvenience. First, it must be recognized that when proprietor A pumps groundwater and thereby reduces proprietor B’s access to that same groundwater reservoir, this constitutes a de minimus (or even non-existent) intrusion on proprietor B’s property. Proprietor A has not interacted with proprietor B’s property except to cause the migration of groundwater from underneath B’s land. For this reason, this factor weighs against a finding that excessive withdrawal of groundwater constitutes a compensable injury. However, actual physical intrusion is not required under article 667, and the lack of physical intrusion could be outweighed by other factors under certain circumstances. For example, the character of the neighborhood might be such that all proprietors have historically made moderate withdrawals from a common groundwater reservoir for domestic uses or for raising livestock. If a proprietor in this neighborhood withdraws significantly greater amounts of water from that reservoir for use in industrial or mining operations, such a use would not be in line with the character of the neighborhood. To the extent that the other proprietors are prevented or restricted from making use of the groundwater in the manner to which they are accustomed, this would weigh in favor of a finding of compensable injury rather than mere inconvenience.

Additionally, the greater the effect on the plaintiff’s health, safety, and welfare occasioned by the excessive withdrawal, the greater the chance that a court will find that a compensable injury has occurred. This might be shown by proof of a negative effect on the plaintiff’s livelihood, such as when the plaintiff’s access to groundwater has been reduced to such an extent that the plaintiff’s agricultural or ranching operations have become impractical or prohibitively expensive. Also, if the plaintiff is able to show that

109. Hero Lands Co., 310 So. 2d 93, 98 (La. 1975) (“...damage may well be intrinsic in nature, a combination of facts and conditions which, taken together, do not involve a physical invasion but which, under the circumstances, are nevertheless by their nature the very refinement of injury and damage.”)
his neighbor’s excessive withdrawal of groundwater has reduced the plaintiff’s ability to obtain safe drinking water and thus exposed his family to greater health risks, this would weigh in favor of a finding that a compensable injury has occurred.

The factors used by the courts to determine whether a particular use of property creates a compensable injury essentially guide the courts in an assessment of the severity of the disturbance suffered by neighbors. The more severe the disturbance created by a particular use of property, the more likely a court is to find that a real injury has occurred.

E. Additional Elements of Negligence as Applied to a Tort Claim under Article 667 for Excessive Pumping of Groundwater

After the court makes the preliminary determination that a compensable injury has occurred, the plaintiff still must prove three distinct elements to impose liability on the defendant under article 667: 1) the defendant had actual or constructive knowledge that his works would cause damage; 2) the damage could have been prevented through the exercise of reasonable care; and 3) the defendant failed to exercise reasonable care. These elements were added to article 667 in 1996 in order to change the law from strict liability to a negligence standard.

1. Actual or constructive knowledge

A defendant “is answerable for damages only upon a showing that he knew or, in the exercise of reasonable care, should have known that his works would cause damage.” The knowledge element might serve to immunize some proprietors who are ignorant of the possibility that their excessive groundwater

110. See Aubrey et Rau, Property § 194 et seq. “Although in principle it is not prohibited to cause nuisances to a neighbor... such a damage becomes illegal when the source exceeds certain intensity.”

111. See discussion supra part III.B.

112. LA. CIV. CODE art. 667.
pumping would cause damage to their neighbors if the possibility of this damage was not discoverable or predictable through the exercise of reasonable care. However, given the sophisticated nature of the science of hydrogeology, the ignorance defense may be a “tough sell.” This is especially true if the defendant is a large firm conducting mining or secondary recovery operations and has significant scientific knowledge and resources at its disposal. Such a large and sophisticated firm should probably know, through the exercise of reasonable care, the effects of its groundwater pumping operations on the underlying aquifer and the resultant harms which might be suffered by neighbors. Furthermore, because Louisiana state regulations require that new water wells be installed by a licensed contractor, the level of knowledge imputed to those who install large capacity wells should be considerable. Thus, the knowledge which a court would expect a groundwater withdrawer to obtain through the exercise of reasonable care may depend in large part on the size of the well and the expected amount of water to be pumped.

2. Damage could have been prevented through exercise of reasonable care

For a defendant to be liable under article 667, a plaintiff must show that “the damage could have been prevented by the exercise of reasonable care.” This may be the most difficult element for a plaintiff to prove in a case of excessive withdrawal of groundwater. Clearly, any amount of withdrawal is going to draw

113. LA. ADMIN. CODE tit. 43, §701.
114. Steven J. Levine, *Ground Water: Louisiana’s Quasi-Fictional and Truly Fugatious Mineral*, 44 LA. L. REV. 1123, 1145 (1983-1984). “Wells that a reasonable person would not install without first making hydrologic tests would be defined as high-capacity wells, and owners of such wells would be charged with knowledge revealed by the tests and could be liable for unreasonable injurious consequences. Small wells would be defined as those which a reasonable person would install without expensive testing. Owners of small wells would be charged only with knowledge reasonably available to them.”
115. LA. CIV. CODE art. 667.
down the groundwater reservoir to some extent, so the question becomes how a proprietor might prevent damage to a neighbor through the exercise of reasonable care. At the very least, a proprietor can prevent damage to neighbors by not withdrawing more groundwater than he is able to put to a productive use. If a proprietor withdraws more groundwater than he is able to productively use, then it can be presumed that this waste could have been prevented through the exercise of reasonable care and any damage which results from this waste would be imputable to the excessive withdrawal.

Furthermore, a proprietor could prevent damage to a neighbor by making use of other reasonably available alternative sources of water. This argument could cut both ways, however, because if there are alternative sources of water reasonably available to the defendant, those alternative sources might also be available to the plaintiff, in which case it would be harder for the plaintiff to show that he has suffered real damage. Still, it is conceivable that a large industrial user of groundwater has a greater ability to obtain alternate sources of water due to its greater financial resources and larger economies of scale than an individual user. If a large groundwater user has reasonably-available alternative sources of water that it can use to avoid severely limiting a smaller neighbor’s access to a common groundwater resource, then it can be fairly claimed that the damage suffered by the smaller user could have been prevented through the use of reasonable care on the part of the larger user. In the context of industrial or mining operations where the quality of the water is of little importance, it might also be reasonable to expect this operation not to deprive its neighbors of access to a pristine source of groundwater that is being used for human consumption, animal consumption, or agricultural purposes. In such a situation it would be reasonable to expect such an industrial or mining operation to make use of reasonably-

116. See discussion supra part IV.D.
available alternative sources of water, such as untreated surface water, that are not suitable for its neighbors’ more sensitive uses.

The requirement that proprietors can only be liable when the damages could have been prevented through the exercise of reasonable care is closely related to the causation element required in all tort actions. Clearly, if the damage suffered by a neighbor is not caused by the actions of the defendant in pumping groundwater, then this damage could not have been prevented by the exercise of reasonable care on the part of the defendant and the defendant would not be liable for those damages. The causation element allows a defendant to argue that the damage suffered by his neighbors was either caused by the neighbors’ own actions, by the actions of a third party, or by some “act of God.”

3. Failure to exercise reasonable care

Failure to exercise reasonable care refers to a breach of the duty which one proprietor owes to another under article 667. This duty, as discussed above, consists of a requirement that all proprietors must exercise reasonable care in determining if their works might cause damage to a neighbor and to exercise reasonable care in preventing such damage. After a court weighs all the facts and determines that a duty exists on the part of the groundwater withdrawer to protect his neighbors from damage that could result from the withdrawal, the inquiry turns to whether the groundwater withdrawer breached this duty. While the delineation of the duty to avoid excessive pumping of groundwater that may cause damage to neighbors is the province of the court, the question of whether a groundwater withdrawer breached this duty is a question of fact. In other words, once the court has identified the specific duty owed by a proprietor and articulated the reasonable care with which it is expected to exercise when

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117. See Loescher v. Parr, 324 So. 2d 441 (La. 1975).
118. See Pinsonnéaull v. Merchants & Farmers Bank & Trust Company, 816 So. 2d 270 (La. 2002).
pumping groundwater, the question of whether the proprietor has failed to exercise reasonable care becomes a simple yes or no question submitted to the factfinder.

**F. Available Remedies under Louisiana Civil Code Article 667 for Excessive Pumping of Groundwater**

If a plaintiff establishes liability under article 667, a court must then determine the appropriate remedy: injunctive relief, monetary damages, or both. The remedy of injunctive relief will be sought by plaintiffs who are seeking to prevent future injury caused by excessive groundwater pumping. In many cases the plaintiff may also seek monetary damages as compensation for past injury which they have already sustained as a result of excessive groundwater pumping.

1. **Injunctive relief**

Injunctive relief is generally only available when the plaintiff is faced with “irreparable injury, loss, or damage.” The Louisiana Supreme court held in *Salter v. B.W.S. Corp., Inc.* that this limitation on the availability of injunctive relief is applicable in an action predicated on Louisiana Civil Code article 667. However, the *Salter* holding is arguably at odds with the general civil law principle that property rights (i.e., real rights) are *per se* entitled to injunctive protection and a showing of irreparable injury is usually not required. Notwithstanding this apparent conflict, as long as the *Salter* rule remains in effect, a plaintiff must show that he has suffered or will suffer an irreparable injury to obtain injunctive relief in a claim involving excessive pumping of groundwater. An injury is irreparable when it “cannot be adequately measured or compensated by money.”

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120. Salter, 290 So. 2d 821, 825 (La. 1974).
Louisiana Civil Code article 667 prevents a proprietor from making any work on his land which “deprive[s] his neighbor of the liberty of enjoying his own, or which may be the cause of any damage to him.” Thus, article 667 contemplates two distinct categories of injuries: 1) loss of enjoyment, and 2) damage. The nebulous notion of a loss of enjoyment, especially when contrasted with the more traditional notion of damage, might qualify as a type of injury which cannot be adequately measured or compensated. Accordingly, a plaintiff who is able to show that his reduced access to groundwater has deprived him of the liberty of enjoying his property may be entitled to enjoin his neighbor from making excessive use of the shared groundwater reservoir. This situation might arise when a plaintiff who relies solely on groundwater for his domestic use is deprived of the ability to enjoy his property when a neighbor’s excessive pumping of groundwater makes this use impossible or impracticable. On the other hand, a plaintiff who suffers some monetary damage but is not prevented from using or enjoying his own land may not be entitled to enjoin his neighbor’s excessive pumping. This situation might arise when a plaintiff has lost the use of a groundwater well but has other sources of water available to him such that he is not completely prevented from using or enjoying his property. The increased costs of obtaining these other sources of water would be readily quantifiable in the form of damages. While the circumstances surrounding such a situation must still weigh in favor of a finding that the plaintiff has suffered some compensable injury, the appropriate remedy would be the awarding of monetary damages rather than injunctive relief. Interestingly, it is unclear whether the new elements of negligence that were added to article 667 in 1996 apply when a plaintiff is requesting only injunctive relief. The relevant codal language reads, “if the work he makes on his estate deprives his neighbor of enjoyment or causes damage to him, he is answerable

123. LA. CIV. CODE art. 667.
124. See discussion supra part IV.D.
for damages only upon a showing that [the new elements of negligence have been met].” (emphasis added). A literal reading of the article suggests that a plaintiff may be entitled to injunctive relief regardless of whether the defendant has acted negligently. Thus, a plaintiff may be able to enjoin a neighbor from making excessive use of groundwater even if the neighbor could not have discovered that injury would result from the excessive use and even if the neighbor otherwise exercised reasonable care.

2. Monetary damages

In cases where there is no showing of irreparable injury, a plaintiff may be limited to recovering monetary damages.125 Article 667 has been successfully used as a legal basis for imposing on defendants an obligation to pay damages.126 In theory, there is no reason to doubt that damages sustained by a plaintiff as a result of a defendant’s excessive pumping of groundwater might give rise to an obligation to pay damages under article 667. For example, if a plaintiff temporarily lost access to water as a result of a neighboring proprietor’s excessive pumping and the plaintiff’s cattle subsequently died as a result, the excessive pumper might be held liable to pay to the plaintiff the value of the cattle, assuming all other elements of liability are met.

V. CONCLUSION

The growing use of water in Louisiana has the very real potential to negatively affect groundwater reservoirs throughout the state. As groundwater pumping increases, groundwater levels will continue to decline. This creates significant problems for operators of smaller wells and raises concerns for the long-term sustainability of Louisiana’s groundwater resources.

125. LA. CODE CIV. PROC. ANN. art. 3601 (2005).
126. See Butler, 529 So. 2d 374 (La. 1988) (holding defendants liable under article 667 to pay damages to plaintiffs as a result of damages sustained by plaintiff’s oyster leases).
Present law is inadequate to address these problems. The rule of capture, which does not place any limits on how much groundwater a proprietor is able to withdraw from a reservoir underlying his land, does not provide incentives for conservation or encourage responsible use of groundwater. The Louisiana Department of Natural Resources has not yet demonstrated that its groundwater resources management program has been able to address the problems of aquifer decline throughout the state.

The availability of a tort remedy against those who withdraw excessive amounts of groundwater to the detriment of their neighbors would provide a much needed supplement to Louisiana’s stated goal of conservation of groundwater resources. This tort remedy is available as provided by Louisiana Civil Code article 667 which embodies the civil law maxim that no one may use his property so as to injure another. In order to prevail on such a tort claim, a plaintiff will have to prove that he has suffered actual injury as opposed to mere inconvenience. The determination that a plaintiff has suffered actual injury will depend on the circumstances surrounding the claim, including the nature and degree of the intrusion on plaintiff’s property, the character of the neighborhood, and the extent or degree of the damage, including the effect on the health and safety of the plaintiff. The additional elements of negligence which were added to article 667 in 1996 will also have to be proven by the plaintiff.
The Continuing Debate of Continuing Tort: The Louisiana Supreme Court’s Treatment of the Continuing Tort Doctrine in Hogg v. Chevron USA, Inc.

Mark Assad*

On July 6, 2010, the Louisiana Supreme Court decided an important installment in the debate surrounding the proper application of the continuing tort doctrine.1 The court held that, under Louisiana law, the continuing tort doctrine suspends prescription if the operating cause, defined by the majority as the initial tortious act of the defendant rather than the subsequent effects, is continuing in nature.

I. BACKGROUND

Plaintiffs brought suit against neighboring property owners, Chevron USA, Inc., and the operator of the service station located thereon, alleging property damage resulting from leaking gasoline tanks located beneath the service station.2 On discovering the leaks in 1997, defendant replaced the tanks. In 2001 and 2002, plaintiffs received two letters from the Louisiana Department of Environmental Quality (LDEQ) apprising them of the gasoline contamination in the area surrounding the service station and informing the plaintiffs that LDEQ may ask permission to perform environmental tests on their property in the future. On September

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1. Hogg v. Chevron USA, Inc., 09-2632 (La. 2010), 45 So. 3d 991.
2. Id.
12, 2006, the plaintiffs were contacted concerning access to their property for the purpose of conducting remediation.

On September 6, 2007, the plaintiffs filed suit against the defendants under the tort theory of trespass “seeking damages for diminution of the value of their property, the stigma of owning contaminated property, loss of enjoyment of use of the property, and exemplary damages.” The plaintiffs argued that the presence of the gasoline, the defendants’ failure to remove it, and the ill effects sustained resulted in a viable claim in trespass under Louisiana tort law. Defendants subsequently filed motions for summary judgment asserting plaintiff’s action was barred by the one-year liberative prescription pursuant to Louisiana Civil Code articles 3492 and 3493. Defendants argued that plaintiffs were aware of the damage from the letters received in 2001 and 2002, and therefore prescription began to run upon receipt of those letters. Plaintiffs argued the letters were subject to more than one reasonable interpretation and summary judgment was inappropriate because the reasonableness of their interpretation was an issue of material fact to be decided at trial. The district court agreed with the plaintiffs and denied the defendant’s motions for summary judgment. The Court of Appeal, Second Circuit, declined the defendant’s application for supervisory writ; however, the Supreme Court of Louisiana subsequently granted writs to review the district court’s denial of summary judgment.

II. JUDGMENT OF THE COURT

The Supreme Court of Louisiana addressed two primary issues in its decision. First, the Court had to decide whether or not the LDEQ letters sent to plaintiffs were sufficient to give them actual

3. Id.
4. Id. at 996.
5. Id.
6. Id.
or constructive knowledge of the contamination such that prescription began to run upon the plaintiffs’ receipt of the letters. Second, the Court addressed the continuing tort doctrine and whether or not it was applicable to the facts before the Court.

Regarding the first issue, the Court noted that “there is no question as to what the plaintiffs knew and when [they knew it]” because the “[p]laintiffs’ knowledge is contained in the letters.”8 A plain reading of the letters, according to the Court, clearly indicated that there was soil and groundwater contamination in the area surrounding the service station; therefore, there was no issue of material fact regarding whether or not this amounted to actual or constructive knowledge.9 Instead, the Court framed the issue as whether or not the plaintiffs’ knowledge from the letters constitutes actual or constructive knowledge such that prescription began to run upon their receipt.10 Because the dispute concerns whether or not the letters amount to actual or constructive knowledge and not what the substance of the letters contained, the Court found that summary judgment was appropriate.11

In addressing whether the doctrine of continuing tort would suspend prescription for the plaintiffs’ claim, the Court first addressed plaintiffs’ assertion that the presence of the gasoline on their property was a trespass, and its continued presence was, in fact, continuing tortious activity by the defendants.12 The Court also distinguished continuous and discontinuous operating causes, relying on Crump v. Sabine River Authority, where the Louisiana Supreme Court stated, “[a] continuing tort is occasioned by [continual] unlawful acts, not the continuation of the ill effects of an original, wrongful act.”13 Applying this standard to the present

8. Hogg, 45 So. 3d at 999.
9. Id. at 1000.
10. Id. at 999.
11. Id.
12. Id. at 1002.
case, the Court held that the operating cause of the injury was the leaking of the gasoline out of the tanks, which was abated in 1997, rather than the continued presence of the gasoline on the property. Therefore, the tortious activity alleged by plaintiffs ceased in 1997 and the continuing ill effects of that conduct does not suspend the running of prescription under the doctrine of continuing tort. However, prescription did not begin to run until years later because plaintiffs were not made aware of the injury until the letters were received in 2001 and 2002. Nevertheless, plaintiffs’ suit, filed in 2007, was not within the one-year prescriptive period for tort actions.

III. COMMENTARY

First, the procedural posture of the case is worth noting. The appeal was from a motion for summary judgment that was denied at the trial court, thus the question was whether or not there was a genuine issue of material fact in existence such that judgment could not be rendered as a matter of law. Overturning the trial court’s ruling, the Louisiana Supreme Court held that, because there was no issue of material fact regarding when the plaintiffs acquired actual or constructive knowledge, summary judgment was appropriate. The only question left after this factual determination was whether or not the defendant was entitled to judgment as a matter of law, which the court found it was through

14. Hogg, 45 So.3d at 1006.
15. LA. CIV. CODE art. 3493 provides: “[w]hen damage is caused to immovable property, the one year prescription commences to run from the day the owner of the immovable acquired, or should have acquired, knowledge of the damage.”
16. LA. CIV. CODE art. 3492 provides in pertinent part that “[d]elictual actions are subject to a liberative prescription of one year.” In the context of this case, the provisions of Louisiana Civil Code art. 3493, id. note 15, apply as to when the one-year liberative prescription commences.
17. LA. CODE CIV. PROC. ANN. art. 966(B) (2011). The article provides that summary judgment should be granted if “there is no genuine issue as to material fact, and … [the] mover is entitled to judgment as a matter of law.”
18. Hogg, 45 So. 3d at 1006.
the correct interpretation of the continuing tort doctrine. For the purposes of this note, the court’s treatment of the continuing tort doctrine is the central issue to be considered.

The plaintiffs argued for the application of the continuing tort doctrine in order to circumvent prescription.19 The plaintiffs characterized the presence of the gasoline as a trespass and asserted, consequently, that the trespass continued as long as the gasoline remained on the property. The Court acknowledged this argument and summarily dismissed it for two reasons. First, the Court questioned whether the leaking of the gasoline was a trespass at all because there was little evidence that the defendants intended the gasoline to enter plaintiffs’ land.20 The Court only briefly questioned whether or not the gasoline’s presence was a trespass at all because a final determination on that issue was not necessary to address the continuing tort doctrine and prescription. As the Court noted, the issue of whether or not an underground leak falls within trespass, nuisance, neither, or both, is more appropriate for another discussion.

