

Contra Non Valentem in France and Louisiana: Revealing the Parenthood, Breaking a Myth

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***Contra Non Valentem* in France and Louisiana: Revealing the Parenthood, Breaking a Myth**

*Benjamin West Janke**

*François-Xavier Licari***

*But here comes your carriage, Colonel. Adieu, young folks.
Miss Julia, keep your heart till I come back again; let there be
nothing done to prejudice my right whilst I am non valens agere.¹*

TABLE OF CONTENTS

I.	Introduction.....	504
II.	<i>Contra Non Valentem</i> in Louisiana Law: A Spanish Girl in French Dress, or Vice Versa?	505
III.	The Fate of <i>Contra Non Valentem</i> in France and Louisiana: A Short Study in Parallel	511
	A. The Fate of <i>Contra Non Valentem</i> in France: From an Announced Death to a Crowning Codification	511
	B. <i>Contra Non Valentem</i> in Louisiana: The Animated Success Story of an Old Maxim.....	522
IV.	Does <i>Contra Non Valentem</i> Apply to Acquisitive Prescription?	527
	A. The French Jurisprudence	529
	B. The Louisiana Jurisprudence	533
V.	Conclusion	540

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All translations, unless otherwise indicated, are our own. The original text is retained where appropriate.

1. WALTER SCOTT, GUY MANNERING OR THE ASTROLOGER (1815).

I. INTRODUCTION

At first blush, prescription in the Louisiana Civil Code takes shape differently than in the French Civil Code. But as Justice Oliver Otis Provosty of the Louisiana Supreme Court noted in 1918, both systems share a common ancestor:

The arrangement, distribution, or classification, of the subject-matter of prescription in the Code Napoléon is not the same as in ours. The two prescriptions, *liberandi causa* and *acquirandi causa*, are there dealt with together, instead of separately, as in our Code. Basing himself upon this, the learned counsel for the defendant in this case contends that these French decisions and authorities are not applicable. The answer to that argument is that the principles of prescription embodied in the two Codes are absolutely the same. Both Codes are very largely, if not entirely, derived in the matter of prescription from . . . Pothier's treatises, *De la Propriété*; *De la Possession*; *De la Prescription*; *Introduction aux Coutumes d'Orleans*, at the part dealing with Prescription; and *Obligations*. The French Code is more condensed than ours, not expressing those things which follow as logical consequences; whereas ours expresses those consequences. That is the only difference. But what is thus expressed in our Code and not found in the Code Napoléon is found, mostly in the same words, in Pothier. Pothier in his treatise *De la Propriété* has a chapter headed "*Comment se Perd le Domaine de Propriété*," "*How Ownership is Lost*."²

Justice Provosty's comments are as true today as they were when he wrote them in 1918. That is why the domain of prescription, perhaps more so than any other mode of comparative law between Louisiana and France, proves so fruitful.³

2. *Harang v. Golden Ranch Land & Drainage Co.*, 79 So. 768, 778 (La. 1918) (Provosty, J., dissenting).

3. See Benjamin West Janke, *The Failure of Louisiana's Bifurcated Liberative Prescription Regime*, 54 LOY. L. REV. 620 (2008); Benjamin West Janke & François-Xavier Licari, *The French Revision of Prescription: A Model for Louisiana?*, 85 TUL. L. REV. 1 (2010); François-Xavier Licari, *Le nouveau droit français de la prescription extinctive à la lumière d'expériences étrangères récentes ou en gestation (Louisiane, Allemagne, Israël)*, 61 REVUE INTERNATIONALE DE DROIT COMPARÉ 739, 749 (2009) (Fr.); Benjamin West Janke, Comment, *Revisiting Contra Non Valentem in Light of Hurricanes Katrina and Rita*, 68 LA. L. REV. 498, 505–12 (2008) [hereinafter Janke, *Revisiting Contra Non Valentem*].

In this Article, we will show that the relationship between Louisiana and France is not limited to written law; it also exists in one important extra-codal and equitable principle of prescription law: *contra non valentem agere non currit praescriptio*.⁴ In this regard, the juridical parenthood is tight. We will show that *contra non valentem* in Louisiana is the fruit of French doctrine and jurisprudence. Furthermore, we will bring to light the noticeable similarity of the maxim's fate in France and Louisiana. Courts in both jurisdictions proclaimed it as dead, but despite the antagonism it faced, *contra non valentem* evolved as a major component of prescription's institution. Finally, we will dispel a deep-rooted myth that *contra non valentem* does not apply to the domain of acquisitive prescription and reveal another strong convergence between Louisiana and France.

II. *CONTRA NON VALENTEM* IN LOUISIANA LAW: A SPANISH GIRL IN FRENCH DRESS, OR VICE VERSA?

The origin of the maxim seems enigmatic. When applying *contra non valentem* in the 1817 case of *Quierry's Executor v. Faussier's Executors*,⁵ the Louisiana Supreme Court did not

4. This is the formulation of the maxim in modern French Law. Sometimes it is expressed as "*Agere non valenti non currit praescriptio*," especially in ancient French literature. See, e.g., FRANÇOIS IGNACE DUNOD DE CHARNAGE, *TRAITÉS DES PRESCRIPTIONS, DE L'ALIENATION DES BIENS D'ÉGLISE ET DES DIXMES* 270 (1730) (Fr.); 2 BALTHAZARD-MARIE EMERIGON, *TRAITÉ DES ASSURANCES ET DES CONTRATS À LA GROSSE* 287, 289, 305 (1783) (Fr.). In German law, see Karl Spiro, *Zur neueren Geschichte des Satzes "Agere non valenti non currit praescriptio,"* in *FESTSCHRIFT FÜR HANS LEWALD* 585 (1953) (Ger.). But everywhere the maxim is established, "*contra non valentem agere non currit praescriptio*" is the usual form. E.g., Belgium (Jean Dabin, *Sur l'adage "Contra non valentem agere non currit praescriptio,"* 1969 *REVUE CRITIQUE DE JURISPRUDENCE BELGE* 93 (Belg.)); Italy (MAURO TESCARO, *DECORRENZA DELLA PRESCRIZIONE E AUTORESPONSABILITÀ—LA RILEVANZA CIVILISTICA DEL PRINCIPIO CONTRA NON VALENTEM AGERE NON CURRIT PRAESCRIPTIO* (2006) (It.)); Scotland (JOHN HEPBURN MILLAR & MARK NAPIER, *A HANDBOOK OF PRESCRIPTION ACCORDING TO THE LAW OF SCOTLAND* 100 (1893) (Scot.)). In Louisiana, one may encounter the latter form as well as "*Contra non valentem agere nulla currit praescriptio*." Many recent Louisiana cases mistakenly use the expression "*contra non valentem*." Presumably this is a contagious typographical error. For a comparative survey on this maxim, see further RAFAEL DOMINGO OSLÉ ET AL., *PRINCIPIOS DE DERECHO GLOBAL*, 1000 *REGLAS Y AFORISMOS JURÍDICOS COMENTADOS* 129 No. 70 (2006) (Spain) (*Agere non valenti non currit praescriptio*); *id.* No. 210 (*contra non valentem agere non currit praescriptio*). See also REINHARD ZIMMERMANN, *COMPARATIVE FOUNDATIONS OF A EUROPEAN LAW OF SET-OFF AND PRESCRIPTION* 132 (2002).

5. 4 Mart. (o.s.) 609 (La. 1817).

mention any authority, as if this maxim had always been a natural component of Louisiana law.⁶ In the same vein, contemporary authors routinely acknowledge the maxim's Roman⁷ or French origin,⁸ but they do not further explore the proof of its roots or its historical origin.⁹ Louisiana courts express various opinions on the matter.¹⁰ The Roman origin is beyond any doubt,¹¹ but the way

6. *Id.*

7. Joyce M. Cossich, Note, *Contra Non Valentem: The Family of the Late Leander Perez Cannot Hide Behind the Passage of Time*, 33 LOY. L. REV. 1099, 1106 (1988); Marc S. Firestone, Note, *Prescription—What You Don't Know Can Hurt You—Louisiana Adheres to a Three Year Limit on the Discovery Rule*, 58 TUL. L. REV. 1547, 1551 (1984); Mark D. Latham, Note, *Plaquemines Parish Commission Council v. Delta Development Co.: Contra Non Valentem Applied to Fiduciaries*, 48 LA. L. REV. 967, 968 (1988).

8. Patrick D. Gallagher, Jr., Comment, *Revision of the Civil Code Provisions on Liberative Prescription*, 60 TUL. L. REV. 379, 385 n.45 (1985); Regina O. Matthews, Recent Case, *Gover v. Bridges*, 61 TUL. L. REV. 1541, 1541 n.1 (1987).

9. On the other hand, members of the Louisiana bar have long explored the roots of prescription in general. See *Davis's Heirs v. Prevost's Heirs*, 12 Mart. (o.s.) 445, 447 (La. 1822) (appellate argument of Moreau).