Second, the Court stated that defining the presence of the gasoline as continuing tortious activity in the form of a trespass would render trespass “an imprescriptible species of tort, an argument at odds with the plain language of Louisiana Civil Code arts. 3492 and 3493, which makes no exception of trespass….”21 The majority’s position on this issue is well grounded in light of the plain meaning of the prescription articles, which make no indication that an expansive reading is appropriate. In fact, the Official Revision Comment (b) to Louisiana Civil Code art. 3492

19. The applicable liberative prescription period in delictual actions is generally one year pursuant to LA. CIV. CODE art. 3492. See supra note 16.

20. Hogg, 45 So.3d at 1002 (the Court specifically states in n.11 that “civil trespass is generally considered to be an intentional tort, requiring proof that the defendant took some intentional action that resulted in harm to the plaintiff.”).

21. Id. at 1002, n.12.
states that the one-year prescription applies to all delictual actions.22

The decision turns on how to define the operating cause of the damage, and the majority opinion is consistent with jurisprudence regarding the continuing tort doctrine.23 The Louisiana Civil Code offers no guidance regarding the continuing tort doctrine, which has developed primarily through jurisprudence. In Crump,24 the Louisiana Supreme Court defined the operating cause of the injury in order to determine the applicability of the continuing tort doctrine. In that case, the defendants created a canal on land adjacent to the plaintiff’s, which caused continued flooding on the plaintiff’s land. The Court held that the operating cause was digging the canal - not the water that was spilled onto plaintiff’s land.25 Instead, the Court characterized the water that remained on plaintiff’s land as the “continuing ill effects arising from a single tortuous act.”26 The initial act of digging the canal was the operating cause of the injury suffered, not the continued presence of the water on the plaintiff’s property. The Supreme Court presented the issue as a problem of determining where the line between cause and effect was drawn, and essentially held that only the initial act should be considered the operating cause of the injury suffered within the context of the continuing tort doctrine.

Justice Knoll’s dissent argues in favor of considering the presence of the gasoline a continuing tort that would suspend prescription, which differs from the majority position that views the “operating cause” of the tortious effects as only the initial act of the defendants. Justice Weimer, writing for the majority, defines

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22. Id.
23. See Marin v. Exxon Mobil Corp., 09-2368 (La. 10/19/10), 48 So. 3d 234 (reaffirming the holding in Hogg, supra note 1); Crump v. Sabine River Authority, 98-2326 (La. 1999), 737 So. 2d 720; South Central Bell Telephone Company v. Texaco, Inc., 418 So. 2d 531 (La. 1982); Mouton v. State of Louisiana, 525 So. 2d 1136 (La. App. 1 Cir. 1988), writ denied, 526 So. 2d 1112 (La. 1988).
24. Crump, 737 So. 2d at 728.
25. Id. at 731.
26. Id. at 728.
the operating cause of the injury as the actual leaking of the gasoline from the tanks. In contrast, Justice Knoll’s position is that the continued presence of the gasoline is causing the harmful effects to plaintiffs and therefore the presence should be considered the cause of the injury suffered. The fundamental question of where to draw the line for cause and effect is apparently still contentious among current Justices of the Louisiana Supreme Court. The majority’s holding, aligned with Louisiana Supreme Court jurisprudence, considers the leak from the tanks the initial, operating cause of the injury, and therefore it alone is the tortious activity in the present case. Consequently, the contamination of plaintiffs’ land itself is the injury, or the effect, of the operating cause along with any additional effects that may arise as a result of the leak.

In light of the Louisiana Supreme Court’s past rulings regarding the doctrine of continuing tort and the holding in this case, there is a clear indication that the Court is unwilling to expand the prescriptive period beyond the initial act (or acts) constituting the operating cause of the injury. The prescriptive period in such cases begins to run as soon as the defendant’s tortious conduct ceases and the plaintiff knows or should know of the damage caused by the act.

However, it is worth noting that Louisiana is not alone in its confusion over the appropriate circumstances for the continuing tort doctrine’s application. For example, in Nieman v. NLO, Inc., the federal Sixth Circuit ruled that Ohio’s continuing trespass doctrine requires no showing of continuing conduct, but rather

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27. The question of whether the continuing conduct (cause) or the continuing damage (effect) is the proper method of defining a continuing tort is recognized in national sources as an area that is generally unsettled. See 54 C.J.S. Limitations of Actions § 223 (2012) (“Under the continuing tort doctrine, where a tort involves a continuing or repeated injury, the limitations period does not begin to run until the date of the last injury or the date the tortious acts cease…”) (emphasis added). The use of the “or” demonstrates the rift in jurisdictions’ analysis for defining a continuing tort.

28. 108 F.3d 1546 (6th Cir. 1997).
only a showing of continuing damage. Interestingly, Judge Krupansky’s dissent mirror’s the Louisiana Supreme Court majority’s reasoning in \textit{Hogg}, noting that “[o]ngoing \textit{conduct} is the key to a continuing tort. Where no continuing action by the defendant is necessary to effect the damage in controversy—that is, where the tort is an accomplished fact, such as when intangible pollutants have impacted the plaintiff’s property…—the tort is permanent” and thus prescribed.
COLUMBIA GULF TRANSMISSION CO. V. BRIDGES: AN EXAMPLE OF DIFFERING DEFINITIONS OF SALES UNDER LOUISIANA LAW

Brian Flanagan*

This case compares the definition of a sale for sales tax purposes with sale as defined by the Louisiana Civil Code.

I. BACKGROUND

Columbia Gulf Transmission Co. (Columbia) is a natural gas transmission company seeking to recoup sales tax and use tax paid under protest to the Louisiana Department of Revenue.1 Columbia transports natural gas through a series of pressurized underground pipelines. During transportation, the natural gas loses pressure and must be recompressed at compression stations along the way.2 Some of the gas Columbia transfers is diverted to these compression stations and used to power the compressors in order to maintain the gas pressure in the pipeline. Pursuant to the gas tariff (effective rate schedule) that Columbia was operating under, Columbia was not charged for the use of this gas.3

The Louisiana Department of Revenue asserted that the gas belonged to Columbia’s customers, and Columbia’s use of the gas to power the compressors constituted a sale in the form of a barter.4 Therefore, the Department of Revenue asserted the sale was subject to Louisiana state sales tax and use tax.

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2. Id.
3. The gas tariff is regulated by the Federal Energy Regulatory Commission (FERC).
4. Columbia, 28 So. 3d at 1035.
Columbia paid the taxes under protest while asserting there had been no sale. Further, Columbia argued that the Louisiana Department of Revenue calculated the use tax based on “spot [market] prices,” in violation of the definition of “cost price” set forth in Louisiana Revised Statute 47:301. Columbia argued that it did not pay any price for the fuel, in that it was “tendered to Columbia Gulf by its shippers without cost,” thus its taxable “cost price” should be zero. Therefore, Columbia argued it did not owe any sales or use tax on the gas.

II. JUDGMENT OF THE COURT

The Court of Appeal reversed the summary judgment that had been granted in favor of Columbia by the trial court. In doing so, the court of appeal distinguished a sale as defined by Louisiana Civil Code Article 2439 from a sale defined in the LA. REV. STAT. 47:301 for sales tax purposes. Using the definition in LA. REV. STAT. 47:301, the court held when Columbia diverted some of the natural gas from the pipeline to power the compressors, such action constituted “transfer of title of possession of the gas for a consideration.” Even though no price in money was paid for the gas, LA. REV. STAT. 47:301 allows the price to be paid in money or otherwise. Therefore the fact that Columbia did not pay any money

5. LA. REV. STAT. 47:301 defines cost price: “‘Cost price’ means the actual cost of the articles of tangible personal property without any deductions therefrom on account of the cost of materials used, labor, or service cost, except those service costs for installing the articles of tangible personal property if such cost is separately billed to the customer at the time of installation, transportation charges, or any other expenses whatsoever, or the reasonable market value of the tangible personal property at the time it becomes susceptible to the use tax, whichever is less.”

6. Columbia, 28 So. 3d at 1034.

7. Id. at 1043. While Article 2439 states that Sale is a contract whereby a person transfers ownership of a thing to another for a price in money, LA. REV. STAT. 47:301(13)(a) defines “Sales price” as the total amount for which tangible personal property is sold, less the market value of any article traded in including any services, except services for financing, that are a part of the sale valued in money, whether paid in money or otherwise. (emphasis added)

8. Although the Civil Code articles do not use the term “consideration,” LA. REV. STAT. 47:301 uses the term for sales tax purposes.
for the gas did not preclude it being categorized as a sale for sales tax purposes. Finally, the court added that consideration could be inferred because “nothing in the record supports a finding that this transfer of gas was gratuitous,” and moreover, “businesses do not generally give away their assets.”9 The court of appeal then remanded to the trial court to determine the correct amount of sales tax owed by Columbia.10

III. COMMENTARY

This case illustrates the principle in Louisiana law that courts will give contracts their proper legal characterization, focusing on its component parts rather than form or wording. Thus, when the name or title fails to properly identify the nature of the contract, courts will apply the proper characterization according to the component parts of the contract.11 In this case, Columbia had an agreement with its customers that allowed it to use the gas free of charge to power the necessary compression stations, but despite the wording of the contract, the court of appeal categorized this as a taxable sale under LA. REV. STAT. 47:301.12

Next, it is important to note that the court recognized that “laws regulating the collection of taxes are sui generis, and constitute a system to which the general provisions of the Louisiana Civil Code have little, if any, application.”13 Therefore the statute on sales tax should be considered separately from the Civil Code. Finally, this statute is lex specialis in that it deals specifically with sales tax, and should not impact the definition of a sale in the lex generalis.14

One may not infer from this case that under Article 2439, a price

9. *Id.* at 1042.
10. *Id.* at 1044.
11. LA. CIV. CODE art. 2053.
12. Additionally, Judge Parro states, “the fact the terms of Columbia’s contracts with its customers were mandated by the FERC regulations does not render the sales tax law of this state inapplicable once the taxing jurisdiction of Louisiana was invoked.”
13. Columbia, 28 So. 3d at 1041.
14. The *lex generalis* in this case is LA. CIV. CODE art. 2439.
may be money or otherwise. If paid in kind, the contract is not a sale but an exchange.  

Interestingly, the definition of sale in LA. REV. STAT. 47:301 is consistent with the common law definition of sale found in Uniform Commercial Code 2-304, in that both statutes allow that the price may be in money or otherwise. Likewise, in the law of lease, LA. CIV. CODE art. 2675 now allows the payment of rent to be in money or “otherwise,” specifically commodities, fruits, services or other performances specific to support an onerous contract. While this may suggest a pattern in the legislation, there does not appear to be any need to broaden the definition of a sale under Civil Code article 2439. The category of exchange already exists for these situations. Moreover, there is also a possibility of categorizing the contract as an innominate contract to categorize transactions where the price is not in money, but otherwise.

16. U.C.C. §2-304(1) states, “The price can be made payable in money or otherwise. If it is payable in whole or in part in goods each party is a seller of the goods which he is to transfer.”
17. In the international realm, the United Nations Convention on Contracts for the International Sale of Goods (CISG) makes no reference to price being paid in money or otherwise. (emphasis added)
18. LA. CIV. CODE art. 2664 provides that, with several exceptions, the contract of exchange is governed by the rules of the contract of sale. Innominate Contracts are defined in art. 1914, in the general obligations portion of the Civil Code.
NEEB V. LASTRAPES, AND THE CONFUSING STATE OF THE ANCIENT DOCTRINE OF DELIVERY IN LOUISIANA

William Gaskins*

Is there a sale when the owner’s husband negotiates the deal, the price is never agreed upon, neither the buyer nor the real owner signs the document of sale, and the buyer moves into the house only to be replaced by the old owner after a month? These are the issues faced in the tangled 2011 Louisiana Fifth Circuit Court of Appeal case *Neeb v. Lastrapes*.1 This comment will recount that odd case, and then will briefly determine its place (and that of the Louisiana law underlying it) in relation to Roman and French civil law.

I. BACKGROUND AND THE DECISION OF THE COURT

In September of 2005, shortly after the Hurricane Katrina disaster, John Lastrapes contacted Anne Neeb via email about purchasing her house in Metairie, just outside of New Orleans. Mrs. Neeb responded that she planned to sell her house for $415,000; fifteen days later, Mr. Lastrapes sent her a $10,000 “deposit,” which Mrs. Neeb accepted into her bank account. Then, Mr. Neeb (who did not share in his wife’s ownership) faxed an “agreement to sell real estate” to Mr. Lastrapes. The document proposed the price of $415,000 for the sale of the property, and was signed by Mr. Neeb, purportedly as a proxy for his wife; yet neither Mr. Lastrapes nor Mrs. Neeb ever signed the contract. Despite this, the Neebs removed some, but not all, of their possessions from the home, and vacated the home themselves. The Lastrapes then moved in, changed the locks, erected a fence, and

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1. *Neeb v. Lastrapes*, 64 So. 3d 278 (La. App. 5 Cir. 2011).
removed all of the yard’s existing landscape plants except the grass.

After inhabiting the house for one month, Mr. Lastrapes called Mrs. Neeb and told her he would not be purchasing the property. He promptly quit the home, and the Neebs moved back in, all of this in such short time that the Neebs were able to host their family meal there on Thanksgiving Day (November 25, 2005). In the three years that followed before the trial began, Mrs. Neeb claimed a “homestead exemption” on the home and paid its property taxes, specifically admitting that she was the owner of the house in August, September, October, and November of 2005. Mrs. Neeb filed suit against Lastrapes in April of 2006, eventually alleging that the Lastrapes reneged on a valid obligation to buy the house.

Despite the complicated nature of the matter, the Fifth Circuit made quick work of it on appeal. The Fifth Circuit overturned the trial court decision and declared that no sale occurred because the seller’s delivery and the buyer’s subsequent possession were too transitory to be valid. To be sure, the facts of the case are peculiar; but given how far the parties went in transferring the house, might not one argue that even the murkily-wrought delivery between the Neebs and the Lastrapes was more than sufficient to result in a valid sale?

II. COMMENTARY

A. The Louisiana Law, and Its Relation to French and Roman Law

The court’s decision is based on Louisiana Civil Code art. 1839, which states in pertinent part that, “A transfer of immovable property must be made by authentic act or by act under private signature.” As an exception to that rule the Civil Code states,

2. Id. at 282. As a secondary line of reasoning seemingly based on the same assumptions as those above, the court noted that a valid sale requires ascertainment of thing, price, and consent, and those factors were not fulfilled in this case. See LA. CIV. CODE art. 2439.

3. LA. CIV. CODE art. 1839.
“Nevertheless, an oral transfer is valid between the parties when the property has been actually delivered and the transferor recognizes the transfer when interrogated under oath.” In other words, oral transfers of immovables are valid when 1) there is actual delivery and 2) the seller admits to the transfer. There is no definition of “delivery” for immovables in Louisiana law except that in Civil Code art. 2477, which only treats immovables transferred by writing; the question thus arises, how should a court determine whether a delivery of immovables without a writing has taken place?

In Roman law, the earliest way to make a sale was by delivery of the thing (in French, tradition réelle). From the requirement of actual delivery, there arose formalistic doctrines which integrated various degrees of fiction to take the place of delivery. In tradition symbolique, delivery of the entire thing was replaced with delivery of a smaller thing that represented or came from the bigger one. Another method was delivery by long hand (longa manu), which allowed the seller to merely show the thing to the buyer to effect a sale. Another method of effecting a sale, and one useful when the buyer had already possessed the thing, was delivery by short hand (brevi manu), in which the seller merely declared the buyer to be the owner. In such situations of pre-sale possession by the buyer, the parties might instead effect delivery by adding an additional element to the underlying contract, such as a usufruct, in order to make the contract valid (tradition feinte). Through all of these institutions, delivery remained the element necessary to effect a sale; only the degree of fiction allowed in the delivery changed. Later, Old French law came up with nothing new, and used the

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4. Id.
5. Concerning immovables, “Delivery of an immovable is deemed to take place upon execution of the writing that transfers its ownership.”
7. Id.
Roman methods of delivery and fictitious delivery to satisfy the continued requirement of delivery for the validation of a sale.  

Notwithstanding the reverence of the French for Roman law, the 1804 Code civil made a complete break from the past on the subject of consecration of a sale. Whereas the necessity of delivery, either real or fictitious, had always been the rule in civil law before, the drafters of the Code civil declared consent to be the new means of sale. Article 1589, in both the 1804 Code civil and that of today, reads: “La promesse du vente vaut vente, lorsqu’il y a consentement réciproque des deux parties sur la chose et sur le prix.” Furthermore, in article 1583, “[La vente] est parfaite entre les parties, et la propriété est acquise de droit à l’acheteur à l’égard du vendeur, dès qu’on est convenu de la chose et du prix, quoique la chose n’ait pas encore été livrée ni le prix payé.” In other words, the French Code civil has held since its conception that consent is what consecrates a sale. Planiol argues that the effect of the new rule is the same as that of the old because Roman delivery was often fictitious, and might as well have not occurred; yet the fundamental theory underlying sale was certainly changed in 1804. Even where the Code civil requires writing to prove a sale, consent is nonetheless the real modern method for achieving the sale, and writing is merely proof of the consent.

Louisiana law states that, “[a] party who demands performance of an obligation must prove the existence of the obligation;” likewise the French Code civil says, “[c]elui qui réclame

8. Planiol, supra note 6, at 532.
9. “The promise of sale becomes validly a sale when there is reciprocal consent of the two parties on the thing and the price.” Code Civil art. 1589 (fr.) (years 1804 and 2005). Note that the modern-day article adds a stipulation for land that is to be divided into allotments.
10. “[The sale] is perfect between the parties, and the property is acquired by law by the buyer with regard to the vendor, when there is agreement on the thing and the price, although the thing has not yet been delivered, nor the price paid.” Code Civil art. 1583 (fr.) (years 1804 and 2005).
11. Planiol, supra note 6, at 533-34.
12. Planiol, supra note 6, at vol. II, 564.
l’exécution d’une obligation doit la prouver.” 14 Doubtless this idea is the reason for the requirement that a sale be validated by a writing in authentic form. Perhaps the allowance for sale by delivery in Louisiana Civil Code art. 1839 serves the same purpose: not as a way around the requirement of proof of a transfer, but simply as another, more ancient method of proof. Whatever the reason for the delivery provision, its effect is exactly that: although modern civil law doctrine has otherwise abandoned its old method of consecrating a sale of an immovable, one Louisiana Civil Code article keeps alive the tradition of consecration by delivery.

B. Interpreting the Louisiana Rule and Neeb in Light of Legal History

In Neeb v. Lastrapes, the court declared that Mrs. Neeb did not meet the Louisiana Civil Code art. 1839 requirement that property be “actually delivered,” despite the facts that the Neebs moved out of their house, that they removed most of their possessions, that the Lastrapes moved into the house and lived there for a month, and that the Lastrapes changed the locks, dug up all of the plants, and erected a fence around the property. It seems that under ancient Roman and Old French law such actions would have constituted not just fictional but real delivery of the immovable into the hands of the sellers. Thus, the court’s decision that the actions do not satisfy the delivery provision under Louisiana Civil Code art. 1839 departs from, not only the ancient law of delivery, but also the words themselves in the modern allowance for valid sale when 1) “the property has been actually delivered” and 2) “the transferor recognizes the transfer.” 15

Present-day law of sale in both France and Louisiana is based upon consent, rather than the ancient doctrine of sale by delivery.

15. LA. CIV. CODE art. 1839.
Yet one article of the Louisiana Civil Code—article 1839—pays tribute to the ancient Roman and Old French delivery law. Unfortunately, the short explanation of the court in *Neeb* leaves readers to wonder why the lengthy and multi-faceted delivery to and possession by the Lastrapes was not sufficient for the property to have been “actually delivered” and thus to result in a valid sale. Perhaps a future case will explain this questionable departure from both the written and the historical law; but if to have our explanation we must wait for another case with facts as odd as those in *Neeb*, we may have to wait a long time.
UDOMEH V. JOSEPH: WHEN ACKNOWLEDGING PATERNITY IS NOT ENOUGH

Taylor Gay*

I. BACKGROUND

The case of Udomeh v. Joseph involves a Plaintiff named Fidel Udomeh who filed suit for the wrongful death of his son. Mr. Udomeh claimed that he and Sandra Joseph were the biological parents of a child named S.U., who was born on June 16, 1997. Although Mr. Udomeh and Ms. Joseph were never married, Mr. Udomeh alleged that he played an active role in S.U.’s life.

In February of 2006, Mr. Udomeh discovered that Ms. Joseph attempted to commit suicide while she was in the presence of S.U. Ms. Joseph subsequently committed herself for psychiatric treatment, and was released a few days later. Following this, Mr. Udomeh lodged a formal complaint against Ms. Joseph with the Louisiana Department of Social Services (LDSS). The LDSS, who employed Ms. Joseph, responded to his complaint by sending a form letter stating that they were “unable to investigate the situation because it does not meet the legal and policy definition of child abuse or neglect.”

A few years later, in January of 2009, Ms. Joseph experienced a psychotic episode at a restaurant while S.U. was with her. The Lafayette City Police sent her to the University Medical Center (UMC) for treatment, and Ms. Joseph was eventually released with S.U in her custody. Later that month, Ms. Joseph began acting strangely and erratically at work, and her coworkers at the LDSS consequently filed complaints about Joseph, voicing concern for S.U.’s safety.

* Candidate, J.D. & Graduate Diploma in Comparative Law, LSU Law Center (2013). Special thanks to Prof. John Randall Trahan for his guidance and to Ms. Jennifer Lane and Prof. Olivier Moréteau for proofreading and editing.

Finally, on February 21, 2009, Ms. Joseph drove S.U. to Grand Coteau, Louisiana, and ordered him out of the car. She then used her car to intentionally and repeatedly run over S.U. until he died.

Mr. Udomeh accordingly filed a wrongful death action against Ms. Joseph, UMC, and the LDSS. UMC and the LDSS filed exceptions of no right of action and/or lack of procedural capacity. Because Mr. Udomeh failed to institute a Petition for Judgment of Filiation under Louisiana Civil Code article 198, the trial court sustained their exceptions and dismissed Mr. Udomeh’s case against UMC and LDSS with prejudice.

Mr. Udomeh thereafter appealed the trial court’s decision, alleging that the trial court erred in granting the exception because: “(1) Louisiana Civil Code article 198 does not require that a father establish paternity before having a right of action for wrongful death, (2) Such a finding leads to inequitable, unjust, and otherwise absurd consequence, and (3) The court should have considered the dilatory exceptions of lack of procedural capacity instead.”

II. JUDGMENT OF THE THIRD CIRCUIT COURT OF APPEAL OF LOUISIANA

A majority of the appellate court affirmed the trial court’s finding that Mr. Udomeh lacked a right of action. The court relied on First Circuit case Thomas v. Ardenwood Props. & Scottsdale Ins. Co., which addressed the question of whether a biological father could institute a wrongful death action on behalf of his child born out-of-wedlock. The First Circuit suggested that such a father would have a right to bring this action, but only if he first complied with the requisite procedural formalities. The procedural formalities contemplated by the First Circuit include a judgment of filiation under Louisiana Civil Code article 198—action to obtain

2. Id. at 524.
4. Udomeh, 75 So. 3d at 525.
which must be instituted within a peremptive period of one year from the day of the child’s death.

In *Udomeh v. Joseph*, although Mr. Udomeh alleged that he was S.U.’s biological father in his wrongful death petition, Mr. Udomeh never instituted a Petition for Judgment of Filiation to establish his filiation to S.U. within the one-year peremptive period. Thus, because Mr. Udomeh failed to timely institute an action to establish filiation, the appellate court decided that he is no longer within the class of persons entitled to bring a wrongful death action on S.U.’s behalf.

### III. DISSENT BY JUDGE COOKS

Judge Cooks dissented from the majority’s opinion. According to Judge Cooks, Louisiana Civil Code article 198 does not compel a father to institute an action to establish paternity before pursuing a wrongful death or survival action found in Louisiana Civil Code articles 2315.1 and 2315.2. Judge Cooks suggested that Louisiana Civil Code article 198 is not mandatory. Her proposition is based on the seemingly permissive language found in the statute, which states that a “man may institute an action to establish his paternity.” Judge Cooks argued that the majority should not have allowed the permissive language found in Louisiana Civil Code article 198 to “thwart the right of action provided to biological fathers to bring actions under our tort laws.”

Judge Cooks went on to suggest that statutes found in the family law section of the Louisiana Civil Code should not override statutes found in the obligations section of the Code. She also noted that the majority should not have granted the Defendants’ motion to strike references to and copies of the documents attached to Udomeh’s brief, because these references and copies contained evidence that Udomeh was the biological father of S.U.  

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5. *Id.* at 526  
6. *Id.* at 528. These stricken documents and records show that Mr. Udomeh is listed as the father of S.U. on S.U.’s birth certificate and that Mr.
This case provides a stern warning for Louisiana lawyers wishing to avoid malpractice claims: if representing an unfiled parent of a decedent child, you should institute a Petition for Judgment of Filiation contemporaneously with any wrongful death and survival actions or, at least, institute such an action within the one year peremptive period. 7

In the author’s opinion, the court’s holding is severely unjust because the court allowed Mr. Udomeh’s failure to comply with a vague procedural requirement, i.e. the requirement to file a Petition for Judgment of Filiation, to preclude his opportunity to recover damages for the loss of his son. Mr. Udomeh obviously cared for S.U. He provided child support to S.U., was declared to be S.U.’s biological father in a court proceeding, and was listed as S.U.’s father on S.U.’s birth certificate. 8 Furthermore, Mr. Udomeh attempted to protect S.U. from the unstable behavior of Ms. Joseph, but his efforts were quashed by LDSS, who employed Ms. Joseph.

Udomeh always held himself out to the community as S.U.’s father. The trial judge also stated that he had “no doubt” that Mr. Udomeh was S.U.’s biological father. Further, Udomeh voluntarily paid child support until Ms. Joseph filed for state mandated child support in 2001. After Ms. Joseph’s filing for mandated child support, there were court proceedings in which it was determined that Mr. Udomeh was indeed S.U.’s biological father, and the court ordered him to pay monthly child support to S.U. on that basis.

7. This warning is equally applicable to cases, like Udomeh, where the plaintiff has filiated himself to the child by means of a formal acknowledgment under Louisiana Civil Code article 196. Article 196 provides that a man may formally acknowledge a child not filiated to another man. Formal acknowledgment may be accomplished by either authentic act or signing the child’s birth certificate. This acknowledgement creates a presumption that the man who acknowledges the child is the father. Nevertheless, this presumption can only be invoked on behalf of the child. In the Udomeh matter, Mr. Udomeh was presumed to be S.U.’s father under Louisiana Civil Code article 196 because he formally acknowledged S.U. by signing his birth certificate. Mr. Udomeh’s presumption of paternity, however, could have only been invoked by S.U. Thus, Mr. Udomeh could not use this presumption of paternity in his wrongful death and survival action because the effects of this article flow only in the child’s favor. LA. CIV. CODE ANN. art. 196 (2009).

8. Udomeh, 75 So. 3d at 527.
As Judge Cooks’ dissent correctly points out, Louisiana Civil Code article 198 does not require a father to file a Petition for Judgment of Filiation.\(^9\) The author thus prays that the Louisiana Supreme Court will take notice of this article’s words and reverse the lower court’s decision so as to avoid inequitable judgments like the one found in \textit{Udomeh v. Joseph}.

\(^9\) \textit{Id.} at 527.
A TALE OF TWO FATHERS: STATE OF LOUISIANA, DEPARTMENT OF SOCIAL SERVICES \textit{ex rel.} P.B. V. MICHAEL REED

Sarena Gaylor\textsuperscript{*}

I. BACKGROUND

A child, P.B., was conceived in May 2000 while his mother, B.B., was married and simultaneously involved in a sexual relationship with her brother-in-law, Michael Reed. Because B.B.’s husband had undergone a vasectomy, she believed Reed was the biological father of P.B. On September 10, 2007, the Department of Social Services (DOSS) filed suit against Reed to Prove Paternity and Obtain Child Support.\textsuperscript{1} DOSS offered genetic evidence, which reflected Reed’s probability of being P.B.’s biological father as 99.999%.

On November 10, 2008, the juvenile court judge determined it was in P.B.’s best interest for Reed to be established as P.B.’s biological father. Following this ruling, a hearing took place to set child support. Using two paycheck stubs from the mother, an unauthenticated list of bank deposits for the biological father, two different Louisiana Automated Support Enforcement System (LASES) worksheets, and a 1099 form for the biological father, the judge ordered Reed to pay B.B. $365.00 per month for P.B.’s support.

The State appealed the award arguing that the juvenile court judge erred, as a matter of law, in the methodology used to calculate the child support obligation of a biological father. The trial judge did not have the adequate evidence necessary under

\textsuperscript{*} Candidate, J.D. & Graduate Diploma in Comparative Law, LSU Law Center (2013). Special thanks to Prof. Randall Trahan and Prof. Katherine Spaht for their assistance with research; and to Prof. Olivier Moreteau, Ms. Jennifer Lane, Ms. Taylor Gay, and Ms. Chelsea Gomez for proofreading and editing.

\textsuperscript{1} 52 So. 3d 145 (La. App. 5 Cir. 2010).
Louisiana Revised Statute 9:315, *et seq.* to determine Reed’s financial obligation to the child.

II. JUDGMENT OF THE COURT

On appeal, the Fifth Circuit Court of Appeal reversed and remanded the case. The trial court’s discretion in setting child support is structured and limited by the Guidelines for Determination of Child Support which are set forth in Louisiana Revised Statute 9:315 *et seq.* Louisiana Revised Statute 9:315.2 requires “each party to provide a verified income statement showing gross income and adjusted gross income with documentation of current and past earnings...The documentation shall include a copy of the party’s most recent Federal Tax Return.” It was uncertain as to what exhibits of those transmitted to the Fifth Circuit were actually introduced into evidence at the hearing. Additionally, no copy of the parties’ most recent federal tax return was provided. Moreover, it was unclear to the Fifth Circuit how the trial judge came upon the amount of income imputed to the legal father or the biological father with the evidence provided. In cases where the record contains inadequate information and documentation upon which to make a child support determination under the guidelines, a remand to the trial court is necessary. Accordingly, the Fifth Circuit concluded the trial court judge abused her limited discretion in calculating the child support award, and the court consequently vacated the award and remanded the case to the lower court for a hearing to set child support in compliance with the guidelines, including, but not limited to Louisiana Revised Statute 9:315.2(A).

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2. *Id.* at 147, citing State of Louisiana, Department of Social Services ex rel. D.F. v. L.T., Jr., 934 So. 2d 687, 690 (La. 2006).

3. Reed, 52 So. 3d at 147.

4. *Id.*
III. COMMENTARY

Unlike the rest of the United States, Louisiana has long recognized the possibility of a child having two fathers: a biological father and a legal presumptive father.\(^5\) This concept, referred to as “dual paternity,” is now legislatively provided for in Louisiana Civil Code articles 197 and 198.\(^6\) Dual paternity allows a child to seek support from his or her biological father, though the child is presumed to be the child of a marriage between the mother and another man (legal father).\(^7\)

In *Smith v. Cole*,\(^8\) the court stated “the biological father does not escape his support obligations merely because others may share with him the responsibility,” establishing that in circumstances where a child already has a legal father to support him or her, the biological father’s duty to the child is not extinguished. Furthermore, biological fathers are civilly obligated to support their offspring.\(^9\) Whether the biological father has or has not played a role in the child’s life has no material effect on the obligations he has assumed.\(^10\)

The aforementioned duty the fathers owe to the child is, of course, expressed by way of child support. Louisiana Revised Statute 9:315.2 provides a rigid guideline as to the calculation of basic child support. The statute requires parties to provide verified income statements showing gross and adjusted income, documentation of current and past earnings, a copy of the party’s most recent federal tax return, and any documents related to the

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\(^5\) LA. CIV. CODE ANN. art. 197 (2011); see also art. 197 comments. (a), (b); LA. CIV. CODE ANN. art. 198 (2011); State of Louisiana ex rel. C.W. v. Wilson, 855 So. 2d 913, 914 (La. App. 2 Cir. 9/24/03).

\(^6\) LA. CIV. CODE art. 197 allows a child to establish paternity though he is presumed to be a child of another. LA. CIV. CODE Art. 198 allows a man to establish paternity of a child who is presumed to be that of another.

\(^7\) Wilson, 855 So. 2d at 914, citing State, Dep’t of Soc. Serv., Office of Family Support ex rel. Munson v. Washington, 747 So. 2d 1245 (La. App. 2d Cir. 12/08/99).

\(^8\) Smith v. Cole, 553 So. 2d 847, 854 (La. 1989).

\(^9\) Id.

\(^10\) Wilson, 855 So. 2d at 915.
ownership interest in a business. The parties combine the amounts of their adjusted gross incomes and then determine (by percentage) his or her proportionate share of the combined adjusted gross income. The court then determines the basic child support obligation amount from the schedule provided for under Louisiana Revised Statute 9:315.19 using the combined adjusted monthly gross income of the parties and the number of children for whom support is sought. The amount which each party is obligated to pay is divided in proportion to each parents’ percentage share of the combined adjusted gross income. While seemingly fair and equitable to the parties involved, the statute contemplates that there are two – and only two—parents, one mother and one father.

Although dual paternity has long been a part of Louisiana law, there has yet to be either legislation or jurisprudence constante developed to establish guidelines to determine the legal and biological fathers’ financial obligations to the child in terms of child support. The court in State ex rel. C.W. v. Wilson attempted to resolve this issue by combining the adjusted gross incomes of the biological and legal father with that of the mother. Utilizing the schedule within Louisiana’s current child support guidelines, Louisiana Revised Statute 9:315.19, the paternal support obligation was established. The court then compared the two fathers’ shares of income and the mother’s income and determined that the fathers, together, were responsible for 67.4 percent ($519.88) of the child’s total support obligation; the mother was responsible for the remaining 32.6 percent ($251.48). Of the $519.88, the legal father was responsible for 65 percent ($339) of the paternal

12. LA. REV. STAT. ANN. §315.2(C) (2011).
14. Supra note 12.
15. Wilson, 855 So. 2d at 913-914 (2003).
16. Id.
17. Id. at 915 n.5.
obligation, and the biological father was responsible for 35 percent ($180.88) of the paternal obligation. The Second Circuit Court of Appeal affirmed the lower court’s judgment finding that the calculation was done “in the spirit of the guidelines [of LA. REV. STAT. §9:315.2],” because child support was allocated in proportion to the needs of the child and the ability of the parents to provide such support. The Fifth Circuit in Reed, noting the formula accepted by the Second Circuit, described this methodology as “interesting” and remanded the question to the lower court to determine a proper child support payment in compliance with Louisiana Revised Statute 9:315. Again, this is, strictly speaking, impossible because Louisiana Revised Statute 9:315 does not provide a formula for multiple fathers.

Though the Wilson resolution allows a child to receive the necessary support, are we inadvertently rewarding a woman for committing adultery? Including an extra parent in the child support calculation will only reduce the obligation of the mother. Further, accepting adultery is inconsistent with Louisiana’s strong public policy that considers the sanctity of marriage and familial values top priority.

On the other hand, if courts do not follow the procedure set forth in Wilson, where does the legal father stand in a dual paternity situation? Should the legal father be required to support the child at all? If so, are the two fathers bound solidarily on the obligation to the support the child? If the legal father is forced to pay, can he seek indemnity from the biological father? Or, if he cannot obtain indemnity, can he at least obtain contribution? If he can, then in what amount?

These are the questions facing Katherine Spaht, Professor Emeritus at LSU Law Center, chairman and reporter of the Marriage and Persons Committee of the Louisiana State Law

18. Id. at 915-16.
19. Id. at 916.
20. Reed, 52 So. 3d 145, 148 n.2.
Institute and member of the Child Support Committee. The Marriage and Persons Committee has been given the task by the Louisiana Legislature to identify all areas of law, which are effected by “dual paternity”; one of these areas, naturally, is child support.21 On behalf of the Marriage and Persons Committee, Prof. Spaht drafted the proposed resolution regarding child support in a dual paternity situation.22 The proposal acknowledges that the guidelines used in Wilson were proper: considering the income of all three parents and proportioning the responsibility of each parent gave the most satisfactory resolution.23 Prof. Spaht’s proposal will likely be introduced at the next Child Support Review Committee guidelines meeting, which meets every four years (the next meeting to be held in 2016).24 Until then, courts have freedom to determine dual paternity child support in any manner that strikes them as consistent with the current Child Support Guidelines.

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22. Id.
23. Id.
SS ex rel. K.B.D. v. Drew: The Failure to Align Biological and Legal Paternity—When Clear and Convincing Evidence Isn’t Enough

Chelsea Gomez*

I. BACKGROUND

The case of State of Louisiana, Department of Social Services ex rel. K.B.D. v. Drew1 required the Louisiana Second Circuit Court of Appeal to determine whether a presumed father, under Louisiana Civil Code article 185, could successfully file a petition to disavow paternity more than five years after the birth of his presumed child by providing clear and convincing evidence that he was not the biological father of the child.2 Particularly, the court was asked to determine whether a presumed father could successfully disavow paternity when he had no reason to question paternity until four years after the child’s birth.

After becoming pregnant out of wedlock, the mother of K.B.D. married her boyfriend, Marion Drew, Jr., in December 2003. Six months later, on June 14, 2004, the child was born of the marriage, and the husband signed the certificate of live birth. The husband filed for divorce more than four years later. At this point, he never questioned the biological paternity of the child. After the state filed a rule to establish support on behalf of the minor child in April 2008,3 the husband acquired knowledge that the mother might

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1. 46,337, (La. App. 2 Cir. 6/29/11); 70 So. 3d 1011.
2. Id. at 1012.
3. Id. at 1011, n.1 (citing 42 U.S.C. §§ 651 and 608) “...recipients of AFDC under Title IV D of the Social Security Act assign their child support rights to the state and are required to cooperate (unless good cause for refusing to do so is determined to exist) in whatever legal action the state undertakes. By assigning their child support rights in return for AFDC aid, they give the states
have slept with another man around the time of conception. In June 2008, the presumed father requested DNA testing, which ultimately determined that he was not the biological father. In July 2009, he filed a petition to annul his acknowledgment and in October 2009 amended his petition to disavow paternity. This suit was brought more than four years after the birth and more than a year after questioning filiation.

II. JUDGMENT OF THE COURT

A divided court\(^\text{4}\) upheld the legal presumption of paternity and dismissed the father’s disavowal action as prescribed, with a concurring opinion advocating for the application of *contra non valentem* when a father, such as the presumptive father in the instant case, was not informed of the possibility that the baby could have been fathered by another man.\(^\text{5}\) In its legal analysis, the majority quickly disposed of the petition in which the presumed father attempted to annul his acknowledgement of paternity.\(^\text{6}\) He alleged that Louisiana Revised Statute 9:392(A)(7)(b) allowed him to annul his acknowledgment because he was able to prove, by clear and convincing evidence, that he was not the biological father.\(^\text{7}\) The court, however, recognized that the acknowledgment referred to is not that which can be accomplished by the signing of the birth certificate at the time of birth, but rather that which can be accomplished by the execution of an authentic act of acknowledgment or by the subsequent signing of the birth certificate.\(^\text{8}\) As the court correctly noted, the presumed father in this case had not made such an acknowledgment. In addition, the

\(^\text{4}\) *Id.* at 1016 (Judge Stewart concurring in a separate opinion).

\(^\text{5}\) *Id.* at 1015, 1016.

\(^\text{6}\) *Id.* at 1014.