10. See, e.g., *Am. Cyanamid Co. v. Elec. Indus., Inc.*, 630 F.2d 1123, 1128 (5th Cir. 1980) ("ancient civil law doctrine"); *Goodman v. Lee*, No. 85-2966, 1990 WL 15259, at *6 n.3 (E.D. La. Feb. 13, 1990) ("Roman law doctrine"); *Crier v. Whitecloud*, 496 So. 2d 305, 307 n.4 (La. 1986) ("civilian doctrine"); *Reynolds v. Batson*, 11 La. Ann. 729, 730 (1856) (according to which the first case of *contra non valentem* has Roman law origin); *Compeaux v. Plaisance Inspection & Enters., Inc.*, 639 So. 2d 434, 438 (La. Ct. App. 1st 1994) ("civilian concept"); *Trujillo v. Boone*, 539 So. 2d 894, 896 n.1 (La. Ct. App. 4th 1989) (Barry, J., dissenting) ("civilian doctrine"); *Shortess v. Touro Infirmary*, 508 So. 2d 938, 943 (La. Ct. App. 4th 1987) ("equitable doctrine"), *rev'd*, 520 So. 2d 389 (La. 1988); *Dagenhart v. Roberston Truck Lines, Inc.*, 230 So. 2d 916, 918 & n.1 (La. Ct. App. 1st 1970) ("Roman origin," referring to ROBERT-JOSEPH POTHIER, A TREATISE ON OBLIGATIONS CONSIDERED FROM A MORAL AND LEGAL VIEW Nos. 640-93 (François-Xavier Martin trans., 1802) (1764)). For cases asserting a common law origin, see *Nathan v. Carter*, 372 So. 2d 560, 562 (La. 1979); *Cartwright v. Chrysler Corp.*, 232 So. 2d 285, 287 (La. 1970). In *Corsey v. State*, 375 So. 2d 1319 (La. 1979), the majority opinion described it as "an ancient civilian doctrine," *id.* at 1321, while the dissenting justice called it a common law doctrine, *id.* at 1328 (Marcus, J., dissenting). In a later case, however, that same justice writing for the majority referred to the "civilian doctrine of *contra non valentem*." *Rajnowski v. St. Patrick's Hosp.*, 564 So. 2d 671, 674 (La. 1990). Last but not least, litigants have their opinions too. See *Sprinkle v. Farm Bureau Ins. Cos.*, 492 F.2d 469, 471 (5th Cir. 1977) ("Both parties agree that *contra non valentem*, though originally a common law doctrine, has been granted explicit, albeit limited, recognition in the law of Louisiana."). The confusion may lie in a somewhat cavalier attitude expressed by some early Louisiana courts to the sources of law. See Vernon V. Palmer, *The Many Guises of Equity in a Mixed Jurisdiction: A Functional View of Equity in Louisiana*, 69 TUL. L. REV. 7, 64 & n.233 (1994). The common law origin is highly doubtful considering the statement of Chief Justice Tindal in

Louisiana courts apply the venerable maxim has little to do with how the Romans understood it.

According to their legal tradition, Romans knew no general rule, but rather a combination of special statutes and praetorian edicts.¹² The way Louisiana courts apply *contra non valentem* is the product of the systematization of the glossators¹³ and of a multisecular practice coming from France, as we suggest below, not the mere and direct application of Roman sources.¹⁴ A look at some early cases begins to explain the origins.

The first statement from a Louisiana court on the historical origins of *contra non valentem* can be found under the pen of Justice Matthews in *Morgan v. Robinson*, who asserts its Spanish and natural law roots.¹⁵ But it seems to us that French law rather

Huber v. Steiner, (1835) 132 Eng. Rep. 80 (C.P.) 85; 2 Bing (N.C.) 202, 215: "In the case before us, *both* were absent: it would be enough, however, to say that the *debtor* was absent, to call in aid the maxim of the French, no less than of the civil law, '*contra non valentem agere, non currit prescriptio*.'" (emphasis added). See also James B. Thayer et al., *The Effect of a State of War upon Statutes of Limitation or Prescription*, 17 TUL. L. REV. 416, 439-40 (1943) ("The British doctrine is that once the statute of limitations has begun to run nothing avails to stop it; neither the existence of war nor any other cause whatsoever." (footnote omitted)).

11. Douglas Nichols, *Contra Non Valentem*, 56 LA. L. REV. 337 (1995); see also Palmer, *supra* note 10, at 64 n.235 (noting that "[a]ccording to Ulpian's text in DIG. 44.33.1, prescription ran only during available days (*dies utiles*) when a person had the opportunity to bring an action").

12. HENRI GONDARD, *DE LA SUSPENSION DE LA PRESCRIPTION ET DE LA RÈGLE "CONTRA NON VALENTEM PRAESCRIPTIO"* 11 (1904) (Fr.); Karl Spiro, *Zur neueren Geschichte des Satzes "Agere non valenti non currit praescriptio,"* in *FESTSCHRIFT FÜR HANS LEWALD*, *supra* note 4, at 585, 587.

13. See JOSEPH-HENRI-MARIE CLÉMENT, *DE LA REGLE CONTRA NON VALENTEM AGERE NON CURRIT PRAESCRIPTIO EN MATIERE CIVILE* 30-48 (1902) (Fr.).

14. Cf. *Hendrick v. ABC Ins. Co.*, 787 So. 2d 283, 289 (La. 2001) ("*Contra non valentem* heralds from Roman law and has been passed down to us through our civilian roots. French jurisprudence, like ours, recognizes *contra non valentem*." (citations omitted)).

15. 12 Mart. (o.s.) 76 (La. 1822). Justice Matthews remarked: [The appellee] relies principally on the maxim, "*contra non valentem agere, non currit prescriptio*": as adopted and recognized by the Spanish law, and being an axiom or first principle of natural law and justice, and therefore applicable to every system of jurisprudence, wherein the contrary is not expressly established by legislative power. In this view of the subject we agree with the counsel of the plaintiff, and, notwithstanding the express terms of limitation in our code, it is thought, that they ought not to be interpreted as to conflict with this universal maxim of justice.

Id. at 77.

than Spanish law was strongly determinative in the reception and in the formation of the maxim in Louisiana. Two elements of proof emerge: (1) the sources of law in early French Louisiana, and (2) some salient cases rendered at the beginning of the nineteenth century under the pen of Louisiana judges who were well-versed in French law.¹⁶

Concerning the sources of law, we have to remember that French Louisiana, like the Province of Lower Canada,¹⁷ was at one time governed by the *Coutume de Paris*.¹⁸ The authority of this *coutume savante* was not limited to the 50 years of the Colony; indeed, it lasted through Spanish rule and early Louisiana codifications.¹⁹ Yet, *contra non valentem* was known in the jurisdiction of Paris as early as the fourteenth century when the *Coutume de Paris* was unwritten,²⁰ and the doctrine continued to prosper after its codification.²¹ We can reasonably speculate that *contra non valentem* voyaged to the New World and became a part of the practice of the Louisiana Superior Council, or at least a well-

16. We do not intend to deny that *contra non valentem* has Spanish origins too. Although Morgan does not mention any authority, see *supra* note 15, there are rules of *Las Siete Partidas* that are clearly inspired by the ancient maxim. See, for example, Part III, Title XXIX, Laws VIII (minors under the age of 25 years, sons under the control of their fathers, and married women do not lose their property through lapse of time) and XXVIII (what persons do not lose their property through lapse of time, on account of absence). Moreover, a comment on Part III, Title XXIX, Law XXVII (how a person who holds property in pledge may lose any rights which he has in it by lapse of time) refers *expressis verbis* to the maxim and to the glossators' works. See LAS SIETE PARTIDAS DEL REY D. ALFONSO EL SABIO, PARTIDA TERCERA, GLOSSADAS POR EL SENIOR D. GREGORIO LOPEZ, DEL CONSEJO REAL DE LAS INDIAS 398, Law XXVII, cmt (2) (1767). The existence of the maxim in Spanish law can explain its transfusion to California. See *Ord v. de la Guerra*, 18 Cal. 67 (1861) (citing *Orso v. Orso*, 11 La. 61 (1837)).

17. William Bennett Munro, *The Genesis of Roman Law in America*, 22 HARV. L. REV. 579, 580 n.1 (1909).

18. See Jerah Johnson, *La Coutume de Paris: Louisiana's First Law*, 30 LA. HIST. 145 (1989); Vernon V. Palmer, *Historical Notes on the First Codes and Institutions in French Louisiana*, in ESSAYS IN HONOR OF SAÚL LITVINOFF 233, 245 (Olivier Moréteau et al. eds., 2008).

19. See Palmer, *supra* note 18, at 248.

20. 2 FRANÇOIS OLIVIER-MARTIN, HISTOIRE DE LA COUTUME DE LA PRÉVÔTÉ ET VICOMTÉ DE PARIS 79 (1926).