\(^\text{7}\) *Id.*

\(^\text{8}\) *Id.*

the opportunity to recoup the financial drain imposed by the welfare system on the state and federal treasuries."
court noted, even if the father had made such an acknowledgment and even if it were to have been annulled, the outcome of the case would not have been changed: the child was born of the marriage; therefore, the presumption of paternity created by Civil Code article 185 was valid without any acknowledgment required.9

The court relied on Louisiana Civil Code articles 185 and 189 in deciding this dispute.10 Article 185 states, “The husband of the mother is presumed to be the father of a child born during the marriage or within three hundred days from the date of the termination of the marriage.”11 The husband and presumed father may rebut this presumption by bringing a “disavowal action.”12 This action is further governed by the one year liberative prescription period of Louisiana Civil Code Article 189, which provides that prescription commences from the day the husband learns of, or should have learned of the birth of the child.13 The only exception provided is if the husband and mother continuously lived separate and apart during the three hundred days preceding the birth.14 In that case, prescription does not begin to run until the husband is notified in writing that someone has asserted he is the child’s father.15

The court recognized that the presumed father’s testimony, the mother’s testimony, and the DNA results successfully proved, by clear and convincing evidence, that he was not the biological father, thus, meeting the requirements of Louisiana Civil Code article 187 for a successful disavowal action.16 Regardless of such proof, the language of article 189 is clear and unambiguous—prescription should start on the date the presumed father learned or

9. Id.
10. Id. at 1012-1013.
14. Id.
15. Id.
should have learned of the birth.\textsuperscript{17} Though the prescriptive period may be subject to the doctrine of \textit{contra non valentem},\textsuperscript{18} the court recognized that the presumed father, under these circumstances, clearly knew that the child was born on the date of birth, which disallowed interruption or suspension of the prescriptive period.\textsuperscript{19} Therefore, by the time the complaint was filed in the instant matter, the cause of action had prescribed. Under this analysis, the majority of the Second Circuit seems willing to apply the doctrine of \textit{contra non valentem} only if the father has no reason to know about the actual birth, not in cases where he had no reason to question the biological paternity until a later date. Though this reasoning is consistent with the public policy to “protect innocent children, born during the marriage,” the doctrine would be unnecessary in such circumstances.\textsuperscript{20} If the husband has no reason to know of the birth of the child, article 189 already provides for interruption of prescription until he should have learned of the birth.\textsuperscript{21} Although the court states that \textit{contra non valentem} could be applied to this prescriptive period, its reasoning rejecting its application seemingly bars the doctrine from use in disavowal suits.

The Second Circuit recognized that the changes made in 2005 to the law of filiation liberalize the strict nature of the presumptions, more closely aligning biological and legal

\textsuperscript{17} LA. CIV. CODE Ann. art. 189 (2011).
\textsuperscript{18} See Corsey v. State ex rel. Dep’t of Corrections, 375 So. 2d 1319, 1321-22 (recognizing that “Louisiana jurisprudence has recognized a limited exception [to the running of prescription] where in fact and for good cause a plaintiff is unable to exercise his cause of action when it accrues” The Court also recognizes that this “principle is often denoted by the maxim \textit{Contra non valentem agere nulla currit praescriptio}” and is “especially applicable in the present instance, where the plaintiff's inability to act is due to the defendant's willful or negligent conduct.”); Benjamin West Janke and François-Xavier Licari, \textit{Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth}, 71 LA. L. REV. 503 (explaining the relationship between the Louisiana and French courts’ treatment of the extra-codal principle of \textit{contra non valentem} in prescription law).
\textsuperscript{19} Drew, 70 So. 3d at 1014.
\textsuperscript{20} \textit{Id.} at 1015.
\textsuperscript{21} LA. CIV. CODE ANN. art. 189 (2011).
paternity. These changes make the presumption more easily rebuttable, including changing the period to disavow from peremptive to prescriptive and extending an action of contestation to the mother of the child. However, the court states that the unambiguous prescription period must govern, and prescription was deemed to have run. Therefore, the Second Circuit affirmed the grant of the state’s exception of prescription. This reasoning is in stark contrast with the concurring opinion. Judge Stewart’s separate concurring opinion advocates for the application of contra non valentem, a doctrine standing for the “proposition that prescription does not run against those who cannot act.” Louisiana courts allow contra non valentem to apply and prevent the running of liberative prescription when the “cause of action is not known or reasonably knowable by the plaintiff.” Judge Stewart states that this doctrine should be applicable “in matters like this one, where the mother withheld information” and “prevented him from availing himself of the disavowal action.” In particular, the mother never informed the presumed father that she was still sexually involved with her ex-boyfriend at the time of conception. Whereas the majority seemingly would never apply contra non valentem to a disavowal action, Judge Stewart recommends this doctrine be applied when the mother withholds information necessary for the presumed father to avail himself to his cause of action.

III. COMMENTARY

The Second Circuit majority decision in SS ex rel. K.B.D. v. Drew reinforces the notion that the presumption of paternity found

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22. Drew, 70 So. 3d at 1013-1015.
23. Id. at 1014.
24. Id. at 1013-1015.
25. Id. at 1017.
26. Id. (citing Corsey v. State ex rel. Dep’t of Corrections, 375 So. 2d 13139, 1321-22 (La. 1979)).
27. Id.
28. Id. at 1016.
in Louisiana Civil Code article 185 is one of the strongest presumptions in Louisiana law.\textsuperscript{29} Regardless of the ability to determine biological paternity with practical certainty (i.e. using advances in technology and science such as DNA testing), the decision strictly enforces the prescriptive period set forth in article 189. The court explained its holding by recognizing the Louisiana Supreme Court’s explanation of the purpose of the presumption stating, “The action to disavow is to protect innocent children, born during marriage, against scandalous attacks upon their paternity by the husband;” because of this important purpose, the presumption should be zealously guarded and enforced.\textsuperscript{30} However, under the facts provided in the case, it was clear, through testimony, that the mother knew the identity of the other man she engaged in sexual intercourse with, making it possible to find and impose liability on the biological father for the support of his child.

The policy questions raised by Judge Stewart’s concurring opinion are especially noteworthy. Particularly, he recognizes that this decision requires a man to support a non-biological child while the known, although absent biological father “escapes financial responsibility.” \textsuperscript{31} The majority does say that \textit{contra non valentem} could be applied to disavowal actions, but its discussion of the doctrine would likely lead to confusion in lower courts when applying this doctrine to similar disputes. The court merely recognizes its potential application, recognizes that the Plaintiff clearly knew of the child’s birth and believed at this time that it was his biological child, and that there was no question of filiation until almost four years later.\textsuperscript{32} There is no further explanation as to exactly why the doctrine should not apply. The court’s explanation seemingly hinges on the fact that the presumed father \textit{clearly} knew

\textsuperscript{29} See, e.g., Tannehill v. Tannehill, 261 So. 2d 619 (La. 1972); Williams v. Williams, 87 So. 2d 707 (La. 1956).
\textsuperscript{30} Drew, 70 So. 3d at 1015 (citing Gallo v. Gallo, 03-0794 (La. 12/3/03); 861 So. 2d 168).
\textsuperscript{31} \textit{Id.} at 1016.
\textsuperscript{32} \textit{Id.} at 1014.
of the birth, and that the prescription period is unambiguous. However, Judge Stewart’s recommendation to remedy this situation seems reasonable—to apply *contra non valentem* in matters, such as the present case, where the mother withheld information, thereby making it impossible for the father to “reasonably know” of his possible cause of action.\(^{33}\) Today, this seems especially reasonable with the availability of DNA technology, allowing for biological and legal paternity to be more closely aligned without violating the strong public policy in favor of providing child support. Until there is clarification in the Second Circuit’s application of *contra non valentem*, the prescriptive period for disavowal actions will likely be strictly enforced to protect children born of a marriage.

Another potential remedy for this apparent inequity would be to extend the policy embedded in the Louisiana Civil Code provisions on the designation of “dual paternity”\(^ {34}\) to circumstances similar to those in the instant case—when a *legal father* is deceived by the mother and there is a known biological father. Civil Code article 198 would seemingly be the most relevant statement of law, capable of application through analogy to the instant situation.\(^ {35}\) This article allows a biological father to establish paternity even if the child has a presumed father.\(^ {36}\) The action to designate a biological father when a presumed father exists is typically limited by a one-year peremptive period, commencing at the time of birth of the child. However, the

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33. *Id.* at 1017.
35. *La. Civ. Code Ann.* art. 198 (2011); “A man may institute an action to establish his paternity of a child at any time except as provided in this Article. The action is strictly personal. If the child is presumed to be the child of another man, the action shall be instituted within one year from the day of the birth of the child. Nevertheless, if the mother in bad faith deceived the father of the child regarding his paternity, the action shall be instituted within one year from the day the father knew or should have known of his paternity, or within ten years from the day of the birth of the child, whichever first occurs. In all cases, the action shall be instituted no later than one year from the day of the death of the child. The time periods in this Article are peremptive.”
36. *Id.*
legislature provides a limited application of contra non valentem in circumstances of the mother’s deception of the biological father.\textsuperscript{37} Specifically, the action may be instituted within one year from when the biological father knew or should have known of his paternity, but at the latest, within ten years of the child’s birth. Applying a similar contra non valentem period for the presumed father would not defy the policy in favor of child support as long as appropriate safeguards are followed—as long as a known biological father exists and may be held liable for support. Since dual paternity is already recognized in Louisiana, the legislature could at least allow courts to designate dual paternity in these narrow instances of deception of the presumed father. In these cases, courts could then adopt the process already recognized for setting child support in dual paternity cases designated under Civil Code articles 197 and 198.\textsuperscript{38} Doing so would not only ensure support for the child, but would also coincide with the policy argument recognized in the Reed case. In particular, the court stated, “the biological father does not escape his support obligations merely because others may share with him the responsibility. Biological fathers are civilly obligated for the support of the offspring.”\textsuperscript{39} In sum, with the proper legislative safeguards, there is no reason to continue requiring presumed fathers to be solely liable to support a child with a known biological father when the mother intentionally deceived the presumed father about the conception of the child. Especially with modern DNA testing, there should be action taken to better align legal and biological paternity.

\textsuperscript{37} Id.

\textsuperscript{38} See State of Louisiana, Department of Social Services ex rel. P.B. v. Reed, 10-410 (La. App. 5 Cir. 10/26/10); 52 So. 3d 145 (requiring both the presumed and biological father to provide support to the child because it was found to be within the child’s best interest; and also requiring the child support guidelines to be followed, with each party providing to the court a verified income statement showing gross income and adjusted gross income, together with documentation of current and past earnings).

\textsuperscript{39} Id. at 147.
“TRESPASS” TO MOVABLES? SAY NO MORE.

MCI COMMUNICATIONS SERVICES, INC. V. HAGAN
AND LOUISIANA CIVIL CODE ARTICLE 2315

Bill Hudson*

Answering a certified question from the U.S. Fifth Circuit Court of Appeals, the Louisiana Supreme Court recently refused to recognize the tort of trespass to chattels, declaring instead that the claim at issue was governed by the general delictual liability provision of Louisiana Civil Code article 2315.

I. BACKGROUND

MCI Communications maintained claims of trespass and negligence against co-defendants Hagan and Joubert in federal court.1 The suit arose after an MCI fiber optic cable, a portion of which ran underground Hagan’s property, was cut, allegedly by Joubert while operating a backhoe on Hagan’s land.2 At trial, MCI attempted to demonstrate the defendants’ negligence by claiming noncompliance with the Louisiana Damage Prevention Act.3

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1. Verizon Business Global initially brought the action, and MCI was substituted when its ownership of the damaged movable was established. MCI Communications Services, Inc. v. Hagan, 641 F. 3d 112, 114 (5th Cir. 2011).
2. MCI Communications Service, 641 F. 3d at 114.
3. MCI Communications Services, Inc. v. Hagan, 74 So. 3d 1148, 1149, 1151 (La. 10/25/11). The Louisiana Underground Utilities and Facilities Damage Prevention Law, or “Damage Prevention Act” as used by the court, LA. REV. STAT. § 49:1749.11 et seq., provides among other things that “no person shall excavate… near the location of an underground facility or utility… without having first ascertained, in the manner prescribed in Subsection B of this Section, the specific location as provided in R.S. 40:1749.14(D) of all underground facilities or utilities in the area which would be affected by the proposed excavation or demolition.” LA. REV. STAT. § 49:1749.13(A).
The trial court found that MCI had only a contractual right for its cable to run through Hagan’s property according to the sale terms when Hagan purchased the land, and not a servitude. A jury found the co-defendants had not acted negligently. Based on these findings, the trial judge declined, over MCI’s objection, to instruct the jury, in essence: “A Defendant may be held liable for an inadvertent trespass resulting from an intentional act.”

Reviewing the case on MCI’s appeal, the U.S. Fifth Circuit Court of Appeals reasoned that, without a servitude in MCI’s favor, no trespass to land could have occurred. Although, finding enough evidence to establish Joubert had severed the cable while intentionally operating the backhoe, the Fifth Circuit believed “MCI may [have been] entitled to have the jury instructed on the claim of trespass to chattels.” Having been presented with no Louisiana Supreme Court decision on the requisite intent for “trespass to chattels” (or in regard to the very existence of that tort in Louisiana), the Court of Appeals certified to the State Supreme Court the question:

Is the proposed jury instruction in this case, which states that “[a] Defendant may be held liable for an inadvertent trespass resulting from an intentional act,” a correct statement of Louisiana law when the trespass at issue is the severing of an underground cable located on property owned by one of the alleged trespassors [sic], and the property is not subject to a servitude by the owners of the underground cable but only to the contractual right to keep it, as an existing cable, underneath the property?

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4. MCI Communications Services, 74 So. 3d at 1151.
5. Id.
6. MCI Communications Services, 641 F. 3d at 115.
7. MCI Communications Services, 74 So. 3d at 1152.
8. MCI Communications Services, 641 F. 3d at 116.
II. LOUISIANA SUPREME COURT DECISION

To reply to the Fifth Circuit, the Louisiana Supreme Court framed the issue as “whether Louisiana law recognizes a distinct tort of ‘trespass to chattels’ and, if so, can a ‘trespass to chattels’ be committed inadvertently if it results from an otherwise intentional act.”9 The court first noted an important distinction between trespass to chattels and the facts of the Hagan case: relying on Black’s Law Dictionary, legal scholars, and The Restatement (Second) of Torts,10 the court concluded that “the common law claim of trespass to chattels appears to require intent to interfere with another’s interest in movable property before an action for trespass to chattels may lie.”11

The court then concluded that, regardless of the presence or absence of intent, an owner of movable property damaged by another “has an adequate remedy under the law of tort without recourse to the common law trespass to chattels” under the broadly-phrased Louisiana Civil Code article 2315(A)—“[e]very act whatever of man that causes damage to another obliges him by whose fault it happened to repair it.”12 A remedy under article 2315 does not preclude evidence of a defendant’s noncompliance with the Damage Prevention Act, since, even though “a violation of the statute does not result in either strict civil liability or negligence per se,” ignoring the duty to locate “an underground utility as required by statute subjects the excavator to delictual liability under the theory of negligence, and any statutory violation is considered in the traditional duty-risk analysis.”13 MCI’s proposed jury instruction was thus “not a correct statement of Louisiana law.”14

9. Id. at 1153.
10. Id. at 1153-1154 & n.8-10.
11. Id. at 1154.
12. Id. at 1155 (quoting LA. CIV. CODE art. 2315(A)).
13. Id. at 1155.
14. Id.
Hagan is a key illustration of the basic difference in how the common law and the civil law remedy damages. The decision underlines, and will doubtlessly help to preserve, Louisiana’s civil law tradition.

The question certified by the Fifth Circuit appears to have resulted from MCI’s ignoring Louisiana’s encompassing codal framework for remedying damages, and needlessly pinning its case to a “trespass” theory. Presented with the issue of trespass, the Fifth Circuit wondered whether a certain type of trespass theory—trespass to chattels—was applicable to the claim.

At common law, a claim for damage to movable property would involve a more particularized claim centered on one or more specific theories of recovery, since common law tort suits, traceable to old writs, are maintained under theories of recovery connected to specific sets of facts. The task of fitting the right theory with its corresponding elements to an injury-causing occurrence can become highly technical: regarding cases of damage to buried utility lines, Prosser and Keeton note that the intent element alone produces contention in the fact-specific inquiries surrounding trespass to chattels claims. By contrast, Louisiana Civil Code article 2315 gives legal effect to a general principle, as is characteristic of codal law, that there may be a remedy for any act which causes damage, thus removing the

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16. H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 211 (2000); (Common law "could not, and did not, subsequently modernize itself, in terms of overall expression…. [T]here is still a law of torts (the plural is important) since there were no general principles of liability in England, only given wrongs…") ld. at 217.
complexity of defining and recognizing specific torts claim-by-claim and fact-by-fact.

In Hagan, the State Supreme Court applied article 2315 literally, in accordance with the Code’s rule of interpretation: “When a law is clear and unambiguous and its application does not lead to absurd consequences, the law shall be applied as written and no further interpretation may be made in search of the intent of the legislature.” The court recognized article 2315’s capacity to remedy damage, and it prevented the adoption of a common law theory which, given its historical application, could have become the basis for tort liability for trespass alone, even when trespass does not produce damages.

In his treatise on Louisiana tort law, Professor William E. Crawford states, “The fact of trespass in itself is not an actionable civil wrong, contrary to the common law. All actions for trespass under Louisiana law have involved damage done by the trespasser after or in the course of the trespass.” Indeed, under the reasoning of cases like Dickie’s Sportsman’s Centers, Inc. v. Department of Transp. & Dev., an action in trespass without damages would be absurd in Louisiana:

In the assessment of damages arising out of trespass, the trial court has much discretion. The damage, however, must be certain, and the discretion exercised only to the extent of the damage and ascertained from all the facts and circumstances.

Without damage, there can be no recovery; therefore, there is no “tort” in the sense of “[a] civil wrong, other than breach of contract, for which a remedy may be obtained.” The simple

19. LA. CIV. CODE art. 9.
20. KEETON ET AL., supra note 17 at 67.
23. BLACK’S LAW DICTIONARY 1626 (9th ed. 2009).
solution in *Hagan* is a consistent application of these concepts: a claim for trespass to movable property cannot stand alone and apart from a claim for damages; thus Civil Code article 2315 governs actions where there is damage resulting from trespass.

Trespass as recognized in Louisiana appears to be a tort almost completely anticipated by the broad wording of article 2315. It would seem that filing a suit “for trespass” should be effectively unnecessary in Louisiana, since a “suit for damages pursuant to La. Civ. Code art. 2315” would likely be a more accurate description. Even trespass accompanied by the conversion of trees on another’s property, the distinctive instance where interference with private property gives rise to enhanced damages in Louisiana, is governed by statute, and not fact-specific common law theory.²₄ Where trespass is concerned, the language of the Civil Code, while broad, does not seem to need court-created factors “borrowed from the common law of torts” to substantially clarify how liability is to be proven, as opposed to concepts like “assault, battery, false imprisonment...[, and] negligence,” in regards to which the common law has been readily enlisted to define essential elements.²⁵ Rather, a plaintiff in a trespass action succeeds by proving what the Code plainly and simply requires: damage caused by another’s act.

Yet how valuable is *Hagan* in “predict[ing] the path of Louisiana tort law”²⁶ generally, or the direction of state law in its entirety? The opinion seems at first glance a sweeping defense of civilian methodology, insisting on reliance upon the Civil Code’s language despite a common law theory which might more closely fit the facts alleged, and reconciling a claim for damages to

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²₄. LA. REV. STAT. § 3:4278.1; CRAWFORD, supra note 21.
²⁵. Harriet Spiller Dagget et al., *A Reappraisal Appraised: A Brief for the Civil Law of Louisiana*, 12 TUL. L. REV. 12, 32 (1937). See also, CRAWFORD, supra note 21, at 22 (“The codal texts governing délit are so spare and general that the court must as a practical matter write most of the tort law with its own pen, though it is done in the name of interpretation.”).
²⁶. CRAWFORD, supra note 21, at 24.
movable property with statutory text. But the Louisiana trespass claim might be rather unique even in Louisiana tort law for the ease with which it can be understood and maintained. Proving liability for other delicts in the state appears to require more attention to the factors of specific wrongs, as evidenced by the importation of common law elements to define many other torts.  

Another indication of plain application of statutory language being a less-than-universal principle is the wide discretion exercised by Louisiana appellate courts in tort cases. Prof. Crawford has identified forty-five key cases spanning twenty-four years which represent the state judiciary’s independent modifications of rules on such matters as strict liability, prescription, and damages for mental and emotional suffering. The old notion that “[t]here is no liability in this State for damages sounding in tort except where such liability is expressly or impliedly authorized by the codal articles and statutes of the state” seems unlikely to remain absolute when one reads a long list of Louisiana appellate decisions illustrating “[l]iberalization of tort liability by the Louisiana appellate courts.”

In Louisiana jurisprudence on other matters of law as well, strict adherence to civil law principles has counterparts. While one can identify close adherence to elementary civil law principles in a number of court opinions, there are others in which common law doctrine seems about to summarily supplant existing statutory principles. For instance, in the 2004 Louisiana Supreme Court decision in Avenal v. State, the majority and concurring

27. Dagget et al., supra note 25.
28. Id. at 25-30.
30. CRAWFORD, supra note 21, at 25.
31. See e.g., State ex rel. D.W., 865 So. 2d 45, 46 (La. 2004) (on statutory construction); Gregor v. Argenot Great Cent. Ins. Co., 851 So. 2d 959, 964 n.6 (La. 2003) (“Legislation is superior to any other source of law and is a solemn expression of legislative will.”); State Farm Fire & Cas. Co. v. Sewerage & Water Bd., 710 So. 2d 290, 292 (La. App. 4 Cir. 1998) (on sources of law).
32. Avenal v. State, 886 So. 2d 1085, 1101-1102, 1108 n.28 (La. 2004); John J. Costonis, Avenal v. State: Takings and Damagings in Louisiana, 65 LA.
opinions suggested a common law public trust doctrine could be applied in Louisiana, despite scholars’ conclusions that Louisiana’s constitution and legislation might well serve the purposes met by the public trust doctrine in other states.\textsuperscript{34}

However, despite any drifting away from the pure civil law caused by Louisiana judicial decisions,\textsuperscript{35} the delict akin to trespass to chattels as concerned in \textit{Hagan} seems particularly suited for straightforward application of the Civil Code’s language, and thus is unlikely to be complicated by judicial gloss in the future. “Trespass” claims like that brought by MCI are suits for either unauthorized intrusion upon another’s property, or damage to another’s property.\textsuperscript{36} Louisiana law does not remedy mere unauthorized intrusions if no damage has resulted, and plainly allows recovery when there is injury caused by another. Refusing to recognize a specific action for trespass to chattels, the Louisiana Supreme Court refused to complicate the plain meaning of article 2315 and the requirements for maintaining a suit for delictual damages, and declined to expand unnecessarily state law through jurisprudence. The court followed its charge from the legislature

L. REV. 1015, 1030 (2005) (“Justice Victory... announced... the public trust-based doctrine acknowledging the ‘right of the state to disperse fresh water... over saltwater marshes in order to prevent coastal erosion.’”).

33. Avenal, 886 So. 2d 1085, at 1115 n.8 (Weimer, J., concurring).


35. The ultimate question, likely, is whether Louisiana courts have sometimes looked completely beyond statutory law and proceeded according to a kind of common law, or have acted within their authority under Civil Code article 4: “When no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity. To decide equitably, resort is made to justice, reason, and prevailing usages.” This issue cannot be fully examined here. However, the breadth of article 2315 in sanctioning remedies for all damage-causing acts, as well as the public trust-like statutory law of Louisiana, see e.g., LA. CIV. CODE arts. 450-452, 455-456; Hargrave, supra note 34, call into question the necessity of judicially-created rules in cases to which this legislation would seem to apply.

36. MCI Communications Services, 74 So. 3d 1151.
most exactly, applied what the Code clearly provides, and was thereby true to the law, in principle and in letter.
MALONE V. MALONE: STRICT APPLICATION OF AUTHENTICITY REQUIREMENT OF FORMALITY OF DONATIONS IN LOUISIANA

Daniel Lee*

I. BACKGROUND

WEI, a Louisiana corporation, was a family business with two majority shareholders, Ken and Greg Malone.1 When their father died in 2007, they each owned 849 shares, while their father owned two shares. His surviving spouse, Doris Malone, succeeded one share as part of her one-half interest in community property. The other share was succeeded by Ken and Greg in the capacity of legatees. Based on a judgment rendered in 2009, Ken and Greg Malone ended up having 849 and half shares each, and Doris had one share.

Later in 2009, Doris purported to execute a donation of her one share equally to Ken and Greg so that they would own 850 shares each. The act of donation was drawn up in the form of a notarial act but was not dated or notarized. It stated that Doris delivered her share to Greg and Ken and they accepted the donation by receiving the property, but it did not indicate whether the certificate of stock was in fact transferred by actual endorsement and delivery.

Greg was the manager of WEI, and Ken was an employee at the sales department of WEI. They had dispute about selling the business of WEI – Ken was for the sale, while Greg was against it. While considering quitting his employment from WEI, Ken requested certain documents from WEI’s attorney, including his mother’s donation of one share to her sons. The attorney warned

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1. 77 So. 3d 1040 (La. App. 2 Cir. 2011).
him that the donation was not notarized and needed to be redone. Besides, it seems that Greg already knew the defect of the act of donation. However, Greg never shared with Ken his knowledge about the problem with the act of donation, so Ken did not have such notice.

On November 18, 2010, shortly before the annual shareholders meeting, Ken filed a derivative action against Greg, in his capacity as a shareholder of WEI. After the filing of the derivative action but before the shareholder’s meeting, Doris executed an “irrevocable” proxy allowing Greg to vote any share held by her. On December 14, 2010, a shareholders meeting was held. In the meeting, Greg became the president of WEI and Ken lost his position as an officer. About a week after the meeting, Ken filed three actions to restrain the defendants and enjoin them from making executive decisions, and have the defendants recognize the donation at issue and administer transfer by the donation. The Louisiana Fifth Judicial District Court, Franklin Parish, finding for the defendants, held that the \textit{inter vivos} donation was invalid. The Plaintiff appealed. The Court of Appeal of Louisiana, Second Circuit, confirmed, on the ground that the purported \textit{inter vivos} donation of Doris’ share was not in the form of an authentic act, and thus the transfer was not completed.

A donation \textit{inter vivos} is a contract by which the donor divests himself/herself, at present and irrevocably, of a thing in favor of the donee who accepts.\textsuperscript{2} A donation \textit{inter vivos} should be made by authentic act.\textsuperscript{3} To be an authentic act under art. 1541, the act of donation should be notarized.

\textsc{La. Civi. Code} art. 1550 states that the donation of an incorporeal movable of the kind that is evidenced by a certificate may be made by authentic act or by compliance with the requirements otherwise applicable to the transfer of that particular kind of incorporeal movable. In addition, an incorporeal movable

\begin{itemize}
\item \textsuperscript{2} \textsc{La. Civi. Code} art. 1468.
\item \textsuperscript{3} \textsc{La. Civi. Code} art. 1541
\end{itemize}
that is investment property\textsuperscript{4} may also be donated by a writing
signed by the donor with donative intent and with direction of the
transfer of the property to the donee. A share of a stock is an
incorporeal movable in LA. CIV. CODE art. 473, so it may be
subject to the application of art. 1550.

When the language of a statute is clear and unambiguous and
its application does not render absurd consequences, no further
interpretation should be made in search the legislative intent.\textsuperscript{5} If
the language is susceptible of different meanings, it must be in
conformance with the purpose of the law.\textsuperscript{6} Laws on the same
subject matter must be interpreted in reference to each other in
order to accomplish the purpose of the laws.\textsuperscript{7}

The legislative history of LA. CIV. CODE art. 1550 shows that
the legislature added this article as part of its revision of the Civil
Code in 2008, but did not change the prior law requiring authentic
act for donations incorporeal movables. It rather provided other
means of completion of act of donation for incorporeal movables
evidenced by a certificate. In addition to the legislative history, the
pertinent jurisprudence proves that the formalities of an authentic
act in such donation can be waived as long as the shares of stock
are transferred pursuant to Louisiana’s stock transfer laws.\textsuperscript{8} The
Court found that article 1550 codified the jurisprudence.

It is obvious that the donation by Doris was not made by an
authentic act or other ways in compliance with the requirements
under Louisiana Commercial Laws, LA. REV. STAT. 10:8(101) \textit{et seq.} In addition, there was no evidence of delivery or endorsement
of the stock as required under LA. REV. STAT. 10:8(301) or

\begin{itemize}
\item \textsuperscript{4} Investment property is as defined in Chapter 9 of the Louisiana
Commercial Laws.
\item \textsuperscript{5} LA. CIV. CODE art. 9.
\item \textsuperscript{6} LA. CIV. CODE art. 10.
\item \textsuperscript{7} LA. CIV. CODE art. 13.
\item \textsuperscript{8} Primeaux v. Libersat, 322 So. 2d 147 (La. 1975); Champagne v.
Champagne, 992 So. 2d 1071 (La. App. 1st Cir. 2008); Succession of Payne v.
Pigott, 459 So. 2d 1231 (La. App. 1st Cir. 1984).
\end{itemize}
10:8(304) for the transfer of securities. Therefore, the donation by Doris was not completed and thus invalid.

Ken argued that the form of the donation instead satisfied the requirements of the second paragraph of LA. CIV. CODE art. 1550. However, the Court disagreed: as explained in Comment (b) of the 2008 Revision Comments of article 1550, the words “for his benefit” are intended “to cover situations when the transfer may not be directly to the donee’s account, but would be used to pay something for his benefit such as paying off debt to a bank for a child.” There was no record indicating that the donation by Doris was made in such purpose.

Moreover, the transfer still did not follow the formality requirements as required by LA. CIV. CODE art. 1550, or other pertinent stock transfer laws. Therefore, no matter how the signed writing described the transfer, the record showed that there was no delivery or endorsement as required by pertinent law and the transfer of one share by Doris was not made in the proper form and thus invalid.

II. COMMENTARY

This case emphasizes the formal requirement of donation *inter vivos* in Louisiana. Several Louisiana Civil Code articles show that the laws regarding act of donation *inter vivos* consistently require the necessity of forms by an authentic act.

Notarization is essential part of authentic act in regulating the formality of donation *inter vivos*. Notarization is generally done only by registered notary. Unless formally notarized as required by Louisiana Civil Code, an act of donation was invalid due to the lack of required formality. This is the case even when it satisfies other requirements such as signature by donor, signature by donee, and signature by two witnesses. The formality requirements for a donation must be strictly followed, since it is described explicit and clear enough in the Civil Code.
Moreover, even when the property which is being donated is subject to the rules of other pertinent law (e.g. stocks are subject to the laws regulating the transactions of stocks), the procedure of the donation itself must be made and evidenced in accordance with the formalities requirements of the donation under the Civil Code. In the instant case, the transfer of the property, one share of stock which had been owned by Doris Malone, was not evidenced to be transferred to Ken and Greg Malone. Thus the act of donation was in conformance neither with requirements under Louisiana Civil Code Articles nor with the requirements under pertinent part of Louisiana commercial law.

This case is a good example how the Louisiana’s civil law on notary public is different from other civil law traditions. In Louisiana, basically any person can be appointed a notary public if he or she passes a written examination administered by the Secretary of the state of Louisiana.9 The licensed Louisiana attorneys are exempted from the examination requirement, so any attorney licensed to practice law in Louisiana may notarize any documents without further requirements.10

Notaries have broader powers in Louisiana than in other states. Unlike notaries in the other 49 states in the United States, Louisiana notaries may perform unique civil law notarial works. For example, notaries in Louisiana can perform many notarial acts which usually associate only with attorneys in other states, except legal representation.11 However, their “advice” must be limited to purely notarial ones, since they are not allowed to give any legal advice to their clients.

A “notary” in a civil law country other than Louisiana is quite different in the scope of its roles. In a civil law country such as France, Italy, Spain, Germany, Mexico or South Korea, all notaries

10. Id.
are “public officials” who received educations as thoroughly as attorneys and judges.\(^\text{12}\) Notaries are bound to advise the contracting parties before them, including diligent inquiries into the identity and legal capacity of the parties and legal consequences of their acts.\(^\text{13}\) If, either negligently or intentionally, a notary omits or misrepresents such advice, he or she is subject to disciplinary proceedings and to civil liability for malpractice.\(^\text{14}\)

For example, in South Korea, all notaries are appointed, authorized and employed by the national government.\(^\text{15}\) Only attorneys, prosecutors, or judges may apply for the position of notary public. The notaries are subject to very intense supervision of district attorneys. Most importantly, the notaries, who are already attorneys, are obliged to give legal advice to the full extent to their clients, even if the clients did not ask for. Since nearly all business transactions and real property transactions use notarial services for its authentic authorization, the roles of notaries in Korea are fairly broad enough to overlap the roles of ordinary legal practices in those transactions.

If the instant case took place in other civil law countries, the notary who notarized the donation at issue would have informed the parties about the deficiency of required formality, or, at least, advise them the potential consequences the notarized act would encounter. Otherwise, the notary would be subject to a claim for malpractice. For these reasons, the troubling defects of form in the present case would have been prevented or remedied. While it is true that Louisiana recognizes broader scope of the role of notary public than other common law states, it is also distinguishable from other civil law traditions as well, not offering equivalent quality standards.

\(^\text{13}\) Id.
\(^\text{14}\) Id.
LOUISIANA PUBLIC RECORDS DOCTRINE AFTER *Wede v. Niche Marketing*

Joseph Stanier Manning*

Louisiana’s approach to public records doctrine is muddy and largely the result of historical accident; the Louisiana State Law Institute and Louisiana legislature have amended the civil code intending to reform this body of law, but the courts have not recognized this reform and interpret the new codal text in ways that yield no new substantive change in the law. Beginning in 1992, the Louisiana legislature revised the Civil Code, which created Titles 22 and 22-A. Some commentators interpreted these revisions as an attempt to change the law of recordation completely. In 2010, the *Wede v. Niche Marketing* case made its way to the Louisiana Supreme Court, and the case was decided in such a way that the apparent changes in the law made by the revisions were given no effect.1 *Wede* tells us that the law of public records doctrine has not changed since the addition of Titles 22 and 22-A, but the case also illustrates the problems that arise by keeping two separate sets of land records – one for mortgages and one for conveyances. If this arbitrary distinction were removed, it is likely that the *Wede* case would have been decided in a way that would have given effect to the apparent changes in the revisions.

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I. BACKGROUND

In Wede, a money judgment was filed in the parish records to create a judicial mortgage on all immovables that the defendant-debtor owned in that parish. Because the Clerk of Court’s office no longer kept physical records, the judgment was scanned electronically. When the document was scanned, the Deputy Clerk handling the document, instead of electronically marking it “MO” for mortgage documents, electronically marked it “CO” for conveyance documents. Because of this mistake, the judgment would not show up in any mortgage searches made by means of the computer system.

Before the Clerk’s Office realized and corrected its mistake, the debtor sold some of his encumbered immovable property. The judgment creditor then moved to seize that property from the third-parties who had bought it, insisting that its judicial mortgage was in evidence in the parish records when the sale took place despite the Deputy Clerk’s computer errors.

II. JUDGMENT OF THE COURT

The district court, applying Louisiana Civil Code article 3347 ruled for the judgment creditor. The article states in full:

The effect of recordation arises when an instrument is filed with the recorder and is unaffected by subsequent errors or omissions of the recorder. An instrument is filed with a recorder when he accepts it for recordation in his office.

The court found the mistake to be one of misindexing on the part of the Clerk’s office rather than one of misrecording. Though the court acknowledged that third-parties should be able to rely on the public records, the court also pointed out that the indices are not part of the public records. To the trial court, this meant the

2. Id.
recording was valid and that the clerk's mistake did not have any adverse effect on the judicial mortgage.

The Fifth Circuit and the Louisiana Supreme Court both disagreed with the district court that this was an indexing error. The Louisiana Supreme Court echoed the circuit court’s reasoning by reading Civil Code article 3347 alongside Civil Code article 3338. The Supreme Court held that, while article 3347 describes “when” a document must be recorded, it is article 3338 that addresses “where” a document must be recorded. The Supreme Court held that because the document was listed as "CO" rather than "MO," it had been filed in the conveyance records rather than the mortgage records. And because it was filed in the wrong set of records, it was not properly recorded and did not affect third-parties.

III. COMMENTARY

Among the jurisdictions within the United States, there is a majority and a minority approach regarding how to deal with public records. “The majority view is that a person who files a document . . . is protected if the instrument is delivered to the proper recording official. . . .” Under this approach the filer is legally protected despite any recording errors later – even if the instrument is never actually recorded at all. On the other hand, the minority jurisdictions hold an instrument must be recorded to be effective. Louisiana has historically fallen within the minority camp, and this case further cements Louisiana’s position among those jurisdictions.

5. Wede, 52 So. 3d 60, n.9 at 65.
7. Id. at 219.
8. Id.
For most of Louisiana legal history, the Louisiana law of recordation has lacked “a unified and coherent legislative framework.”9 Indeed, “the statutory provisions specifying . . . when the act of recordation was deemed to be complete contradicted one another.”10 This unruly approach came about largely through accident.11 “Louisiana law historically has always distinguished between filing and recordation.”12 It also distinguished and treated separately “the recordation of mortgages and that of conveyances.”13 For example, “[c]onveyances were always deemed effective upon filing, even if not recorded, while mortgages were effective only upon recordation.”14 Also, rather than recording all land documents together like most jurisdictions, Louisiana record offices keep a distinct set of records for conveyances and a distinct set of records for mortgages.15

Over the past century the legislature made several attempts to remedy these discrepancies.16 For example, Act 215 of 1910, codified as Louisiana Revised Statute 9:5141, was passed to make mortgages effective against third-parties at the time of filing.17 This would have brought the way mortgages were deemed to be effective into line with the way conveyances were treated. Even so, this legislative intent was “not recognized by the jurisprudence.”18

9. Id. at 246.
10. Id. at 247.
11. Id.
13. GARRO, supra note 6, at 245.
15. The Wede case is rooted in the fact that these distinct sets of records are kept. Although the judgment-creditor’s mortgage did indeed get recorded, the problem was that it was incorrectly recorded in an arbitrarily defined set of land records. If nothing else, this case illustrates the folly of keeping separate records for conveyances and mortgages for no reason other than historical accident.
16. GARRO, supra note 6, at 276–282 (discussing a thoroughly researched history of these attempts as well as the various outcomes of each attempt).
18. Id., Rubin & Grodner at 1002.
Instead of ruling that mortgages become effective immediately upon filing, the courts made mortgage instruments effective retroactive to the time of filing only if they were actually placed in the records within a reasonable time after the filing.\(^\text{19}\)

This was the state of the law until 1992 when the Louisiana State Law Institute, recognizing the law’s haphazard approach to registry, decided to fully systematize and integrate the public records law. This systemization was put into effect by the Louisiana Legislature through Act 652 of 1991 and Act 169 of 2005, which gave rise to Title 22 and Title 22-A respectively, in Book III of the Civil Code. Notably, one of the amendments to the Civil Code that came about through these revisions was article 3347. A plain reading suggested that in all instances a record would become effective against third parties at the time of filing without regard to later errors.\(^\text{20}\) For these reasons, this article at first glance appeared to rewrite the recordation law so that Louisiana would join the majority view described above.

While the earlier rule, as noted above, was that an instrument’s effectiveness arose retroactive to filing provided that actual recordation later occurred, this new provision’s language seemed to put forward rather plainly that any “effect” that comes from “recordation” arises when an instrument is “filed,” without regard to any later errors on the part of the recorder. The new article goes on to specify that an instrument is “filed” when the instrument is accepted by the recorder.

Of the three courts that rendered judgment in the \textit{Wede} case only one – the trial court – adopted this “plain meaning” reading of the article. The Louisiana Supreme Court, by contrast, specifically

\(^{19}\) \textit{Id.;} GARRO, \textit{supra} note 6, at 280 (explaining the now irrelevant constitutional reasons behind this rule); Rubin & Strohchein, \textit{supra} note 12, at 615 (citing Kennibrew v. Tri-Con Prod. Corp., 154 So. 2d 433 (La. 1963) and Opelousas Fin. Co. v. Reddell, 119 So. 770 (La. App. 1929)).

\(^\text{20}\) Generally this is the tentative rule that was being taught to students by Louisiana law professors since the legislation was passed and at least up until the \textit{Wede} court delivered this decision.
rejected this reading. According to that court, article 3347, rather than answering the question “what must be done in the way of filing and recordation” in its entirety, answers only the “when” part of the question. Alongside this part of the question, the court reasoned, there is also a “where” part. According to the court, the “where” part of the question is answered in article 3338. So, under article 3347 “recordation” occurs when an instrument is “filed,” but according to the Louisiana Supreme Court interpretation of article 3338 any recordation is “without effect . . . unless the instrument is registered by recording it in the appropriate mortgage or conveyance records.”