21. *Id.* at 87 ("Au fond, dans toutes ces hypothèses, la prescription était suspendue parce que l'intéressé se trouvait dans l'impossibilité juridique ou morale d'agir pour l'interrompre. Aussi nos commentateurs n'hésitaient pas à admettre l'adage romain [i.e., *contra non valentem*] et à en déduire des solutions qui n'avaient pas été expressément formulées par la coutume; ils admettaient ainsi la suspension de la prescription en temps de guerre ou de troubles, car l'impossibilité d'agir en était résultée, ou en cas d'absence, dans l'intérêt de l'Etat, ou pour quelque cause juste." (footnotes omitted)).

known doctrine of its members.²² If it had not been so, one wonders how the maxim could have flourished so easily within the Superior Court of the Territory of Orleans and its successor, the Supreme Court of Louisiana.²³ Like their French predecessors, the fathers of the Civil Code of 1825 disregarded this judicial freedom and tried to curb the power of the judiciary in this area.²⁴

A look at Louisiana case law seems to confirm our views of the maxim's French origin. The first clue is the identity of the author of a seminal case,²⁵ *Quierry's Executor*,²⁶ the first case applying *contra non valentem* by name in Louisiana. Justice François-Xavier Martin, who rendered this opinion in 1817, translated Pothier's *Treatise on Obligations Considered from a Legal and Moral View* into English just a few years earlier in 1802.²⁷ *Contra non valentem* is significantly developed in Pothier's work,²⁸ which undoubtedly exerted a major influence on Justice Martin's intellectual formation.²⁹ Other cases offer additional hints of the French origin, and although they never asserted *expressis verbis* the French origin of the adopted solution, they interpreted the

22. For the content of the library of the members of the Superior Council, see Palmer, *supra* note 18, at 241.

23. See *infra* note 25.

24. Compare LA. CIV. CODE art. 3487 (1825) ("Prescription runs against all persons, unless they are included in some exception established by law."), with CODE CIVIL [C. CIV.] art. 2251 (1804) (Fr.) (same, in French).

25. Indeed, one can see in a case rendered by the Superior Court of the Territory of Orleans an older precedent in a matter of civil procedure, but without express reference to the maxim. See *Emerson v. Lozano*, 1 Mart. (o.s.) 265 (La. 1811) (with Justice François-Xavier Martin presiding). But in *Flint v. Cuny*, 6 La. 67 (1833), Justice Martin relies *expressis verbis* on *contra non valentem* in a question concerning appeal and error under the Code of Practice.

26. 4 Mart. (o.s.) 609 (La. 1817).

27. See 2 POTHIER, *supra* note 10. The content of the library of prominent jurists, judges, and attorneys in antebellum Louisiana is also indicative of the foundations of Louisiana law. See M.H. Hoeflich & Louis de la Vergne, *Gustavus Schmidt: His Life and His Library*, 1 ROMAN LEGAL TRADITION 112, 117 (2002); Florence M. Jumonville, "Formerly the Property of a Lawyer"—*Books That Shaped Louisiana Law*, 24 TUL. EUR. & CIV. L.F. 161 (2009); Robert Feikema Karachuk, *A Workman's Tools: The Law Library of Henry Adams Bullard*, 42 AM. J. LEGAL HIST. 160 (1998).

28. 2 POTHIER, *supra* note 10, No. 645.

29. See HENRY A. BULLARD, A DISCOURSE ON THE LIFE AND CHARACTER OF THE HON. FRANCOIS XAVIER MARTIN: LATE SENIOR JUDGE OF THE SUPREME COURT, OF THE STATE OF LOUISIANA, PRONOUNCED AT THE REQUEST OF THE BAR OF NEW-ORLEANS 9 (1847) ("He thus became thoroughly acquainted with that great work, the master-piece of its author—and so completely master of the subject, that it appeared to have become a part of a texture of his own mind—and to the last he exhibited a great familiarity with principles, which it unfolds with equal simplicity and precision.").

general rule of *contra non valentem* or interpreted some provisions expressing this rule in light of French case law.³⁰

The first case to illustrate the French roots of the maxim is *Benite v. Alva*,³¹ where Justice Porter³² explained the suspension of prescription during marriage³³ under articles 3490 and 3491 of the Louisiana Civil Code of 1825 in light of article 2256 of the *Code Napoléon*. In many other cases, the Supreme Court of Louisiana referenced Troplong, a French commentator, to determine the precise scope of *contra non valentem*³⁴ or to defend its fundamental value.³⁵ To develop the fourth category of *contra non valentem* (i.e., the discovery rule *à la louisianaise*³⁶) in the seminal case, *Corsey v. State Department of Corrections*, Justice Tate

30. In *Broh v. Jenkins*, 9 Mart. (o.s.) 526, 1821 WL 1370, at *6 (La. 1821), a case concerning the acquisitive prescription of a slave, Edward Livingston, as attorney for the plaintiff, pleaded the application of *contra non valentem* to suspend the adverse possession of the buyer of the slave. He relied only on Pothier's authority and quoted his fundamental opinion in French. See *infra* note 168.

31. 2 La. 366 (1831).

32. For other cases where Justice Porter applies the maxim in cases of factual or juridical impediments, see, for example, *Landry v. L'Eglise*, 3 La. 219, 221 (1832), and *Ayraud v. Babin's Heirs*, 7 Mart. (n.s.) 471, 481 (La. 1829).

33. *Benite*, 2 La. at 367 ("The article in our code which preserves the wife's rights during marriage, when the action she might bring to maintain them would cast a reflection on, or affect the interests of her husband, is taken from the French jurisprudence: and the delicacy which suggested it does not seem to have been equally fostered and rewarded in Spain."); see also *Hernandez v. Montgomery*, 2 Mart. (n.s.) 422, 432 (La. 1824) (Justice Porter quoting Pothier on *contra non valentem*).

34. See, e.g., *Rabel v. Pourciau*, 20 La. Ann. 131 (1868); *Boyle v. Mann*, 4 La. Ann. 170 (1849). See *infra* notes 89-92 and accompanying text (discussion of *Rabel*).

35. See, e.g., *Martin v. Jennings*, 10 La. Ann. 553 (1855). In this case, Justice Spofford asserted that:

The objection that this rule [i.e., "*contra non valentem agere non currit praescriptio*"] is not to be found in the statute books, does not impair its authority, for it is interwoven with our jurisprudence from the earliest times. It is impossible to compress every principle of law into a code. Le législateur n'a pas entendu rapetisser la mission du jurisconsulte à un horizon si borné.

Id. at 553 (citing 2 RAYMOND-THÉODORE TROPLONG, DE LA PRESCRIPTION No. 701 (3d ed. 1838) (Fr.)); see also, e.g., *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767, 775 (La. 1958) (citing *Boyle*, 4 La. Ann. 170); *Hyman v. Hibernia Bank & Trust Co.*, 71 So. 598 (La. 1916); *Rabel*, 20 La. Ann. at 157; *Remy v. Municipality No. 2*, 11 La. Ann. 148 (1856); *Boyle*, 4 La. Ann. at 171; *Succession of Dubreuil*, 12 Rob. 507, 509 (La. 1846).

36. See *Licari*, *supra* note 3, at 752, 756.

invoked the authority of French law again.³⁷ Thus, with all due respect to Justice Mathews, we may assert that the Louisiana version of *contra non valentem* is a French girl in French clothes.

III. THE FATE OF *CONTRA NON VALENTEM* IN FRANCE AND LOUISIANA: A SHORT STUDY IN PARALLEL

Contra non valentem in France and Louisiana shared a remarkably similar destiny. In both countries, legislators, scholars, and even courts fervently criticized it as a means of equity that was incongruent with the civil law. But even after a short demise, the maxim ultimately triumphed because judges understood its indispensability. In France, *contra non valentem* reached its apogee with its recent codification in the *Code civil* under the 2008 revision of prescription.³⁸ In Louisiana, the venerable maxim never surrendered and became a centerpiece of liberative prescription, especially in the realm of delictual liability.

A. *The Fate of Contra Non Valentem in France: From an Announced Death to a Crowning Codification*

The fate of *contra non valentem* is exemplary of the vitality of old equity maxims in contemporary French law.³⁹ This ground for suspension is a fruit of Bartolus's systemization⁴⁰ of the various and concurring Roman ways of setting aside the injustice caused by extinctive or acquisitive prescription for those who were impeded to act: *suspensio* and *restitutio*.⁴¹ It is probably one of the

37. *Corsey v. State*, 375 So. 2d 1319, 1321 (La. 1979) ("French jurisprudence (despite an identical provision in the French Civil Code) likewise recognizes this exception. The exception is founded on the ancient civilian doctrine of *Contra non valentem agere nulla currit praescriptio*, predating and within the penumbras of modern civilian codes, and it has been recognized from Louisiana's earliest jurisprudence." (emphasis added) (citations omitted)).

38. See generally Janke & Licari, *supra* note 3.

39. See Laurent Boyer, *Sur quelques adages—Notes d'histoire et de jurisprudence*, 156 BIBLIOTHÈQUE DE L'ÉCOLE DES CHARTES 13 (1998) (Fr.).

40. There is a wide consensus among scholars to attribute the paternity of the maxim to Bartolus de Saxoferrato. See, e.g., Boyer, *supra* note 39, at 67. Bartolus (Bartolo da Sassoferrato (b. 1313/14, Sassoferrato, Papal States, Italy; d. 1357, Perugia, Italy)) was a lawyer, law teacher at Perugia, and chief among the postglossators, or commentators, a group of northern Italian jurists who, from the mid-Fourteenth Century, wrote on the Roman civil law. See also CHARLES PHINEAS SHERMAN, *ROMAN LAW IN THE MODERN WORLD* § 219, at 211 n.97 (1917); Janke, *Revisiting Contra Non Valentem*, *supra* note 3, at 505–06.