But what effect, if any, did the Supreme Court give to the language of article 3347 stating that a recording’s effectiveness is “unaffected by subsequent errors or omissions of the recorder?” In a footnote, the court explained that it was unnecessary to describe “what might be included within the complete spectrum” of that phrase.21 The court did, however, declare that the error of “placing an instrument outside of the mortgage records and into the conveyance records” could not be the kind of error contemplated, because otherwise the article would conflict with article 3338. 22 Justifying this interpretation, the court referred to its jurisprudential rule not to interpret statutes as in conflict with one another but rather to reconcile perceived inconsistencies.

Since the revisions to the Civil Code adding Titles 22 and 22-A, Wede has been the only case decided that tells us whether there was effective legislative reform in this area of law. From Wede we learn that the change in the Louisiana public records from the minority view to the majority view that some observers believed had been accomplished by legislative revision was illusory. It remains the case that in Louisiana a mortgage instrument must be actually placed in the correct set of records – the mortgage records – to be considered “recorded.” Only then is

21. Wede, 52 So. 3d, n.10 at 65.
22. Id.
this recordation effective against third parties (albeit retroactively to the original time of filing). This is the same law as Louisiana had before 1992. In this regard, Wede informs us that no change has taken place in this crucial element of the Louisiana public records doctrine. The Louisiana Supreme Court reached its result by focusing intently on “where” land records are filed – with the mortgages or conveyances. Louisiana does not need to maintain two separate sets of records. Removing this arbitrary distinction between mortgage records and conveyance records will go a long way toward improving Louisiana public records doctrine.
BOOK REVIEW

LOUISIANA CIVIL LAW TREATISE SERIES

Reviewed by Phillip Gragg

The theme of the present issue of the Journal of Civil Law Studies is the contribution of Louisiana to the world corpus of civil law. No series better exemplifies that contribution than the Louisiana Civil Law Treatise Series. While these volumes are useful for the struggling student, the advanced scholar will likewise find them to be insightful resources. While a Louisiana-based civil law scholar often struggles with the inadequacies of common law classification and vocabulary so often utilized in English language civil law publications, this series is written by civilians for civilians and common law lawyers with interest in the civil law. While there are efforts currently underway to encapsulate and define the English-language civil law lexicon, the reader of the civil law treatise series will instantly recognize the shared lineage of Louisiana civil law with more traditional civil law jurisdictions. (The debate about Spanish and French influence on Moreau Lislet’s original civil code notwithstanding, and a debate which I will not attempt to engage or comment on here.)

The series encompasses a broad range of subjects, including some that do not traditionally qualify as civil law. However, within the 23 volumes the researcher will still find pillars of the civil law, such as matrimonial regimes, torts, successions and donations, and obligations. Each volume within the series is intelligently designed

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and researched. The volumes contain detailed tables of contents, each chapter begins with an outline of that area of the law, and access to material within the book is enhanced by comprehensive tables of laws and rules, cases and an index sounding in civil law. Updates to the print material are by way of an annual pocket part.

There is one curious addition to these volumes that upon first glance would seem a bit odd: the volumes all contains external references to the West Digest (of cases) System. There are two factors that make this an interesting addition. The first is a weakness, the second a strength. The West Digest system was designed to organize the case law of the United States Federal government and the 50 states. Naturally, indexing civil law based on a common law regime leads to some awkwardness. When we talk about legal resources or the state of the law in the United States, we often say, “the 49 states,” and intentionally leave Louisiana out. One example of the awkwardness created by the digest system (and it is in all other ways brilliant) is that notions such as movable and immovable property are blown into unrecognizable fragments and re-categorized into common law structures. Specifically, if one were to look in the “real estate” section of the Louisiana Digest, there are few cases listed. The notion of movable and immovable property is still alive and well in Louisiana, but categorizing it into a common law system presents unique challenges. This should not otherwise reflect poorly on the digest system, but it is a limitation.

So why would we care that a volume on civil law is interoperable with a common law digest system? Perhaps the best reason is that by moving from the civil law volume to the digest, we might be able to find cases that express similar legal notions within the common law system. If a researcher would like to compare the dispensation of the civil law in Louisiana with some of the other 49 states, this technique could be a real time saver. It is admittedly not a perfect technique, since underlying theory and structure differ, but it is a start.
For those of our readers with access to Westlaw, the Louisiana Civil Law Treatise series is available through that database. For our readers in foreign countries, these series would be an excellent addition to a comparative collection. Indeed, if a scholar wants to look at Louisiana’s take on the civil law, this is a resource not to be missed.2

Louisiana holds the unique distinction of being the only one of fifty U.S. states to be governed by a Civil Code rather than a body of common law. Although jurisprudence may be used to support an argument or to interpret the language of the Civil Code, it is, as in any civil law jurisdiction, a non-binding secondary authority. At the federal level, Louisiana is, of course, bound by the same common law system as the rest of the United States. In such a mixed jurisdiction, the opportunity for misinterpretation of the law is considerable, and it is no wonder that the typical American common law lawyer or law student, or law students first encountering the dual system of civil and common law in Louisiana, may find the differences in concept and language to be confusing or even overwhelming.

In the LexisNexis Précis series, Alain Levasseur, of the Louisiana State University Paul M. Hebert Law Center, seeks to provide a concise and easily understandable guide to Louisiana civil law for both law students and professionals. These volumes serve to expand upon the text of the Civil Code and to explain its meaning, nuance and history. They are a reliable and easily readable study guide to several major areas of law that are covered by the Civil Code, and would be a useful resource not only to students and practitioners working in Louisiana, but to common law attorneys seeking to understand better the unique nature of Louisiana law and the Louisiana Civil Code.

Beginning in 2006 with the first volume, *Louisiana Law of Obligations in General: A Précis*, Levasseur discusses, treatise-style, relevant sections of the Civil Code, moving numerically through the articles in the order that they appear. The first Précis,

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* Foreign, Comparative, and International Law Librarian, Louisiana State University Law Center; M.L.I.S., University of Wisconsin, Milwaukee (2011); J.D., Georgetown University Law Center (2004).
which covers articles 1756 to 1905, provides an overview of those sections of the Civil Code that constitute “Obligations in General,” a term that to a common law lawyer might best be described as obligations arising from contract or from the law itself, which requires certain obligations of an individual, or obligor, toward other persons, or obligees. Levasseur, with the help of his colleagues in the academic study of Louisiana law, has followed his first Précis with five additional volumes: Louisiana Law of Sale and Lease (2007), by Alain Levasseur and David Gruning; Louisiana Law of Torts (2010), by Frank Maraist; Louisiana Law of Conventional Obligations (2010), by Alain Levasseur; Louisiana Law of Security Devices (2011), by Michael H. Rubin; and Louisiana Law of Property (2012), by John Randall Trahan. At the time of publication, at least one more volume of the series is planned. The series also includes a Louisiana Pocket Civil Code, updated annually, containing the text of the Civil Code as written, which serves as a useful companion to the substantive volumes.

The strength of the series lies in the authors’ expertise in their subject areas, and in their ability to elucidate the briefest sections of the Civil Code through discussion of theory and supporting case law, while at the same time keeping the text concise, focused, and practical. The books are also thoroughly indexed and include appendices containing tables of relevant cases, the text of the Civil Code, and other relevant information depending upon the subject area. Each volume also follows essentially the same format, enhancing their readability and allowing the reader to turn to the books as a uniform reference.

If the series wants for anything, it is that few of the volumes contain much framing information. The series assumes the understanding that Louisiana is a mixed civil and common law jurisdiction, as well as an understanding of the purpose of the series itself. It does not attempt, for the most part, to situate the Louisiana laws within the greater context of the U.S. common law legal system, or to draw any parallels between the civil law
concepts and those at common law. Only the volume on Torts includes a history of the Louisiana civil code and its relationship to the common law, while the volume on Security Devices is the only volume to explain the differences and draw parallels between civil and common law concepts. Therefore, readers seeking a more comparative overview may wish to consult additional sources in conjunction with the Précis series. A general Introduction to the study of Louisiana law could also be a useful addition to the collection.

Overall, this series is highly recommended for Louisiana law students and attorneys, for foreign researchers, and for those common law students and practitioners seeking a better understanding of specific provisions of Louisiana’s Civil Code and of the supporting legal theory and case law. The series has filled a much-needed gap in the literature on the Louisiana Civil Code, and is, to this author’s knowledge, one of the only such sources currently available.¹

The most recent addition to the list of works that provide access to Louisiana’s Civil Code is the *Louisiana Civil Law Dictionary*. It is a tool designed for both the civil and common law attorney. The authors, Gregory W. Rome, a practicing attorney from Chalmette, Louisiana and N. Stephen Kinsella, general counsel for a corporation with ties to Louisiana, have succeeded admirably in providing an explanation of civil law terms in the most straightforward manner. The most useful aspect of the dictionary is that definitions are linked to specific provisions of Louisiana law (largely, but not exclusively, the Civil Code), as well as prominent Louisiana-specific secondary sources, cases and law review articles. In fact, the dictionary began life as an article published by Kinsella.¹

This work is a great access point to Louisiana law, particularly for those unfamiliar with the state. It is also a quick reference that could be used by practitioners. The volume concerns itself with Louisiana and therefore makes only incidental or fleeting references to other jurisdictions or languages, and then only that a word is of French origin, for example. In these instances there is no provenance or citation to another source to support the translation. That is not to call into question the accuracy of the work, but rather to suggest that a comparativist would find the depth of treatment wanting. However, that is not the purpose of this particular dictionary, and the authors have

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† GREGORY W. ROME & N. STEPHAN KINSELLA, LOUISIANA CIVIL LAW DICTIONARY (Quid Pro, LLC 2011).
‡ WEST’S LOUISIANA DIGEST (West 2d, 1987-2012; 148 vols.).
* Phillip Gragg is Associate Professor and Director, George R. White Law Library at Concordia University School of Law in Boise, Idaho, and was formerly the Associate Director for Public Services and Adjunct Professor at the Louisiana State University Paul M. Hebert Law Center.
accomplished what they set out to do admirably. The book is accessible in paperback and hardbound editions, and for the technologically-oriented, it can be used with Kindle or iPad (with the Kindle application, of course).

Now, if the reader will indulge us, we would like to take the reader one step further. The above resource is a good, quick reference to civil law terms, but we have in our jurisdiction the obligation to consider the full weight of the opinions of the judiciary. Precedence; a dirty word in some circles, but part of Louisiana’s unique civil law tradition. In the process of drafting opinions, the court is frequently left to wrestle with the meaning of a term. With no judicial college and formal internal techniques of interpretation upon which the judge can rely, they are left to consult the text of the code provision, its commentary, prior opinion, dictionaries and general commentary, not necessarily in that order.

The resulting opinions create a record that can be easily and efficiently tracked, if one knows where to look. The American Digest System, published by West, contains a set of volumes called Louisiana Digest, published in two series covering 1809 through present day material. Within the digest are a smaller set of volumes called, Words and Phrases. These volumes provide an index of terms that have been judicially defined, and their corresponding case citations. This is indeed an unusual concept for our readers in jurisdictions outside of Louisiana and the United States, but it is the reality of our jurisprudence. These volumes have a practical use, but also might serve as a basis for evaluating the impact of our use of precedence as it relates to the application of the civil code.

2. This meant in the classical sense, the Louisiana Supreme Court does, in fact, provide continuing legal education for state judges. See http://www.lasc.org/la_judicial_entities/judicial_college.asp. See also Cheryl Thomas, Review of Judicial Training and Education in Other Jurisdictions, for the Judicial Studies Board. Part 7 should be of particular interest: http://www.ucl.ac.uk/laws/socio-legal/docs/Review_of_Judicial_Train.pdf

3. For the leading work on this issue, see Albert Tate, Jr., Techniques of Judicial Interpretation, 22 LA. L. REV. 727 (1961).
To illustrate the point, the term “compromise” can be found in *Words and Phrases*, and is defined in a manner consistent with other civil law jurisdictions. It is interesting to note that the term “compromise settlement” can also be found. “Settlement,” as a separate term, has caused some consternation in legal proceedings, but readers will be happy to note that “settlement” must be equated with “compromise” for purposes of statute governing “compromise agreements.”

The *Words and Phrases* volumes of the *Louisiana Digest* can serve as a quick access point for the practitioner and comparativist alike. It provides easy access to materials that might be more obscure in modern databases. As the saying goes, do not do work that has already been done for you. The *Louisiana Civil Law Dictionary* is also such a resource. As we strive to explore, catalog and comment on the state of the civil code the world over, one might ask the question, what additional resources are of value? While we have focused on Louisiana-specific materials, it is not a stretch to say that English translations of civil law materials are the next logical frontier in promulgating and supporting the dissemination of the civil code around the globe.

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REDISCOVERED TREASURES OF LOUISIANA

LAW

HISTORY OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW

Thomas J. Semmes*

INTRODUCTION TO THE NEW PUBLICATION

Thomas Jenkins Semmes (1824-1899) was once described as “the most distinguished statesman and brilliant lawyer of the south.”¹ Born in Georgetown, D.C., in a mercantile family of English and French descent, he graduated from Georgetown College in 1842 and received a law degree from Harvard in 1845. He practiced law in Washington, D.C., till 1850, when he moved to New Orleans. He became a leader of the Democratic Party and was soon elected a member of the Louisiana House of Representatives. He later served as a member of the Louisiana Constitutional Conventions of 1879 and 1898.² A U.S. Attorney in New Orleans and later state Attorney General, he became a strong advocate of secession. He served in the Confederate Senate from 1862 to 1865 and, after having received presidential pardon, he returned to New Orleans to practice law. He became a professor of law at the University of Louisiana, later to become Tulane University. There

* Professor of Law, University of Louisiana (1873-1899). This lecture was first published by Melvin M. Cohen and Joseph A. Quintero in New Orleans through Clark and Hofeline, Book Printers, 9 Bank Place, in 1873; it was republished in 1875 in 3 LA REVUE CRITIQUE DE LEGISLATION ET DE JURISPRUDENCE DU CANADA 405.


he taught civil law (1873-1879) and common law (1879-1899), till the day of his sudden death.³

The Journal of Civil Law Studies owes to Mr. Louis de la Vergne the rediscovery of this inaugural lecture, first published as a book in New Orleans in 1873. Ms. Georgia Chadwick⁴ was instrumental in having the text entirely retyped and edited. The lecture proves the vast expertise and intimate knowledge Semmes had of the civil law tradition and its impact in Louisiana, at the moment he started an academic career, at the age of forty-nine. He was an accomplished scholar. The first part of the text gives a very informative and accurate survey of the history of Louisiana law till the revision of its Civil Code in 1870. The second part explains how the civil law tradition evolved in Rome, from the Law of the Twelve Tables to Justinian’s Corpus Juris Civilis, discussing the main steps of the evolution and their significance.

At a time where many a legal scholar would devote fifty pages to the discussion of a small problem, it is good to remember old masters who could cover with clarity and accuracy centuries of legal history in half this volume. To readers looking for a short but informative account of the development of the civil law tradition in Louisiana and its interaction with the common law until the post-Civil War years, Semmes gives a most useful and readable answer. In Louisiana or in other parts of the world, teachers of comparative law and of legal traditions may safely use this text. If pressed to cover the development of Roman law in just one class or two, they will find in the second part of Semmes’ lecture a most useful and reliable guide.

The short book was retyped from the original at the Louisiana Law Library, and edited by Ms. Jennifer Lane at the LSU Center of Civil Law Studies. It is published with minimal edits, aiming at

³. Id.
⁴. Law Librarian of Louisiana, Executive Director, Supreme Court of Louisiana Historical Society, and Curator, Supreme Court of Louisiana Museum.
making the text easily readable in the 21st century. Sequentially numerical footnotes are references by the author, sometimes complemented by the editors. Additional editorial notes are announced by an asterisk.

Olivier Moréteau

PREFACE TO THE ORIGINAL EDITION

The following introductory lecture, delivered by the Hon. Thomas J. Semmes, Professor of Civil Law in the Louisiana University, at the opening of the Institution, needs no comment.

The reputation of the writer, as a jurist of eminent ability, is as firmly established, as it is universally conceded. Of his study, culture, and research, the reader can best judge from a perusal of the lecture. As elaborate in detail as the limits of a discourse will sanction, it is as pointed in application, as the scope of the subject justifies, and doubtless establishes its authenticity, by the citations it introduces.

We present it to the profession in the conviction of its affording them satisfaction; and grateful for the favors conferred in their patronage, hope to offer them other lectures on equally valuable legal themes.

The Publishers
I. AN EPITOME OF THE HISTORY AND SOURCES OF THE LAWS OF LOUISIANA AND OF THE CIVIL LAW

Before I enter upon the consideration of the history and sources of the civil law, I propose to review the history and sources of the laws of Louisiana. In Louisiana, the civil law prevails, and it is the only state in the federal union, carved out of the vast territories acquired by the United States from France, Spain and Mexico, in which the civil law has been retained as the basis of jurisprudence. The common law modified by statute dominates all our sister states.

The intimate relations and intercourse between the people of Louisiana and the citizens of other states, have given rise, in our courts, in consequence of the dissimilarity of the two systems of

law, to more numerous and intricate questions of conflict of laws than in the courts of any other state.

Happily for us, many of these questions were considered and adjudicated while Chief Justice Martin was, by his ability and learning, the ornament of our supreme judicial tribunal.

You will perceive in Story’s elaborate work on the Conflict of Laws, numerous and copious references to the decisions of the Louisiana courts. The conflict of laws is a subject daily considered by the legal practitioner in Louisiana, and I commend it to your careful study, as an essential branch of the law, and necessary to fit you for the intelligent performance of your professional duties.

Louisiana was settled by the French in 1699, and was subject to the dominion of France until August 1769, when it was taken possession of by Alejandro O’Reilly for Spain under a secret treaty concluded in November 1762, but not made public until April 23, 1764. About three months after taking possession, O’Reilly published in the French language extracts from the whole body of the Spanish law, with references to the books in which they are contained, purporting to be intended for elementary instruction to the inhabitants of the province. This publication, followed by an uninterrupted observance of the Spanish law, was received as an introduction into the Louisiana of the Spanish Code in all its parts.

The laws of Spain are contained in various codes, the most complete of which is known under the name of “Las Sieté Partidas.” The other codes are the Fuero Juzgo, Fuero Viejo and Fuero Real: to which may be added the laws regulating the practice of courts, the Royal Ordinances (Ordenancas Reales de Castilla), and those of Alcala; the Laws of Toro, the Recopilacion de Castilla, and the Recopilacion de las Indias.

5. JOSEPH STORY, COMMENTARIES ON THE CONFLICT OF LAWS, originally published by Hilliard, Gray, and Company in 1834.
The Fuero Juzgo was published about the year 693. It was first published in Latin under the title of “Forum Judicum” and afterward translated into Spanish in the 13th century under Ferdinand III. It was originally called “El Fuero de los Jueces,” but this name was changed by corruption of words into Fuero Juzgo, and under that title it was published in the year 1600.

The Fuero Viejo was published in the year 992, and contains the ancient customs and usages of the Spanish nation.

Alphonso the Wise, desiring to establish a uniform jurisprudence in all his dominions, published a third code, under the name of “Fuero Real;” this was the precursor of the Partidas, which Alphonso had ordered to be compiled, and is to the Partidas, what the Institutes of Justinian are to the Pandects.

The Partidas is the most perfect system of Spanish laws; they were compiled in imitation of the Pandects, and as a digest of the laws of Spain, are worthy of the praise bestowed on them by jurists of every country.

The work was projected by Ferdinand III, but accomplished by his son and successor, Alphonso the Wise, who appointed four jurists to execute it. This task was entered upon in the year 1256, and finished in seven years. Strange to say, the names of these enlightened jurists have not been preserved. All those parts of the new code relating to religious matters, were compiled from the canonical laws of Spain: those which relate to civil and criminal matters, are derived principally from the Roman laws, which were freely translated without acknowledgment of the fact. The Partidas were not promulgated until 1343, and were not actually put in operation until 1505, when Ferdinand and Joanna gave them their sanction at the Cortez held that year in the city of Toro.

The Partidas are divided into seven parts, each part divided into titles, and each title sub-divided into laws.