41. JEAN-PHILIPPE LÉVY & ANDRÉ CASTALDO, *HISTOIRE DU DROIT CIVIL* No. 420 (2002) (Fr.).

oldest and most frequently invoked Latin maxims in the day-to-day life of French law.⁴²

Encouraged by the Canonists, who saw prescription as an *improborum subsidium* (a help for the dishonests),⁴³ the French judiciary interpreted the notion of "impossibility to act" with so much laxity that all certainty in the matter vanished.⁴⁴ This attitude *vis-à-vis* equity (*équité*) is one of the reasons for the widely used adage, "*Dieu nous garde de l'équité des Parlements.*"⁴⁵ But this abuse and others led revolutionary and Napoleonic France to adopt a certain number of political and institutional measures to constrict the powers of the newly installed courts.⁴⁶ The enactment of article 2251, the purpose of which was to narrowly define the grounds for suspension, can be seen as one of them.⁴⁷ And indeed, renowned commentators of the *Code civil* ardently declared *contra non valentem* as dead.⁴⁸

42. Of all of the maxims that have been perpetuated in the French legal tradition, *contra non valentem* is one of the rare that French courts still express in its original Latin form. See, e.g., Cour de cassation [Cass.] [supreme court for judicial and criminal matters] com., Feb. 23, 1970, Bull. civ. IV, No. 69 (Fr.).

43. Jean Carbonnier, *La règle contra non valentem agere non currit praescriptio*, 77 REVUE CRITIQUE DE LÉGISLATION ET DE JURISPRUDENCE 155, 157 (1937) (Fr.); see also HENRY SUMNER MAINE, ANCIENT LAW: ITS CONNECTION WITH THE EARLY HISTORY OF SOCIETY, AND ITS RELATION TO MODERN IDEAS 276-77 (Univ. of Ariz. Press 1986) (1864).

44. For a wide picture of the case law of the different Parlements, see CLÉMENT, *supra* note 13, at 49-128.

45. Vernon V. Palmer, "May God Protect Us from the Equity of Parlements": Comparative Reflections on English and French Equity Power, 73 TUL. L. REV. 1287 (1999).

46. See Philippe Rémy, *La part faite au juge*, in 107 POUVOIRS 22, 22-30 (2003) (Fr.); Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81, 104-06 (1994) (discussing measures to restrain the judges).

47. C. CIV. art. 2251 (Fr.) ("Prescription runs against all persons, unless they come within some exception established by law."). One author notes that France was not isolated in the will to exclude all equity tools (*contra non valentem*, the *exceptio doli generalis*, and good faith). This trend was notable in the Prussian (1794) and Austrian (1811) codifications. See Filippo Ranieri, *Bonne foi et exercice du droit dans la tradition du civil law*, 50 REVUE INTERNATIONALE DE DROIT COMPARÉ 1055, 1061-62 (1998) (Fr.).

48. See, e.g., VICTOR-LOUIS-NAPOLÉON MARCADÉ, COMMENTAIRE THÉORIQUE ET PRATIQUE DE LA PRESCRIPTION 151-52 (Cotillon ed., 1854) (Fr.) (commentary of art. 2251). This hostility with regard to the maxim lasted until the beginning of the twentieth century despite its constant consecration by the jurisprudence. See 28 GABRIEL BAUDRY-LACANTINERIE & ALBERT TISSIER, TRAITÉ THÉORIQUE ET PRATIQUE DE DROIT CIVIL Nos. 366 et seq. (3d ed. 1905) (Fr.); 1 LOUIS GUILLOUARD, TRAITÉ DE LA PRESCRIPTION Nos. 153 et seq. (2d ed. 1901) (Fr.); Henri Gondard, *De la suspension de la prescription et de la règle "contra non valentem praescriptio"* 52 et seq. & *passim* (1904) (Fr.) (doctoral thesis). For a complete overview of the French and Belgian opinions, see Jean

The endeavor to constrict judicial power in this matter was a failure. Hardly more than a decade after the enactment of the *Code Napoléon*, cases applying the abhorred equitable tool were to note, but without the name.⁴⁹ Some decades later, *contra non valentem* began to thrive under its true name.⁵⁰

The time for dissimulation eventually passed. Despite the reluctance of the doctrine to accept the resurrection of *contra non valentem*, as it remained faithful to the probable *ratio legis* of article 2251 of the *Code civil*, the maxim regained the largest possible scope. It prospered not only in liberative⁵¹ and acquisitive prescription,⁵² but also in criminal law.⁵³ Today, the legitimacy of

Dabin, *Sur l'adage "Contra non valentem non currit praescriptio,"* 1969 REVUE CRITIQUE DE JURISPRUDENCE BELGE 93, 95 n.7 (Fr.). Another great French author was resigned but appealed to judicial cautiousness. See 1 MARCEL PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL No. 1488 (2d ed. 1901) (Fr.) ("On a objecté, non sans quelque raison, que cette dernière cause de suspension [i.e., ignorance of the law] tend à détruire presque entièrement la règle qui la fait courir en principe contre toutes personnes, car ce ne sont pas ceux qui connaissent leur droit qui le laissent prescrire, mais bien ceux qui l'ignorent. Pour éviter ce reproche, les magistrats font donc sagement de se montrer réservés dans l'appréciation des faits qu'ils admettent comme juste cause d'ignorance."). It is worth mentioning that this opposition was not shared by one major author of the nineteenth century: Claude Bufnoir (1832–1898) recognized the importance of the rule in his famous collection of courses, CLAUDE BUFNOIR, PROPRIÉTÉ ET CONTRAT 401, 408 (L.G.D.J. 2005) (rev. ed. 1924) (1900) (Fr.), despite certain reluctance initially expressed, *id.* at 398.

49. See, e.g., Cour royale de Paris, Feb. 15, 1816 (Fr.), *aff'd*, Cass. req., Aug. 5, 1817, S. 1817, I, 858 (Fr.) (impossible communication between Lisbonne and Hambourg in 1808 because of Napoleonic war).

50. See, e.g., Cass. crim., July 8, 1858, D. 1858, I, 431 (Fr.) (prescription of public action); Cour d'appel [CA] [regional court of appeal] Montpellier, Jan. 10, 1878, S. 1878, II, 313, 315 (Fr.) (acquisitive prescription).

51. FRANÇOIS TERRÉ ET AL., DROIT CIVIL: LES OBLIGATIONS No. 1497 (9th ed. 2005) (Fr.).

52. FRANÇOIS TERRÉ & PHILIPPE SIMLER, DROIT CIVIL: LES BIENS No. 474 (7th ed. 2006) (Fr.).

53. Henry Mornard, *De l'adage "contra non valentem agere non currit praescriptio,"* 9 REVUE GÉNÉRALE DU DROIT, DE LA LÉGISLATION ET DE LA JURISPRUDENCE EN FRANCE ET À L'ÉTRANGER [R.G.D.] 516 (1885) (Fr.); Henry Mornard, *De l'adage "contra non valentem agere non currit praescriptio,"* 10 R.G.D. 37 (1886) (Fr.). For applications of the maxim in criminal procedure law (suspension of the prescription of the public action), see, for example, Cass. crim., Dec. 23, 1999, Bull. crim., No. 312 (Fr.); for applications in criminal law (suspension of the prescription of the penalty), see, for example, Cass. crim., June 2, 1964, Bull. crim., No. 189 (Fr.).

contra non valentem is no longer debatable,⁵⁴ and it is held as a general principle of private law (*principe général du droit privé*).⁵⁵

Many reasons explain the failure of the fathers of the *Code civil* to eradicate the old maxim. First, the codified grounds for suspension were restrained to a personal nature. There was no room for causes extraneous to the person, a position that was logically and practically untenable as Troplong vigorously sustained.⁵⁶ Second, *contra non valentem*, just like many other maxims, is an extra-codal rule instilling necessary flexibility and correcting equity (*équité correctrice*)⁵⁷ in a codified system.⁵⁸ Of course, a system cannot last without flexibility. Third, judges of the Napoleonic and the Restoration eras interpreted the *Code civil* in the light of the *Ancien Droit*, considering rightly that the Code did not create a brand new legal system but rather developed as an amelioration and a modernization of the old one.⁵⁹ Fourth, one must also acknowledge that French judges managed to gradually escape the "straight-jacket" that political power tailored for them and that they discreetly but decidedly recovered much of their lost freedom in interpretation and creation.⁶⁰ Last but not least, it is worth noting that the validity of *contra non valentem* was supported by some of the most influential jurisconsults of this

54. Thierry Gretere, *L'adage contra non valentem agere non currit praescriptio* (1981) (Fr.) (unpublished doctoral thesis) (presented at the University of Paris I (Panthéon-Sorbonne)).

55. Jean-Pierre Gridel, *La Cour de cassation française et les principes généraux du droit*, 2002 RECUEIL DALLOZ 228 No. 2 (Fr.).

56. 2 TROPLONG, *supra* note 35, No. 701.

57. On the equitable nature on this maxim, see PATRICK MORVAN, *LE PRINCIPE DE DROIT PRIVÉ* No. 168 (1999) (Fr.). See also the exceptional statement of the Cour de cassation itself: "*principe du droit commun et de toute équité suivant lequel la prescription ne court pas contre celui qui est empêché d'agir.*" Cass crim., Oct. 19, 1842, Bull. crim. No. 287 (Fr.) (emphasis added).

58. For the progressive revival of equity, disguised or open, of a praetorian nature or incorporated in statutes, see René David, *La doctrine, la raison, l'équité*, 11 REVUE DE LA RECHERCHE JURIDIQUE 109, 134 (1986) (Fr.); Léon Julliot de la Morandière, *The Draft of a New French Civil Code: The Role of The Judge*, 69 HARV. L. REV. 1264, 1272 (1956).

59. On this continuity trend in the interpretation of the *Code civil* and on the systematic recourse to authorities of the *Ancien Droit* in the first decades of the *Code civil*, see Marie-France Renoux-Zagamé, *Additionnel ou innovatif? Débats et solutions des premières décennies de la mise en oeuvre du Code civil*, 41 DROITS: REVUE FRANCAISE DE THÉORIE, DE PHILOSOPHIE ET DE CULTURES JURIDIQUES 19, 29 (2005) (Fr.).

60. Olivier Moréteau, *Codes as Straight-Jackets, Safeguards and Alibis: The Experience of the French Civil Code*, 20 N.C. J. INT'L L. & COM. REG. 273, 281 (1995).

period, such as Merlin de Douai,⁶¹ Troplong,⁶² and Aubry and Rau.⁶³

Nevertheless, we can observe that the resurrection of the maxim did not generate the problems feared most by the legislature because the courts always regarded the maxim as an exception and applied it very carefully, which can be seen in the conditions upon which the maxim was applied. First, the impossibility of acting has to be absolute, or in other words, the source of this impossibility must be comparable to *force majeure*.⁶⁴ Second, if the impossibility was the creditor's fault, the court will refuse to consider that prescription has been suspended.⁶⁵ The requirement of *force majeure* was often expressed by the *Cour de cassation*, but a closer look at the cases in which the maxim was applied shows a certain oscillation of the formulas: sometimes the required impossibility has to be absolute, and other times, the impossibility is simply relative, embodied in the standard of reasonableness.⁶⁶

61. PHILIPPE-ANTOINE MERLIN DE DOUAI, 12 RÉPERTOIRE UNIVERSEL ET RAISONNÉ DE JURISPRUDENCE 757, at "Prescription," sec. I, § VII, art. II, question X (Fr.).

62. 2 TROPLONG, *supra* note 35, No. 701; *see also* Carbonnier, *supra* note 43, at 160 n.1; Dimitri Houtcieff, "Sic transit gloria mundi." *Regards jubilaires sur l'œuvre de Raymond-Théodore Troplong*, 28 REVUE DE LA RECHERCHE JURIDIQUE 2277, 2306 No. 44 (2003) (Fr.).

63. The argument relies on *analogia iuris*. *See* 1 CHARLES AUBRY & CHARLES RAU, COURS DE DROIT CIVIL FRANÇAIS D'APRÈS L'OUVRAGE ALLEMAND DE C.-S. ZACHARIAE 186 (2d ed. 1842) (Fr.) (quoting the first edition of Troplong's comment). In the third edition, these authors tend to limit the effects of the maxim to legal impediments faithful to the glossators. 2 *id.* at 307, 308 n.34 (3d ed. 1865).

64. 2 TROPLONG, *supra* note 35, Nos. 700–01. In the beginning, the *Cour de cassation* did not mention the venerable maxim but practiced it under the sole banner of *force majeure*. *See supra* note 49. At the time of the official resurrection of *contra non valentem*, the closeness of the two rules was openly expressed by the *Cour de cassation* itself. Cass. 2e civ., Feb. 10, 1966, Bull. civ. II, No. 197; D. 1967, II, 315, cmt. Jacques Prévault (Fr.) (mental disease); Cass. 1e civ., June 28, 1870, S. 1871, I, 137 (Fr.).

65. For example, a wife who ignores her husband's death and leaves a claim for indemnity insurance extinguished by prescription may not invoke the reasonable and legitimate ignorance when she had abandoned the matrimonial home for 15 years "without giving any explanation of his attitude." Cass. 1e civ., June 25, 1935, S. 1936, I, 366 (Fr.); *see also* Cass. req., Jan. 27, 1941, S. 1941, I, 7 (Fr.).

66. *See infra* notes 75–76. This flexibility or autonomy of the notion in the area of *contra non valentem* was already underlined by Carbonnier, *supra* note 43, at 181. Moreover, the *force majeure* itself, in its original field (i.e., justified non-performance), is indeed a flexible and relative notion. *See* ALAIN A. LEVASSEUR, COMPARATIVE LAW OF CONTRACTS: CASES AND MATERIALS 165, 171 (2008).

The French doctrine generally classifies the cases of *contra non valentem* as juridical or factual obstacles.⁶⁷ But Carbonnier demonstrated that the first category is in reality an illusory one because the cases it includes can be explained with more precise legal concepts than the "vague" maxim we are discussing here.⁶⁸ Thus, we will focus our attention on the factual impediments under the French model.

The first type of factual impediment considers the "law of catastrophes": war, flood, hurricane, epidemic, strike, profound illness, etc. These cases can be seen as veritable applications of the concept of *force majeure*. But the mere existence of a war or illness does not suffice to invoke the maxim: the impossibility of acting must be absolute, for example, because the courts were closed or inaccessible.⁶⁹ This requires a case-by-case appraisal that is out of the control of the *Cour de cassation*, as the inquiry is no longer just a legal one.⁷⁰ The *Cour de cassation*'s adoption of a strict conception of *force majeure*, which is encouraged and approved by the authors of this Article, is consistent with the writings of the great jurist of Orléans, Robert-Joseph Pothier,⁷¹ whose writings on prescription predate the *Code Napoléon* and remain relevant even today.⁷²

The second case of *contra non valentem* is the ignorance of vital facts that constitute part of the cause of action. The first significant case in which the *Cour de cassation* affirmed this doctrine can be seen as the first step of the development of the discovery rule in France. It was clearly held that the course of prescription was suspended each time the creditor could not

67. See, e.g., TERRÉ ET AL., *supra* note 51, No. 1497.

68. Carbonnier, *supra* note 43, at 165-69.

69. For the particular case of a strike in postal services, see CA Nancy, July 10, 1909, S. 1910, II, 103 (Fr.). For an analysis of other cases, see Janke, *Revisiting Contra Non Valentem*, *supra* note 3, at 505.

70. Cass. req., Aug. 5, 1817, S. 1818, I, 858 (Fr.).

71. 2 POTHIER, *supra* note 10, No. 649 ("When a person is absent in a distant country, for example in the East-Indies; although the person who had his power of attorney in his own country was dead, and there was no person who could take care of his affairs, the time of prescription does nevertheless run against him: he is not for this reason within the rule, *contra non valentem*, etc.; for however distant it might be it is not impossible for him to inform himself of the news of his country, and to send a power of attorney to another person in the stead of him who is dead. Circumstances may however happen in which a person absent has been in actual disability, and when this is evidently proved, we may aid him by applying the rule *contra non valentem*, etc." (citation omitted)).

72. See, e.g., *Plaquemines Parish Comm'n Council v. Delta Dev. Co.*, 502 So. 2d 1034, 1055 n.50 (La. 1987) (citing Pothier's *Law of Obligations or Contracts* for the Roman origins of *contra non valentem*).

reasonably know of the existence of the facts giving rise to the birth of his right.⁷³ But the *Cour de cassation* seemed to be afraid of its own audacity and, some years after, radically excluded the ignorance as a ground for suspension.⁷⁴ But again, it overruled its own position to judge that ignorance could provoke the application of the maxim only if the ignorance of the creditor bore the characteristics of the *force majeure*. Yet, in the meantime, the doctrine of the *Cour de cassation* lost its initial firmness and underwent a conceptual bifurcation: some of the decisions required absolute impossibility,⁷⁵ while others required just a reasonable undiscoverability of the vital facts.⁷⁶ Neither of these two trends ever dominated. This bifurcation is another illustration of the elasticity of the maxim.

Nevertheless, in the past two centuries of the *Code civil*, the discovery rule *à la française* was the most invoked case of *contra non valentem*. To avoid the potential destruction of the discovery rule, French courts always decided, with justified steadiness, that mere ignorance of the law cannot suspend the course of the prescription, offering there a logical consequence of another famous and ancient maxim of French law: *nemo censetur ignorare legem* (no one is deemed to be ignorant of the law).⁷⁷

73. Cass. 1e civ., May 27, 1857, D. 1857, I, 290 (Fr.) (stating that the delayed action of the creditor is not inadmissible whenever he is "reasonably and in the eyes of the law unaware of the fact giving birth to his right and interest and, consequently, commencing the action").

74. Cass. req., June 11, 1918, S. 1922, I, 217, cmt. E. Naquet (Fr.).

75. Cass. 1e civ., Oct. 7, 1992, No. 89-13461 (Fr.); Cass. soc., Jan. 3, 1974, Bull. civ. V, No. 8 (Fr.); Cass. 1e civ., June 25, 1935, S. 1936, I, 366 (Fr.). For other cases requiring an "absolute impossibility" to act, see Cass. 2e civ., July 12, 2007, Bull. civ. II, No. 208 (Fr.); Cass. 3e civ., Nov. 22, 2006, Bull. civ. III, No. 228 (Fr.).

76. Cass. 2e civ., Mar. 22, 2005, Bull. civ. II, No. 75 (Fr.); Cass. com., Apr. 13, 1999, Bull. civ. IV, No. 89 (Fr.); Cass. com., Jan. 4, 1994, No. 92-10249 (Fr.) ("ignorance légitime et raisonnable"); Cass. com., Apr. 7, 1967, Bull. civ. III, No. 125 (Fr.) ("pouvait raisonnablement ignorer le fait qui donne naissance à son action"); Cass. req., Jan. 27, 1941, S. 1941, I, 7 (Fr.) ("just reason to ignore the birth of his right").