The first part details the canons and liturgy of the church. The second is a summary of the ancient usages of the Spanish nation and of the rules of its government. The third, fifth and sixth parts
contain an abridgment of the principles of the Roman laws on actions, suits, judgments, contracts, successions, testaments, minority and tutorship. The fourth is a compendium of the laws relative to marriage and family relations, legitimate and illegitimate, freedom, slavery and enfranchisement. The seventh details crimes, offences, and punishments, and, in imitation of the *Pandects*, concludes with one title on the signification of words, and another on the rules of law.

The *Partidas* contain the fundamental principles of the Spanish law, expressed with grace, with simplicity and in the purest idiom of the Spanish language. The elevation of the sentiments of the *Pandects* has attracted the admiration of the learned. They contain these remarkable words, “despotism tears the tree up by the roots; a wise monarch prunes its branches.”

The Laws of Toro were published at the Cortez held at the city of Toro, in 1505; they relate principally to wills, successions and donations.

The Royal Ordinance was published by Ferdinand and Isabella in 1496; it is divided into eight books and the greatest part of it has been inserted in the *Recopilacion of Castilla*, which completes the system of Spanish legislation. This *Recopilacion* was published by Philip II, in the year 1567. The Ordinance of Alcala, the Royal Ordinance and the Laws of the Toro, are contained in it.

The laws of Spain regulated and governing her immense dominions in America were collected and digested by order of Philip IV, and published in the year 1661, in the *Recopilacion de las Indias*.

The transfer from France to Spain did not change the system of law governing the territory; for the civil law, as a system, then was, and now is, the law of both those nations. Spain, so far as possession affected our laws, remained in possession until 1803, when Louisiana was transferred to the United States.

It is true the territory was acquired from France during the administration of Mr. Jefferson, for by the Treaty of Ildefonso, in
the year 1800, Spain had retroceded Louisiana to France, but the actual possession of France lasted only from November 30, 1803 to December 20, 1803. During this brief interval no material change in the law was made. The French merely re-established the *Code noir* of Louis XV, prescribing rules for the government of slaves, and substituted a mayor and council in the place of the Cabildo, for the administration of affairs of the city of New Orleans.

Therefore, so far as our law is concerned, it may be said that it was French from 1699 to 1769 and Spanish from 1769 to 1803. But as French and Spanish law both descend from the same parent source, the changes made during Spanish rule, so far as private rights are concerned, were not radical, but modifications of the system founded by the French.

The material changes consisted in the substitution of the Spanish for the French language in all legal proceedings, the introduction of Spanish laws respecting public order, and the disposition of the national domain. It is thus perceived, that at the time Louisiana came into the possession of the United States, her law was a system established by the French and modified by the Spanish, but derived from the civil law that was common to both peoples.

By the Treaty of Paris, the inhabitants of Louisiana became citizens of the United States, and were guaranteed the enjoyment of their liberty, property, and religion.

Congress, in anticipation of the transfer, on the October 31, 1803, provided for the temporary government of the territory by a statute vesting all the military, civil and judicial powers exercised by the officers of the existing government, in such person or persons as the President might appoint, to be exercised in such manner as the President might direct. By act of Congress approved March 26, 1804, a territorial government was organized under the name of the “Territory of Orleans.” The territory described in that act embraced all the territory of the present state of Louisiana, and
separated it from the residue of the Louisiana cession, as described in the Treaty of Paris. For at the time of transfer, Louisiana, as acquired from France, embraced all of the country from the Gulf of Mexico to the 49th parallel of latitude, and from the Mississippi River to the Rocky Mountains.

Although the terms of the territorial act of 1804 embraced the territory now comprised within the limits of the state of Louisiana, the part of the state commonly called the “Florida Parishes” was at that time actually in possession of Spain and was held by her until the year 1810.

The territorial act of 1804 vested the legislative power in a governor, appointed by the president, and thirteen persons who were to be appointed annually by the president. But on March 2, 1805, Congress authorized the president to establish in Louisiana a government similar to that existing in the “Mississippi Territory.” That governance had been created by adopting the Ordinance of 1787, relative to territory northwest of the Ohio River, excluding the portion of the ordinance regulating successions and the last article prohibiting slavery. It is thus perceived that the celebrated Ordinance of 1787 regulated the form of government existing in Louisiana until she was admitted into the Union as an independent state. The second article of the Ordinance of 1787 guaranteed, among other fundamental rights, the benefit of writ of habeas corpus, the right of trial by jury, and judicial proceedings according to the course of the common law.

The first important and radical change made by the new government in the laws of the territory was the necessary result of the change of rulers and of the guarantees contained in the Ordinance of 1787.

The criminal law and proceedings of the Latin races of Europe, whose absolute governments ignored the guarantees contained in our Federal Constitution, were repugnant to the Anglo-Saxon ideas of individual liberty and constitutional limitations of governmental power, which predominated in the American mind. The territorial
statute of May 4, 1805, defined what acts should constitute crimes and offences and provided for the trial and punishment of offenders. In so doing, the language and terms of the common law of England were used, and the following provision was embodied in the act, viz:

All the crimes, offences, and misdemeanors hereinbefore mentioned, shall be taken, intended and construed according to, and in conformity with, the common law of England, and the forms of indictment, (divested, however, of unnecessary prolixity,) the method of trial, the rules of evidence, and all other proceedings whatsoever, in the prosecution of said crimes, offences and misdemeanors, changing what ought to be changed, shall be (except by this act otherwise provided for) according to the common law.

This section of the act of 1805 had never been repealed; even in the Revised Statutes of 1870, it is expressly excepted in the general repealing clause contained in the last section of the statutes. The result of this enactment was an entire displacement of the existing criminal law of the territory, and the substitution of the provisions of the act in its stead. Hence, no act of man is criminal in Louisiana unless a statute of the state can be produced stamping it as a crime or offense. There is no such thing in Louisiana as a common law offense; all offenses are created by statute. The common law is resorted to for purpose of interpretation and construction of the terms of the statutes creating offenses, but criminality cannot be predicated on an act that the legislature has not, in express terms, denounced as crime or offense.

An additional result of this statute of 1805 is that the common law of England, as construed and interpreted in 1805, is the standard by which we are governed; hence, no change or modifications of the English laws affect our criminal jurisprudence in Louisiana, unless adopted by statute. In addition, the English decisions and the opinions of English commentators since 1805, in opposition to the decisions and standard works prior to that period, are not authoritative expositions of our criminal law.
The next important legislative measure was a codification of the civil law of the Territory. Prior to this codification, the laws were in the Spanish language, and the fact that the vast majority of the people were of French descent and Americans, rendered it necessary that the new compilation should be published in English and French. It is generally supposed that the Civil Code of Louisiana∗ is but a re-enactment of the Code Napoleon, but such is not the fact. It is true that French code preceded our Code of 1808 by four years, and a projet of it may have suggested to our legislators the idea of codification; however, at the time of the preparation of the Louisiana Code of 1808, the Code Napoleon as adopted had not reached the territory.

In June 1806, the legislature of the territory appointed two lawyers of eminence, James Brown and Louis Moreau Lislet, to prepare the Civil Code. Brown and Moreau Lislet were given express instructions to make the civil law, by which the territory was then governed, the ground work of the code.

On March 31, 1808, the code was adopted by the Territorial Legislature and all ancient laws inconsistent with it were repealed. The effect of this was that the Spanish laws remained in force, to the extent to which they were not in conflict with the Code of 1808, and they were quoted and acted on as authoritative until 1828.

On the March 28, 1828, the legislature repealed all the civil laws of the state in force prior to the Code of 1825,** except a portion of title ten of the Code of 1808 treating of the dissolution of corporations. The state of Louisiana was admitted into the federal Union under the dominion of the Code of 1808, and the Spanish laws not in conflict with that code.

∗ The author refers to the Civil Code of Louisiana throughout the article. The actual name of the enactment is DIGEST OF THE CIVIL LAWS NOW IN FORCE IN THE TERRITORY OF ORLEANS (1808). The Digest was often called the Old Code.

** One page further, the author explains how the Digest of 1808 was replaced by a Civil Code in 1825.
On the February 20, 1811, Congress passed an act to enable the people of the Territory of Orleans to form a constitution and state government, and for the admission of said state into the Union on an equal footing with the original states.\footnote{Louisiana Enabling Act, Ch. 21, 2 Stat. 641 (February 20, 1811), available at http://memory.loc.gov/cgi-bin/ampage.cgi?collId=llsl&fileName=002/llsl002.db&recNum=0678.}

The people in convention assembled, having framed a constitution and adopted the name of Louisiana as the title of the new state, Congress, on April 8, 1812, declared Louisiana to be one of the United States of America and admitted into the Union on an equal footing with the original states in all respects whatever. Provided, that it should be taken as a condition upon which the said state is incorporated into the Union, that the river Mississippi, and the navigable rivers and waters leading into the same, and into the Gulf of Mexico, shall be common highways and forever free as well to the inhabitants of said state as to the inhabitants of other states and the territories of the United States, without any tax, duty, impost of toll therefor, imposed by the said state, and that the above condition, and also all the other conditions and terms, contained in the third section of the act of 1811, shall be taken and deemed as fundamental conditions and terms upon which the said state is incorporated into the Union.\footnote{Admission of the State of Louisiana into the Union, Ch. 50, 2 Stat. 703 (April 8, 1812), available at http://memory.loc.gov/cgi-bin/ampage.cgi?collId=llsl&fileName=002/llsl002.db&recNum=740.}

It was further declared, that all the laws of the United States not locally inapplicable were by that act extended to the said state.

At the same time the state was organized into one federal judicial district, and the appointment of a District Judge of the United States with circuit court powers, was provided for. While on this subject of judicial districts, I may as well mention, that on July 29, 1850, by act of Congress, the state was divided into two judicial districts, called the Eastern and Western districts, but since
the war these two have been merged into one, styled the “District of Louisiana.”

The *Partidas* were translated into English at the expense of the state, by virtue of a law passed March 3, 1819. On the March 14, 1822, a resolution of the Legislature of the state was adopted, by which Messrs. Livingstone, Derbigny and Moreau Lislet, three distinguished members of the bar, were appointed to revise the Civil Code of 1808, by amending it in such a manner as they should think proper, and adding to it such laws in force as had not been adopted in that code.

The report of these jurists was adopted by the Legislature on April 12, 1824 and is denominated the “Civil Code of 1825” because it was put in operation during that year. Many articles of the Codes of 1808 and 1825 are identical with articles in the *Code Napoleon*; no doubt the compilers appropriated the language of the *Code Napoleon*, or its *projet*, whenever the rule of the law intended to be established in Louisiana, was the same as that adopted in France. Many provisions of the *Code Napoleon* are not to be found in either of our codes, and, in some instances, the text of the *Code Napoleon* was amended to conform to our law and so adopted; in other instances, the Spanish law was first written in French and translated into English. The constitution of the state required the laws to be enacted in the English language, hence, in cases of difference between the English and French texts of the Code of 1825, the English text prevailed. But as the Code of 1808 was enacted during the regime of the territorial government, when laws were passed in both languages, the French text of the code has been held to be of equal force with the English text and has been accepted by the courts to avoid the evils of incorrect translation.

The practice of the state courts of Louisiana in civil cases was based on the Spanish law and was regulated by the Territorial Act

* The author refers to the U.S. Civil War (1861-1865).
of 1805 and its amendments until the Code of Practice, approved in April 1824, was put in operation in September 1825.

The Code of Practice, prepared by authority of the Legislative resolution of 1822, was written in French and many inaccuracies exist in the English translation.

By the act of 1828, all other rules of proceeding in civil cases, except those contained in the Code of Practice, were abrogated. In case the Code of Practice contains any provisions contrary, or repugnant, to those of the Civil Code, the latter are considered as repealed or amended by the Code of Practice.9

The revised Civil Code and Code of Practice adopted in 1870 were prepared under legislative sanction. They are almost identical with the Codes of 1825, except that all the provisions in relation to slaves are omitted, and the statutory amendments, enacted from time to time, are incorporated in the new codes. The Codes of 1870 are written and promulgated in the English language only, in conformity with the mandate of the constitution of 1868.

The Legislature, in 1855, undertook a revision of the statutes of the state. This revision was effected by the enactment of many separate statutes, relating to various and distinct subjects; all previous statutes relating to a particular subject were grouped together and incorporated into one statute relative to that subject, and at the end of each revised statute was annexed a clause, repealing all laws on the same subject matter, except what was contained in the Civil Code and Code of Practice. The object of the Legislature was to facilitate the study of law by confining investigation, so far as our statutory law was concerned, to the two codes and the Revised Statutes. The object was not fully accomplished, because the courts have held that there are statutes previous to 1855 not repealed by that revision, as the subject of the un-repealed statutes is entirely omitted from the Revised Statutes of 1855. The Revised Statutes of 1870 are but a reenactment of the

Revised Statutes of 1855, with amendments and additions since made, omitting, however, all legislation pertaining to the institution of slavery.

The revising legislation of 1870 was mainly intended to obliterate from our system of laws every vestige of the institution of slavery and to accommodate our legislature to the new order of things, inaugurated by the various amendments of the Federal Constitution, or resulting from the adoption of the new Constitution of 1868 and the reconstruction measures of Congress.

A projet of a commercial code was prepared under the resolution of 1822, but it failed to meet the approval of the Legislature. Questions of commercial law are, therefore, settled in Louisiana by reference to approved works on the subject and the decisions of the enlightened judicial tribunals of the civilized world. The decisions of the English and American courts are most generally consulted and accepted as authority.

An attempt was made in 1820 to codify the criminal law of the state. In 1821, Edward Livingston was appointed by the Legislature to prepare and submit to its consideration a criminal code. This distinguished legislator made an elaborate and scientific report, which increased his literary fame, but its philosophic speculations never received the sanction of law.

Our lawyers, accustomed to the civilian practice, were much embarrassed as to the method of conducting civil cases in the courts of the United States. The distinction between “law and equity” is unknown in Louisiana practice; the courts adjudicate all civil cases without reference to such distinction, which is peculiar to countries in which the common law prevails. In Louisiana, where the distinction, derived from the common law system, between writ or error and appeal is ignored, the evidence in any civil case of which the court of final resort has jurisdiction is, at the request of either party, reduced to writing. The appellate court reviews the law and the fact, without regard to the circumstance of whether the case was tried by a jury in the court below.
All the evidence is transmitted to the appellate court which disposes of the case on its merits, even though no bills of exception are taken by either party, to the judgment of the court below on questions of law. All that is necessary to bring into activity the revisory power of our Supreme Court is the presentation of all the evidence, on which the judge below decided the case; on that evidence, the court will proceed to adjudicate \textit{de novo} both the law and fact involved in the cause.

Congress attempted to conform the practice of the courts with the United States, sitting within this state, to the practice of the state courts. A special statute for Louisiana was passed by Congress, May 26, 1824,\footnote{10. Act to Regulate the District Courts of Louisiana, Ch. 181, 4 Stat. 62 (May 26, 1824), available at http://memory.loc.gov/cgi-bin/ampage?collId=llsl&fileName=004/llsl004.db&recNum=109.} by which it is enacted that the mode of proceeding in \textit{civil causes} in the courts of the United States, that now are or may hereafter be established in the state of Louisiana, shall be conformable to the laws directing the mode of practice in the district courts of said state. Provided, the judge may alter the times limited or allowed for different proceedings in the state courts, and make by rule such other provisions, to adapt the said laws of procedure to the organization of the United States courts, and to avoid any discrepancy between such state laws and the laws of the United States.

The object of this act has been almost completely nullified by the decisions of the Supreme Court of the United States.

That court was compelled to admit, that the term “civil cases,” used in the process act of 1824, would include cases at law or in equity. But, it held that the acts of Congress in the general legislation of the country have always distinguished between remedies at common law and in equity. To effectuate the purpose of the Legislature, the remedies in the courts of the United States are to be at common law or in equity—not according to the practice of the state courts, but according to the principles of
common law and equity, as distinguished and defined in that
country from which we derive our knowledge of those principles.
Since there are no courts of equity, or state laws in Louisiana
regulating the practice of equity cases, the federal courts in the
state are bound to proceed according to the principles and usages
of courts of equity, and the rules prescribed by the Supreme Court
of the United States.

Louisiana had not then, and has never had, a representative of
her legal system on the bench of the Supreme Court of the United
States.* This decision, which was not given without a vigorous
protest from Mr. Justice McLean, renders it absolutely necessary
for a Louisiana lawyer, who desires to practice in the federal
courts, to study the common law, in order to ascertain what is a
common law case and what is a case in equity. When he finds out
that his case is one in equity, he must become familiar with
chancery practice in order to prosecute it with success.11

If his case is a common law case, he can adopt the Louisiana
practice of pleading, but he must be careful in the trial of the case
to resort to the common law method of proceeding. The Supreme
Court has held:

- First, that if the record contains the evidence, but no bills of
  exceptions, and nothing raising any point of law distinct
  from the evidence, the Supreme Court cannot revise the
  judgment on writ of error.12

- Second, if a case is tried by a jury, even though all the
evidence may be reduced to writing and transmitted to the
Supreme Court, that court cannot revise the judgment of the
facts, as the Supreme Court of Louisiana does. This
decision is based on the Seventh Amendment of the

* Since the writing of this article, there has been a U.S. Supreme Court
Justice from Louisiana: Edward Douglass White, who served from 1894-1921,
and was Chief Justice from 1910-1921.

Pet. 368, 406 (1839); Ex Parte Story v. Story, 37 U.S. (12 Pet.) 339 (1838); Ex
Parte Poultnay v. City of La Fayette, 37 U.S. (12 Pet.) 472, 474 (1838);
Constitution of the United States, which provides “that no fact once tried by a jury shall be otherwise re-examinable in any court of the United States, than according to the rules of the common law.”

Third, when the judge passes on the law and the fact, if a jury trial is not claimed, the judge must find the facts, and the Supreme Court must treat such facts as conclusively settled and, therefore, cannot revise the case on the facts, even though the evidence on which the judge based his findings is transmitted in the record.

Fourth, the practice of the courts in Louisiana as to giving reasons for judgment, which the Louisiana law requires under penalty of nullity and as to the form and effect of verdicts of a jury, is governed by the acts of Congress and the rules of the common law, not by the laws of the state.

It is therefore perceived that, so far as practice is concerned, in the courts of the United States little is left of the state laws with which these courts are to conform. If the case is an equity case, there is absolutely no conformity with the state law. If it is a common law case, the pleadings and rules of evidence are the same as those in the courts of the state; the method of trial, and preparing a case for the appellate court, the form of the verdict and judgment, and the effect of the verdict are totally different. I do not perceive that the judicial acts of 1872 have made any material changes in the particulars I have mentioned.

The act of Congress, approved June 8, 1872, departs from the practice of the state courts as to the number of peremptory challenges in civil cases; in the state courts, four peremptory challenges are allowed, while only three are permitted in the Federal Courts. The same rule applies to criminal cases, except in trials for treason and felony. The act of Congress approved June 1, 1872, merely requires the practice pleadings and forms of

proceedings, in other than equity and admiralty causes, to conform to the practice, pleadings and forms of proceeding in the state courts. This act seems to adopt the views of the Supreme Court of the United States, in regard to the process act of 1824, as it expressly excludes “equity causes” from its operation.

II. CIVIL LAW

The Justinian collections called the *Corpus Juris Civilis*, constitute the basis of modern civil law so far as private rights are concerned.

The public law of the Romans, their criminal law, their laws of practice or procedure, and their laws as to private rights, before and after Justinian, are not received; though a few of the provisions and principles derived from these sources have been incorporated in the modern civil law system.

Even the Justinian collections exercise little or no influence on modern civil law, except in regard to rights of Roman origin or growing out of transactions known to the Romans.

The law in regard to bills of exchange and promissory notes, insurance, stocks, banks, the modern rights of corporations, the modern laws of trade and commerce, and the laws of community between the husband and wife are not of Roman origin, or they have been so radically and thoroughly transformed in the process of adaptation to the requirements of modern civilization that the germ of the Roman law can be scarcely traced.

The Roman jurists are distinguished above all others, ancient or modern, for their classic mode of enunciating principles of law, as well as for the art of tracing, and the method of applying those principles. The celebrated metaphysician Leibnitz remarks:

I have often said, that after the writings of the geometricians, there is nothing extant comparable for force and subtility with the writings of the Roman jurisconsults;
so much nerve is there in them, and so much profundity.\textsuperscript{16}

Again he says:

I admire the digests, or rather the labors of the authors from whom the Digests are extracted; whether you consider the acumen of the reasoning, or the vigor of the expression, I have never seen anything more nearly approach the precision of mathematics.\textsuperscript{17}

The law of the \textit{Pandects} is but a system of general legal principles. For this reason, the enlightened jurists of the civilized world resort to it as a magazine of jurisprudence, based on reason and philosophy, and therefore, in its application and usefulness, unrestricted by time and place.