77. Cass. 2e civ., July 12, 2007, Bull. civ. II, No. 208 (Fr.); Cass. 1e civ., Dec. 11, 1990, Bull. civ. I, No. 284 (Fr.). For other decisions clearly ruling that mere ignorance of the law does not suspend prescription, see Cass. 2e civ., Mar. 6, 2008, Bull. civ. II, No. 59 (Fr.); Cass. soc., Nov. 5, 1992, No. 90-20634 (Fr.); Cass. soc., Nov. 27, 1980, Bull. civ. V, No. 866 (Fr.); cf. Cass. 2e civ., Mar. 12, 2009, No. 08-11210 (Fr.); Cass. 1e civ., June 27, 2006, Bull. civ. I, No. 328 (Fr.); Cass. soc., Apr. 26, 1984, Bull. civ. V, No. 159 (Fr.) ("niveau culturel"). The same solution prevails in Louisiana: mere "[i]gnorance of one's rights does not toll the running of prescription." Shushan, Meyer, Jackson, McPherson & Herzog v. Machella, 483 So. 2d 1156, 1158 (La. Ct. App. 5th 1986); see also Smith v. Tyson, 192 So. 61, 63 (La. 1939); Wilcox v. Henderson, 11 La. Ann.

The third category of *contra non valentem* concerns the cases where the creditor's impossibility to act (or the *verus dominus*) is due to the fault or to the fraudulent concealment of the debtor or the possessor.⁷⁸ The latter is not allowed to avail himself of prescription that has already run. This category has more connections with the doctrines of fraud (*fraus omnia corrumpit*)⁷⁹ and abuse of rights (*la théorie de l'abus de droit*)⁸⁰ than with the doctrine of *force majeure*.⁸²

The will of the French judiciary to limit the subversive power of *contra non valentem* can also be seen in the nature of its consequences. At the beginning of this section, the maxim was qualified as a "ground for suspension," but it was just *simplicitatis causa*. Looking closer at the conditions under which the maxim is applied, it appears that the genuine technical effect of the maxim is not to suspend the prescription, but to set aside an already run prescription, taking here the Roman *restitutio* as a model.⁸³ First, *contra non valentem* cannot validly be invoked if the impossibility to act manifested itself in the first years of the course of prescription. The courts refuse to help the plaintiff if he benefited, after the end of the impediment, from some sufficient lapse of time to sue the defendant. This is why this praetorian maxim is more

190 (1856); *Groom v. Energy Corp. of Am.*, 650 So. 2d 324, 326 (La. Ct. App. 5th 1995); *Harsh v. Calogero*, 615 So. 2d 420, 423 (La. Ct. App. 4th 1993) (expressly referencing Louisiana Civil Code article 5, which states that "[n]o one may avail himself of ignorance of the law"); *Knighten v. Knighten*, 447 So. 2d 534, 542 (La. Ct. App. 2d 1984); *Jackson v. Zito*, 314 So. 2d 401, 407 (La. Ct. App. 1st 1975), *overruled by* *Cherokee Rest., Inc. v. Pierson*, 428 So. 2d 995 (La. Ct. App. 1st 1983).

78. See, e.g., Cass. 1e civ., Oct. 28, 1991, Bull. civ. I, No. 282 (Fr.); see Jérôme Kullmann, *Fautes et sanctions liées à la prescription*, in *LES DÉSORDRES DE LA PRESCRIPTION* 97, 105 (Patrick Courbe ed., 2000) (Fr.).

79. "Fraud is an exception to every rule."

80. See Boyer, *supra* note 39, at 33.

81. On this notion, see Saúl Litvinoff, *Good Faith*, 71 TUL. L. REV. 1645, 1660-61 (1997).

82. But see Jean Carbonnier, *Notes sur la prescription extinctive*, 50 REVUE TRIMESTRIELLE DE DROIT CIVIL 170 (1952) (Fr.), reprinted in 5 CIVIL LAW TRANSLATIONS § 3, at 465 (La. State Law Inst. trans., 1972). According to Filippo Ranieri, the veritable *ratio decidendi* of such decisions is the control of the abuse of the right to invoke prescription. The recourse to the old maxim was a means to reintroduce surreptitiously "*bona fides*" in French law. See FILIPPO RANIERI, *EUROPÄISCHES OBLIGATIONENRECHT, EIN HANDBUCH MIT TEXTEN UND MATERIALIEN* 1866-69 (3d ed. 2009) (Ger.).

83. The first doctrinal expression of this solution comes from Troplong. See Janke, *Revisiting Contra Non Valentem*, *supra* note 3, at 509-10. For a more doctrinal formulation, see C.-S. ZACHARIAE ET AL., 2 COURS DE DROIT CIVIL FRANÇAIS 308 (3d ed. 1865) (Fr.).

frequently applied to short prescriptions.⁸⁴ Second, the maxim is unavailable to the negligent creditor, that is, the creditor who did not promptly act after the disappearance of the impediment.⁸⁵ This shows that the maxim does not suspend the course of prescription; if it were so, the creditor could enjoy a new lapse of time, equal to the duration of the past impediment, without the obligation of diligence.⁸⁶

We note here an interesting convergence between French case law and early Louisiana cases. For example, we can observe cases where the plaintiff pleaded the suspension of prescription based on *contra non valentem* because of impediments caused by the Civil War. In those cases, although there had been a period of several years (except for a period of some months) during which the courts had been closed, the Louisiana courts held that the plaintiff's failure to file suit when the courts were open amounted to unjustified delay that barred recovery.⁸⁷ These decisions were criticized for introducing the common law doctrine of laches in the Louisiana civil law system.⁸⁸ More interestingly, in *Rabel v. Pourciau*, the plaintiff, in his petition for a rehearing, criticized the faithful attitude of the Louisiana courts *vis-à-vis* Troplong's doctrine, which was, according to him, contrary to the *jurisprudence constante* of the court.⁸⁹ The court, according to the plaintiff, had always followed the doctrine of Merlin de Douai, who considered *contra non valentem* as a veritable technique of suspension and not just an equitable ground for relief.⁹⁰ But the

84. Michel Buy, *Prescriptions de courte durée et suspension de la prescription*, 1977 LA SEMAINE JURIDIQUE, I, 2833 (Fr.).

85. Cass. com., Jan. 11, 1994, Bull. civ. IV, No. 22 (Fr.); Cass. 1e civ., Jan. 25, 1821, S. 1821, I, 371 (Fr.).

86. It is noteworthy that one recent decision of the *Cour de cassation* seems to treat *contra non valentem* as a real ground of suspension. See Cass. 1e civ., July 1, 2009, No. 08-13518 (Fr.) (five-year action of nullification suspended as long as the insane woman does not benefit from tutorship); see also Cass. 1e civ., Feb. 4, 1986, JCP 1987, II, 20818, cmt. Laurent Boyer (Fr.) (where the court seems to have treated the maxim as a veritable ground of suspension).

87. See *Zacharie v. Sproule & Co.*, 22 La. Ann. 325 (1870); *Jackson v. Yoist*, 21 La. Ann. 108 (1869); *Mechs. & Traders' Bank v. Sanders*, 21 La. Ann. 106 (1869); *Lemon v. West*, 20 La. Ann. 427 (1868); *Norwood v. Mills*, 20 La. Ann. 422 (1868); *Barriere v. Stein*, 20 La. Ann. 397 (1868); *Durbin v. Spiller*, 20 La. Ann. 219 (1868); *Rabel v. Pourciau*, 20 La. Ann. 131 (1868).

88. Breard Snellings, Comment, *The Application of the Doctrine of Laches in Louisiana*, 12 TUL. L. REV. 279, 285-86 (1938).

89. *Rabel*, 20 La. Ann. at 133.

90. *Id.* On petition for a rehearing, the plaintiff stated:

It is assumed by the Court, as established, and the fact cannot be disputed, that during the time that prescription is supposed to have been running, that there were two years and two months of time, during

rehearing was denied, and the court remained faithful to Troplong's position.⁹¹ Finally, the court went a step further and totally rejected *contra non valentem*, this time loyally following the opinion of another French jurist, Coin-Delisle,⁹² whose extreme legalism had never been followed by French courts.

But, from the time of definitive restoration of the maxim in *Succession of Farmer*,⁹³ it would seem that its effect is to suspend the prescription and that the judge may make the deduction accordingly. To the contrary, as we saw before, the *Cour de cassation* seems to maintain that, if the plaintiff had the ability to sue in the last days of the period of prescription, he is not able to invoke the maxim.⁹⁴ It is still a ground for *restitutio* (relief) and not a ground for suspension.⁹⁵

The French law of liberative prescription was substantially revised in 2008 by the *loi n° 2008-561 du 17 juin 2008 portant réforme du droit de la prescription en matière extinctive*.⁹⁶ One of the consequences of the French revision may be a new convergence of French and Louisiana law *vis-à-vis* the nature of *contra non valentem*. But, before explaining this, we have to focus shortly on the metamorphosis of the *contra non valentem* in the revised French Civil Code.⁹⁷

which no suit could have been instituted against the defendant. The question, therefore is, Did this impossibility to sue *suspend* prescription? If it did, has not plaintiff the right to deduct this time from the first five years? Troplong concedes that, according to the doctrine of Merlin, the creditor would have such a right, for that seems to have been the mode of computation where prescription was *suspended*. Troplong says, Prescription No. 728: "Nous proposerons même une autre limitation dont ne parle pas Merlin," and then he states the doctrine, that if war and pestilence occur in the intermediate time, and not near the termination of prescription, it ought not to be regarded. But the question arises, How have our Courts regarded this question? Have they followed Troplong or Merlin? We think it can be established that they have followed Merlin, and have held that where there was occasion to apply the doctrine of *Contra non valentem agere non currit præscriptio*, they have held prescription to be *suspended* and have made the deduction accordingly.

Id.

91. *Id.* at 137.

92. See Smith v. Stewart, 21 La. Ann. 67, 78 (1869).

93. 32 La. Ann. 1037, 1041 (1880).

94. See *supra* notes 85–86 and accompanying text.

95. But see *supra* note 87 and accompanying text.

96. See M. LAURENT BÉTEILLE, RAPPORT DU SÉNAT NO. 358, Session Ordinaire de 2007–2008 (Fr.).

97. See Janke & Licari, *supra* note 3.

This metamorphosis covers many aspects. First, *contra non valentem* is no longer a venerable general principle of private (unwritten) law but a codified rule.⁹⁸ Second, this codification is ubiquitous. At first glance, the rule is now embodied in article 2234, which copies almost verbatim the judicial principle coined by the *Cour de cassation*: “*La prescription ne court pas ou est suspendue contre celui qui est dans l’impossibilité d’agir par suite d’un empêchement résultant de la loi, de la convention ou de la force majeure.*”⁹⁹ The other and major embodiments of *contra non valentem* are found in new articles 2224¹⁰⁰ and 2227,¹⁰¹ which establish the discovery rule *à la française* or, in other words, the cognizance of vital facts as a criterion for the accrual of the prescription.

Needless to say, codification of *contra non valentem* has notable consequences. First, the discovery rule is no longer an *exception* but a *principle*. When ignorance is an excuse suspending the passage of time, there is no doubt that the burden of proof of this ignorance lies on the shoulders of the creditor. But when knowledge of essential facts is a *sine qua non* condition for the commencement of prescription, it seems reasonable to say that the burden of proof of this knowledge lies on the shoulders of the debtor.

The second consequence of this codification could be a splitting of the conditions under which the rule applies. The codified discovery rule in article 2224 (or 2227) of the *Code civil*

98. *Contra non valentem* is codified, in principle, in many other codes. For a discussion of *contra non valentem* as codified in some Arab nations, including Egypt (article 382), Syria (article 279), Kuwait (article 446), and Jordan (article 457), see Selim Jahel, *Les principes généraux du droit dans les systèmes Arabo-musulmans au regard de la technique juridique contemporaine*, 55 REVUE INTERNATIONALE DE DROIT COMPARE 105, 119 (2003) (Fr.). It should also be noted that there are provisions of Louisiana law relative to conflicts of law that apply the essence of *contra non valentem*. See LA. CIV. CODE ANN. art. 3549(B)(1) & cmt. (f) (1994 & Supp. 2010); see also STEVE HERMAN, CAN WE IMPORT BETTER LAW IN PERSONAL INJURY CASES?, at 9 n.28 (2002), available at http://www.gravierhouse.com/engine/sdocs/getdoc.aspx?name=choice_of_law&dl=1 (presented at the 2002 Spring Retreat of the Louisiana Trial Lawyers Association).

99. C. CIV. art. 2234 (Fr.) (“Prescription does not run or is suspended against the person who is unable to act because of an impediment resulting from the law, agreement, or force majeure.”).

100. *Id.* art. 2224 (“Personal or movable actions prescribe in five years from the date on which the holder of a right knew or should have known of the facts to enable him to exercise it.”).

101. *Id.* art. 2227 (“Real property rights are imprescriptible. Subject to this, real property rights prescribe thirty years from the date on which the holder of a right knew or should have known of the facts to enable it to exercise it.”).

has reasonableness as a criterion, but the codification of the rest of the maxim suffers from a stronger criterion (i.e., the “absolute impossibility”).¹⁰² Here, it should be remembered that the French courts have always treated *force majeure* in a pragmatic manner when applied to *contra non valentem*.¹⁰³ The test of reasonableness should prevail.

A third consequence of the statutory consecration of the maxim could be a heavy trend of the creditors to plead *contra non valentem*. This fear was expressed by Carbonnier more than 60 years ago when dealing with the opportuneness of codifying the maxim¹⁰⁴ and is shared by some commentators of the revision, believing that a mere favor for the creditor has turned into a right.¹⁰⁵

The French legislature changed the very nature of this ancient maxim. The nature of *contra non valentem* under the 2008 revision is decidedly a veritable ground for suspension and not just a ground for relief against the effects of the prescription.¹⁰⁶ Indeed, new article 2234 lies in Section 2 (“*Des causes de report du point de départ ou de suspension de la prescription*”) side by side with traditional grounds for suspension like marriage or minority. We can predict in this area a durable convergence with Louisiana law.

B. Contra Non Valentem in Louisiana: The Animated Success Story of an Old Maxim

The intent of French Civil Code article 2251 was to eliminate *contra non valentem* unless a statute specifically provided for a ground for suspension.¹⁰⁷ The will of the French legislature voyaged to Louisiana when the Louisiana Legislature adopted a translation¹⁰⁸ of that article under the 1825 Civil Code as article 3487: “Prescription runs against all persons unless they are included in some exception established by law.”¹⁰⁹ Article 3487 was retained under the Code of 1870 as article 3521¹¹⁰ and slightly

102. See *supra* note 64.

103. See *supra* notes 75–76.

104. Carbonnier, *supra* note 43, at 193–94.

105. Claude Brenner & Hervé Lécuyer, *La réforme de la prescription*, 2009 LA SEMAINE JURIDIQUE, édition notariale, 1118, No. 61 (Fr.).

106. *Id.*

107. Allain D. Favrot, Comment, *The Scope of the Maxim Contra Non Valentem in Louisiana*, 12 TUL. L. REV. 244, 244 n.2 (1938) (citing VICTOR MARCADÉ, EXPLICATION DU CODE CIVIL XII, DE LA PRESCRIPTION 216, No. 186 (7th ed. 1874) (Fr.)).

108. Palmer, *supra* note 10, at 66; Favrot, *supra* note 107, at 245.

109. LA. CIV. CODE art. 3487 (1825).

110. *Id.* art. 3521 (1870).

modified under the 1983 revision as article 3467: "Prescription runs against all persons unless exception is established by legislation."¹¹¹ Thus, the legislature's will to exclude *contra non valentem* is deeply rooted in Louisiana law.

Despite numerous attempts by both the legislature and the judiciary to outlaw the application of *contra non valentem*, its use remains prevalent today and enjoys a long and resilient history. The maxim first appeared in 1817 in *Quierry's Executor v. Faussier's Executors*,¹¹² seven years before article 3487 of the Civil Code of 1825 would seemingly deny its application. In that case, the Louisiana Supreme Court applied *contra non valentem* when the courts were closed in anticipation of the British invasion in the Battle of New Orleans.¹¹³ Over time, the doctrine continued to develop in Louisiana jurisprudence.

By 1856, in *Reynolds v. Batson*,¹¹⁴ the Louisiana Supreme Court offered a gloss of the three classes of cases of *contra non valentem* applied to prescriptions *liberandi causa* in Louisiana: (1) "Where there was some cause which prevented the courts or their officers from acting or taking cognizance of the plaintiff's action; a class of cases recognized by the Roman law as proper for the allowance of the *utile tempus*";¹¹⁵ (2) "where there was some condition or matter coupled with the contract or connected with the proceeding which prevented the creditor from suing or acting";¹¹⁶ and (3) "where the debtor himself has done some act effectually to prevent the creditor from availing himself of his cause of action."¹¹⁷ Over 100 years later, in the seminal case, *Corsey v. State*, Justice Tate recognized the "fourth" category of *contra non valentem*—the "discovery rule"—"[w]here the cause of action is

111. *Id.* art. 3467 (2010).

112. 4 Mart. (o.s.) 609, 609 (La. 1817).

113. Janke, *Revisiting Contra Non Valentem*, *supra* note 3, at 498.

114. 11 La. Ann. 729, 729 (1856).

115. *Id.* at 730 (citing DIGEST OF JUSTINIAN, lex. 1, lib. 44, t. 3 (533 A.D.); *id.* §§ 7–9, lex. 1, lib. 49, t. 4; *Smith v. Taylor*, 10 Rob. 133 (La. 1845); *Ayraud v. Babin's Heirs*, 7 Mart. (n.s.) 471 (La. 1829); *Quierry*, 4 Mart. (o.s.) 609).

116. *Id.* (citing *Flint v. Cuny*, 6 La. 67 (1833); *Landry v. L'Eglise*, 3 La. 219 (1832)).