It is necessary however, that you should have some idea of the manner, in which the Roman law was gradually developed, and molded into the system embodied in the \textit{Corpus Juris Civilis}, as well as of the sources of that law. I proceed to give you a rapid, and therefore imperfect, sketch of the history and development of the Roman law, preparatory to a discussion of its principles, so far as they are incorporated into the jurisprudence of Louisiana.

It is well known that in the earliest period the Roman government was a limited monarchy, the political power being vested in king, senate and people. The people were separated into two classes: the patricians, or hereditary nobility, and the plebeians, or free citizens. At first, the plebeians were excluded from any participation in the government and from the use of the public lands.

\textsuperscript{16} In Latin: \textit{In juris prudential regnat (romani). Dixi saepius post scripta geometrarum nihil extare quod vic ac subtilitate cum romanorum jurisconsultorum scriptis comparari possit: tantum nervi inest; tantum profunditatis.} Gottfried Wilhelm Baron von Leibniz (1646–1716), German philosopher and mathematician. \textit{NINETEENTH CENTURY NATION BUILDING AND THE LATIN AMERICAN INTELLECTUAL TRADITION} 57 (Janet Burke & Ted Humphrey ed. & trans., 2007).

\textsuperscript{17} In Latin: \textit{Ego Digestorum opus, vel potius auctorum, unde excerpta sunt, labores admiror, nec quidquam vidi, sive rationum acumen, sive dicendi nervos specetus, quod magis accedat ad mathematicorum \ldots} John George Phillimore, \textit{INTRODUCTION TO THE STUDY AND HISTORY OF THE ROMAN LAW} 233 (William Benning & Co., London 1848).
The king and senate proposed laws that were submitted for adoption to the vote of the national assemblies, called the *curiae*, composed exclusively of patricians.

In later times, the laws were submitted for adoption to assemblies, called *centuriae*, in which the plebeians, to a limited extent, obtained some share in legislation. The law adopted in assemblies of the *curiae* was called *lex curiata*, and law adopted in assemblies of the *centuriae* was called *lex centuriata*.

When the kings were expelled, a republic was established, and two consuls, who were patricians, were substituted for the king.

The plebeians, dissatisfied with the insignificant influence exercised by them in the assemblies of the *centuriae*, which had been so constituted as to almost overwhelm their voice by the weight of rank and wealth, succeeded, after severe contests, in establishing officers called “tribunes of the people”, to be chosen from the plebeians, and, for the protection of their rights, vested with authority to render any law ineffectual by a veto.

Soon, however, the tribunes acquired the right of proposing laws to assemblies of the plebeians called *comitia tributa*, and these laws, when approved, were called *plebiscita*.

The struggle between the two parties resulted in the adoption of the celebrated *Law of the Twelve Tables.* This law is both a political constitution and a law in regard to private rights. One of its objects was to establish the political equality of the plebeians with the patricians, and to define the limits of judicial power then in the hands of the consuls. Besides this, it reduced to writing the laws in regard to private rights, which had previously existed, and merged the peculiar law of each tribe in one system. This law is also called *lex decemviralis*, from the number of persons selected to compose it.

The *decemvirate* first appointed was composed solely of patricians; they reported ten tables. But the year following, a

* In 450 BC.
decemvirate, composed of seven patricians and three plebeians, added two to the former ten. Those twelve were engraved on wood, ivory, or brass and exposed on the rostra for public examination. It is said that an Ephesian exile imparted his knowledge to the Roman legislators and, in recognition of his services, a statue was erected in the forum to the memory of Hermodorus.

The Romans entertained the greatest reverence for the Twelve Tables and delighted to bestow encomiums on them as the highest evidence of the wisdom of their ancestors. They vaunted the superiority of Roman legislation over the jurisprudence of Draco, Solon and Lycurgus, which Cicero does not hesitate to characterize as rude and ridiculous while he asserts that the brief composition of the decemvirs surpasses in genuine value of the libraries of Grecian philosophy. The Twelve Tables survived the devastation of the Gauls, and subsisted at the time of Justinian; their subsequent loss has been imperfectly repaired by fragments, collected by modern critics, from the commentaries of Gaius contained in the Pandects, from Ulpian’s fragments, from the lately discovered Institutes of Gaius, and the Vatican fragments.

After the Twelve Tables, the Romans divided their law into jus scriptum and jus non scriptum, or law established by custom. The Institutes of Justinian perpetuated this distinction and defined “the unwritten law to be that which usage has approved—for daily customs, established by the consent of those who use them, put on the character of the law.” The written law consisted of the leges, the plebiscita and the Senatus Consulta.


The *leges* were enacted on the proposal of a magistrate presiding in the Senate and adopted by the Roman people in the assemblies of the *Centuriae*, composed of patricians and plebeians. These related almost entirely to Public Law.

The *plebiscite* were proposed by the tribune, and adopted by the plebeians alone in the *comitia tributa*. For this reason, they were binding on the plebeians only until, at a subsequent period, it was decreed that all the Roman people should be bound by the *plebiscita*.

The *Senatus Consulta* were decreed by the Senate, without the concurrence of the plebeians, who objected to the force of these decrees as to them; but when the Senate submitted the *plebiscite*, the plebeians in turn acquiesced in the authority of the *Senatus Consulta*.

The proper administration of justice in civil cases soon required the establishment of the office of *Praetor*. He was styled *Praetor urbanus*; his jurisdiction, at first, was restricted to cases in which both parties were citizens of Rome. The increase of business intercourse with strangers occasioned about a century later the establishment of another *Praetor* to decide the suits of strangers among themselves or with Romans. He was styled *Praetor Perigrinus*. The term of office of the *Praetor* was one year.

The proper Roman law, *jus civilis*, was never applicable to strangers. It was intended for Roman citizens only. But when the Roman power was extended over Italy and other countries, the necessities arising out of the new relations, and the incessant intercourse with strangers, led the Romans to acknowledge and apply a universal natural law in addition to their peculiar *jus civile*.

The principles of this universal natural law (called by them *jus gentium*) were at first applied to strangers, but subsequently they were extended to Romans also to moderate the rigor and correct the injustice arising from the strict application of the *jus civile*. This change was effected by the edicts of the *Praetors*, who annually, on taking possession of office, announced the legal
principles in accordance with which they would administer justice during the year. Each successive Praetor adopted such rules of his predecessor as had been sanctioned by reason and justice, so that the annual edicts, by continual repetition of the same principles, soon became in practice a fixed system of law. So fixed, indeed, had become the principles of the Praetorian edicts, and for such a long period had they been annually announced, that the annual edict assumed the name of the “Perpetual Edict.” This praetorian law was denominated jus honorarium, because, says the Institutes, “the magistrates who have honors in the state have given their sanction.”

The main principles of law having been thus established by the Twelve Tables and the Praetor’s edicts, the lawyers began to develop them more fully by interpretation. The law thus introduced by jurists was called auctoritas prudentum. These opinions of lawyers were never regarded as authority until Emperor Augustus allowed some distinguished jurists to answer in his name. In the reign of Tiberius, these responsa prudentum grew into considerable credit. But it was not until the reign of Hadrian that the responsa prudentum were vested with the authority of the law. He decreed that the unanimous opinion of the jurists, specially authorized to respond, should have the force of law. In case the lawyers disagreed, the judge should follow the opinion which he himself considered just. At a later period, Constantine determined, by special ordinance, what writings of the old jurists should have special authority. A century later, in the year 426, Theodosius II issued a more extensive ordinance, in which he confirmed, by name, the writings of Gaius, Ulpian, Paul, Papinian and Modestinus, and forbade the judges to depart from the opinion of these lawyers on questions of law. In case they differed in opinion, the Emperor ordained, the judges should be governed by a majority; in case of equal division, they should follow those to

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20. In Latin: “...quod qui bonorem gerunt, id est magistratus, auctoritatem huic juri dederunt.” Id. at 83.
whom Papinian adhered. This ordinance was intended for the Eastern Empire, but it soon obtained force in the Western Empire as well. From Augustus to Trajan, says Gibbon, “the modest Caesars were content to promulgate their edicts in the various characters of a Roman Magistrate; and in the decrees of the Senate, the epistles and orations of the princes were respectfully inserted.”

The Institutes of Justinian expressly declare that the pleasure of the emperor has the vigor and effect of law, since the Roman people, by the royal law, have transferred to their prince the full extent of their own power and sovereignty. Therefore, whatever the emperor ordains by rescript, decree or edict is law. Such acts are called constitutions.

In what manner the emperors were invested with legislative power, is not precisely known. The newly discovered Institutes of Gaius state that it was in virtue of a law, but it is uncertain, whether this was a general law passed on the transition of the government from a republican to the imperial form or a law passed on the accession of each emperor. At all events, from the time of Hadrian, the public and private jurisprudence was molded by the will of the sovereign. The “gloomy and intricate forest of ancient laws” in the language of Tertullian, “was cleared away by the axe of royal mandates and constitutions.”

The period just preceding Augustus surpassed all the others for the variety and profundity of the productions of its jurists, whose learning and sagacity advanced the science of law to a high degree of perfection, but little is preserved of their writings to vindicate their title of the appellation of “the classical jurists.” It is certain,


22. In Latin: “Sed et quod principi placuit, legis habet vigorem; cum lege regia quae de ejusimperio lata est, populus et et in eum omne imperium suum et potestatem concessit. Quodcunque ergo imperator per epistolam constituit, vel cognoscens decrevit, vel edicto praecipit, legem esse constat; hae sunt quae constitutions appellantur.” Supra note 19, at 82-83.

23. See Gibbon, supra note 21, at 269.
however, that the jurists of the age, in which Cicero’s voice resounded in the forum, being thoroughly imbued with Grecian philosophy and the logic of Aristotle and the stoics, established law as an art on a certain and general theory, and diffused over its then-shapeless mass, the light of order and eloquence. The foremost and most distinguished of these jurists was Servius Sulpicius.

The period from Augustus to Alexander Severus is illustrated by the writings of Gaius, Papinian, Ulpian, Paulus and Modestinus, none of which, save the *Institute of Gaius*, have been preserved except such fragments as are contained in the *Pandects* or in the *Fragmenta Vaticana*. The *Institutes of Gaius* are particularly interesting to us because they formed the foundation of the *Institutes of Justinian*. It was not until the year 1816 that the genuine *Institutes of Gaius* were discovered by Neibuhr in a codex rescriptus in the library of the Cathedral chapter of Verona.

While the Syrian priest of the sun, Heliogabalus, surrounded his throne with eunuchs, buffoons, and dwarfs, made senators of coachmen and strollers, and created a senate of women to decide upon questions of fashion, his successor and cousin, Alexander Severus, was learning the great art of ruling from the celebrated Christian doctor Origen who, in the early part of the third century, was the friend of the future emperor’s mother. Alexander Severus never became a Christian, but he revered Christianity and its divine founder. He rendered divine honors to Jesus Christ, whose statue was placed in his oratory. He even made a proposition to the Senate to admit to rank among the gods the founder of a religion whose morals were so pure. But the Senate, having consulted the Oracles, received a response that if this new apotheosis were to be celebrated, the temples would soon be abandoned and all of the world become Christian. Notwithstanding the good will of Alexander towards Christianity, the Roman legislation was not changed in its hostile disposition towards the disciples of Jesus Christ. The legists of the imperial palace, Ulpian and Paulus,
whose names are as imposing in jurisprudence as they are odious in the annals of Christianity, took pleasure in compiling the ordinances which devoted the Christians to death.

The assassination of Alexander Severus at Mayence, in his 28th year, extinguished the hopes of good government, which seemed so flattering at his accession to the throne.

The Roman law never felt the influence of the gospel until after the Battle of Actium for Christianity was fought in the year 312. The famous labarum of Constantine floated from a staff in the form of a cross; above it sparkled a crown of gold and precious stones, in the midst of which was the monogram of Christ.

Under this banner, two religions and two worlds met at the Milvian bridge; two religions were face to face, armed on the banks of the Tiber, in view of the capitol. Maxentius interrogated the Sybilline books, sacrificed lions, and opened pregnant women, to search the bosom of infants torn from their mothers’ wombs, for it was supposed hearts that had never palpitated could not conceal imposture. Constantine came by a divine impulse and the greatness of his genius. These words are engraved on his triumphal arch, Instinctu divinitatis, mentis magnitudine.24

Scarcely had the “Successor of the Caesars” entered Rome as victor when he sought out the representative of the Christian church, the purple of whose spiritual royalty until now had been the blood of the martyrs, and presented to him the Lateran palace as a pontifical residence.

Constantine, born in ancient Maesia, brought up at the court of Nicomedia, and proclaimed Emperor in Britain, had no sympathy with Rome. Julius Caesar had once wished to rebuild Troy, the

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24. The entirety of the engraving of Constantine’s triumphal arch reads:
To the Emperor Caesar Flavius Constantinus Maximus Pius Felix Augustus the Senate and the Roman People dedicate this arch as a memorial to his military triumphs, who by the inspiration of divinity and his own genius avenged, with righteous arms in one instant, the Republic against the tyrant and his faction.
The selection of “Instinctu divinitatis, mentis magnitudine” translated from the Latin is: “to divine inspiration, mental magnitude (genius).”
fabled cradle of the Roman race, and to make it the seat of Empire. Constantine took up the idea with modification and fixed his throne at Byzantium, which he called Constantinople. The rising city was enriched with the spoils of Greece and Asia; they brought idols of the now-unworshipped gods and the statues of great men. The old metropolis also paid its tribute to the youthful rival now growing at its side; Constantinople clothed itself with the nakedness of other cities. The families of senatorial and equestrian rank were brought from the banks of the Tiber to those of the Bosphorus, here to find palaces equal to those they had forsaken. From this time, the Christian religion became predominant and the Latin language was gradually displaced by Greek. The two principle cities had each an administration of its own, unconnected with that of the Empire; the former state authorities thereby became municipal magistrates. The Empire itself was divided into four praefecturae praetoriae: the praefectus Orientis resided at Constantinople; the praefectus Illyrici, at Thessalonica; the praefectus Italiae, at Milan, and the praefectus Galliae, at Treves.

Another political change of considerable importance in the history of private law was that the natural free development of the law by the courts and jurists became more and more limited, in conformity with the spirit of the autocratic government. The autocracy assumed even the interpretation of the law, and hence the multitudinous imperial decrees and constitutions.

Before Constantine, most of the Imperial ordinances were decrees and rescripts. A decree was a decision in a judicial cause, which had been brought by appeal before the Auditorium principis.

The rescript was the answer or direction of the emperor upon applications, or questions, in doubtful cases.

The edicts were general ordinances, intended for the whole people, and called constitutiones generales.

During the reign of Constantine and subsequently, the edicts became frequent and often introduced extensive changes in the
constitution of the nation, for the prevalence of Christianity had changed, or subverted, many ancient opinions and usages.

The imperial constitutions, or edicts, having become very numerous and complex, led two jurists, about the middle of the 5th century, to make two compilations; that of Gregorius contained the constitutions from Hadrian to Constantine, and that of Hermogenes was a supplement to the former, containing the constitutions of Diocletian and Maximian.

These were followed by the *Theodosian Code* (*Codex Theodosianus*). Sixteen jurists compiled this code under an ordinance of the Emperor Theodosius the Younger; it was a collection of the edicts and many of the rescripts and was published as a code for the Eastern Empire in the year 438. Theodosius sent this code to his son-in-law, Valentinian III, who confirmed it in the same year for the Western Empire. The Theodosian code consisted in sixteen books, each of which was subdivided into titles; from the conclusion of the sixth book to the end of it remains entire. Lately, the first five books and part of the sixth have been discovered at Turin.

The *Fragmenta Vaticana*, edited by Angelo Mai in 1823 from a *codex rescriptus* of the Vatican Library, contains fragments of law-writers from the time of Alexander Severus to Justinian, and of imperial constitutions. They appear to be remains of a large collection during the time that intervened, between the *Codex Hermogenianus* and the *Codex Theodosianus*.

In the year 500, Theodoric, King of the Ostrogoths, after the fall of the Roman Empire of the West, issued an edict intended not only for the Romans, but also for the Ostrogoths. This edict is entirely derived from the Roman law, especially from the *Codex Theodosianus*, the later novels and Pauli *sententiae rescriptae*.

Alaric II, King of the Visigoths, in the year 506, published a code affecting only the Romans living in his Empire. This code is a compilation from the previous codes, the later novels, and the writings of Gaius, Paulus and Papinian.
This collection is called the *Breviarium Alaricianum* and in it many passages have been preserved which would otherwise have been lost from the first five books of the *Theodosian Code* and the writings of Gaius, Paulus and Papinian.

After the time of Theodosius II, nothing was done in the East to facilitate the administration and study of the law until Justinian ascended the imperial throne in the year 527.

Justinian was the first, after Theodosius, who undertook a new collection of the imperial constitutions, which was intended to form a substitute for previous collections.

For this purpose, he appointed ten lawyers; among them was the celebrated Tribonian and at their head was Johannes the Ex-quaestor of the Sacred Palace.

In fourteen months, the labors of this commission were completed. This new code consisted of twelve books; it was confirmed by a special ordinance prohibiting the use of the older collections of rescripts and edicts. This first code of Justinian is called the *Codex Vetus* and is now entirely lost.

After the code was published, Justinian, in the year 530, ordered Tribonian and sixteen other jurists to select all of the most valuable passages from the writings of the old jurists, which were regarded as authoritative, and arrange them according to their subjects under suitable headings. He gave them extensive powers and suspended the citation law of Theodosius II, who had prohibited citation from the writings of any other jurists than those specified in his ordinance. The Tribonian commission, however, were not confined to the letter of the passages they might select. They had the privilege to abridge, to add, and to alter, but were directed to avoid repetitions, remove contradictions, and omit the obsolete. The result was that the extracts contained in the *Pandects* did not always truly represent the originals, which were often interpolated, or amended, to conform to the views of the commission as to the existing law.
These alterations, additions, or modifications were called *Emblemata Triboniani*.

The work was completed in three years; within this time the commission had extracted from the writings of thirty-nine jurists all that was considered valuable. It is said the writings inspected and extracted from consisted of two thousand treatises, containing, in the aggregate, three million lines, which were reduced to fifty books containing one hundred and fifty thousand lines. Over every extract a heading was placed containing the name of the work from which it was, or should have been, derived.

The whole composition consisting of fifty books was entitled *Digesta sive Pandectae juris enucleate ex omni vetere collecti*. The *Pandects* were published December 16, 533 A.D., and were put in force on December 20, 533. In compiling the *Pandects*, the commission met with important unsettling controversies. Justinian, however, settled thirty-four of the controversial questions before the commencement of the *Pandects*, and before its completion these decisions increased to fifty. These decisions were afterwards embodied in the new code of Justinian called *Codex repetitae praelectionis*.

As the *Pandects* were unsuited to the use of those just beginning the study of law, Justinian ordered Tribonian, with the assistance of Theophilius and Dorotheus, to prepare a brief treatise, which should contain the elements of legal science.

This resulted in the *Institutes*, published November 21, 533, which obtained legal force on the same day as the *Pandects*—December 30, 533.

This work is but a revised edition of Gaius’ *Institutes*, in which the obsolete was omitted and the new constitutions of Justinian were referred to. After the publication of the *Pandects* and *Institutes*, the code was revised by Tribonian and four other lawyers. This revision included a great many new constitutions and the fifty decisions; it was put in operation November 16, 534, and the old code was abolished.
During the long reign of Justinian, after the publication of the new code, many constitutions were issued, by which the laws were materially changed; the greater part of these new constitutions were written in Greek and are also called novels: *Novellae Constitutiones*.

After the death of Justinian, a collection of 168 novels was made, 154 of which had been issued by him and the residue by his successors.

Justinian’s law collections were intended only for the East, but after he conquered the Ostrogoths, who then ruled Italy, he sent his compilations there, and, by special edict, ordered them to be introduced in the court and law schools.

During all the political changes which subsequently took place in the West, the use of Justinian’s collections continued uninterruptedly, even in the Empire of the Lombards in France.