117. *Id.* (citing *Martin v. Jennings*, 10 La. Ann. 553 (1855); *Boyle v. Mann*, 4 La. Ann. 170 (1849)). Some have noted that *contra non valentem* ought not be constrained to precedential categories but rather should be invoked whenever warranted by exceptional circumstances. See E. Scott Hackenberg, Comment, *Puttering About in a Small Land: Louisiana Revised Statutes 9:5628 and Judicial Responses to the Plight of the Medical Malpractice Victim*, 50 LA. L. REV. 815, 830 (1990), cited in Nichols, *supra* note 11, at 361 n.155.

not known or reasonably knowable by the plaintiff, even though his ignorance is not induced by the defendant.”¹¹⁸

But in the interim, *contra non valentem* suffered a setback in a series of post-Civil War cases.¹¹⁹ Some speculate that many litigants would use the war to excuse their own negligence in failing to file suit, and that although some litigants were indeed constrained to access the courts because they were closed or because of some other impediment, Louisiana courts were content to reject any such plea of *contra non valentem*, regardless of the merits of the case.¹²⁰ Others theorize that declining to apply the maxim “spared the Court from deciding a great political question arising out of the Civil War,” such as whether actions by agents of a rebellious government were lawful.¹²¹ Finally, with the mounting disfavor of *contra non valentem*, the Louisiana Supreme Court declared *contra non valentem* as dead in 1869 in *Smith v. Stewart*,¹²² invoking Civil Code article 3487¹²³ and washing its

118. 375 So. 2d 1319, 1322 (La. 1979) (citing *Cartwright v. Chrysler Corp.*, 232 So. 2d 285 (La. 1970); *Sumerall v. St. Paul Fire & Marine Ins. Co.*, 366 So. 2d 213 (La. Ct. App. 2d 1978)). One author suggested, years before *Corsey* acknowledged the “fourth” category of *contra non valentem*, that Louisiana courts should not extend *contra non valentem* to include the “discovery rule”:

Generally speaking, these [three] categories are inclusive of every situation where the maxim is applied today with the exception of the case where the creditor is ignorant of the facts giving rise to his right of action. It is submitted that the sounder rule would be to exclude the latter exception, as the prescriptive periods usually allow ample time for a reasonably diligent creditor, in the absence of extraordinary circumstances, to obtain knowledge of his right of action and to prosecute it. The social benefits of the law of prescription are well known, and the general rule should admit of as few exceptions as are compatible with equity and justice. While the rule *contra non valentem* seems to be established in the jurisprudence of Louisiana in at least the three classes of cases mentioned above, the courts should be scrupulous not to extend its limits.

Favrot, *supra* note 107, at 254. But others disagree, noting that Louisiana’s short prescriptive periods (particularly in tort) and the necessary delay that comes with the discovery of certain causes of action (particularly, certain diseases) warrants the adoption of the fourth category of *contra non valentem*. See Gallaughier, *supra* note 8, at 388–90.

119. See *supra* note 87.

120. See Favrot, *supra* note 107, at 250 n.37.

121. See Palmer, *supra* note 10, at 67 n.250; see also Janke, *Revisiting Contra Non Valentem*, *supra* note 3, at 503–04.

122. 21 La. Ann. 67 (1869).

123. *Id.* at 79 (“So we think. ‘Prescription runs against all persons, unless they are included in some exception established by law.’” (quoting LA. CIV. CODE art. 3487 (1825))).

hands of the possible unjust result; *lex dura, sed lex*.¹²⁴ But the same five justices in *Smith* invoked the maxim in principle but without name just two years later in *Tutorship of Hewitt*.¹²⁵ The Louisiana Supreme Court reinstated the maxim by name in 1880 in *Succession of Farmer*,¹²⁶ and more formally in *McKnight v. Calhoun*.¹²⁷

Louisiana courts continued to apply the maxim, though some regarded it as a disfavored doctrine.¹²⁸ The next setback came during the 1983 revision of the title of prescription in the Civil Code. Where there was a proposal to give statutory recognition to *contra non valentem*,¹²⁹ the legislature went the other way by enacting Louisiana Civil Code article 3467.¹³⁰ Now, instead of accommodating "some exception established by law,"¹³¹ which theoretically could include jurisprudential approval of *contra non*

124. See Palmer, *supra* note 10, at 66 n.244 (citing Albert Tate, Jr., *The "New" Judicial Solution: Occasions for and Limits to Creativity*, 54 TUL. L. REV. 877, 911 (1980)).

125. 23 La. Ann. 682 (1871) (holding that prescription did not run during a tutorship and was suspended for a four-year period following the termination of the tutorship).

126. 32 La. Ann. 1037 (1880).

127. 36 La. Ann. 408 (1884).

128. See Nichols, *supra* note 11, at 340 n.16 (citing *Israel v. Smith*, 302 So. 2d 392, 393 (La. Ct. App. 3d 1974) ("On the contrary our study indicates that the doctrine of [c]ontra non [valentem] has been given very limited application in Louisiana." (emphasis added))).

129. An early draft of Civil Code article 3467 gave express legislative approval to *contra non valentem*, although a close inspection of the text shows that the proposal would only have given recognition to the third category of the maxim under the *Reynolds* formulation, and other generalized modes of injustice: "Liberative prescription is exceptionally suspended when the filing or prosecution of a suit is prevented by the fraud of the creditor or is made impossible by extraordinary circumstances totally beyond the control of the plaintiff, and the accrual of prescription would result in obvious injustice." See LA. STATE LAW INST., REVISION OF THE LOUISIANA CIVIL CODE OF 1870, BOOK III, TITLE XXIV (NEW), DOC. NO. 1-29-2, art. 3467 (Council Meeting, Feb. 19, 1982). The Law Institute's election to simply insert "comment (d)" has been criticized because comments are not law. See Symeon Symeonides, *One Hundred Footnotes to the New Law of Possession and Acquisitive Prescription*, 44 LA. L. REV. 69, 139 n.109 (1983); see also Vernon V. Palmer, *The Death of a Code—The Birth of a Digest*, 63 TUL. L. REV. 221, 260-61 (1988).

130. See Gallagher, *supra* note 8, at 387 ("In revising the Code, the legislature rejected a proposal to give statutory recognition to the doctrine of *contra non valentem*. Instead, the legislature chose to reemphasize the rule that prescription runs on a claim for personal injuries from the day of the injury rather than the time the plaintiff receives adequate notice. This could signal legislative disapproval of *contra non valentem*, suggesting that the courts should reappraise the scope of the doctrine.").

131. See LA. CIV. CODE art. 3521 (1870).

valentem, prescription would run “against all persons unless exception is established by legislation,”¹³² implying that the exceptions are more limited and do not include jurisprudential rules of equity. Nevertheless, the infamous comment (d) to article 3467 provides: “Despite the clear language of Article 3521 of the Louisiana Civil Code of 1870, courts have, in exceptional circumstances, resorted to the maxim *contra non valentem non currit praescriptio*. . . . This jurisprudence continues to be relevant.”¹³³ Still, Louisiana courts continue to apply the maxim.¹³⁴

Considering the legislature’s express, repeated, and increasingly bold expressions against the maxim,¹³⁵ its resilience is remarkable. *Contra non valentem* is not just an equitable tool that lacks statutory support. It is a maxim that has been specifically rejected by the legislature¹³⁶ and recognized as in “direct contradiction to the articles in the Civil Code” by Louisiana courts.¹³⁷ Thus, to invoke the maxim, the judge is put in the difficult position of applying the law and snubbing it at the same time.¹³⁸ Its utility is easily comprehensible: an injection of flexibility into an institution (prescription) that is otherwise rigid. Although the judge is tempted to make the easier decision and reject the maxim under the authority of law—that there can be no exception unless it is established by legislation¹³⁹ (*dura lex, sed lex*)—truths of natural law¹⁴⁰ and equity continue to provide sound

132. See *id.* art. 3467 (2010) (emphasis added).

133. See *id.* cmt. (d).

134. See *Corsey v. State*, 375 So. 2d 1319, 1321–22 (La. 1979). *Corsey* is the most frequently cited case in Louisiana applying *contra non valentem*, and several courts continue to reference it. See, e.g., *Teague v. St. Paul Fire & Marine Ins. Co.*, 974 So. 2d 1266, 1274 (La. 2008).

135. See *supra* notes 109–11 and accompanying text.

136. See *supra* note 129.

137. *La Plaque Corp. v. Chevron U.S.A. Inc.*, 638 So. 2d 354, 356 (La. Ct. App. 4th 1994); see also *Perrodin v. Clement*, 254 So. 2d 704, 708 (La. Ct. App. 3d 1971) (citing *Hyman v. Hibernia Bank & Trust Co.*, 71 So. 598, 600 (La. 1916)) (“It would seem that a literal interpretation of the language of the Code precludes a consideration of the doctrine ‘*contra non valentem*’ in this state.”).

138. The judge should not be put in the difficult position of acting as both *iudex* and *praetor*. The latter is reserved for the legislature, which could alleviate the judge’s predicament by codifying *contra non valentem* in some way. See *Nichols*, *supra* note 11, at 362.

139. LA. CIV. CODE art. 3467 (2010).

140. See *Rabel v. Pourciau*, 20 La. Ann. 131, 131 (1868) (“This Court has always considered the maxim, *Contra non valentem agere non currit praescriptio*, an axiom or first principle of natural law, and notwithstanding the terms of limitation in prescription, contained in the old, as well as the new, Code, [has] interpreted these terms in such a manner as to harmonize with this maxim of universal justice.”).

justification for its use. And where Louisiana courts acknowledge their constrained power to invoke the maxim in the exceptional cases, they point to the *jurisprudence constante* for their authority.¹⁴¹ Given the continued recognition of the doctrine, some commentators have argued that the maxim deserves codification¹⁴² just as it earned under the 2008 French revision of prescription.¹⁴³

IV. DOES *CONTRA NON VALENTEM* APPLY TO ACQUISITIVE PRESCRIPTION?

In France, when courts resuscitated the maxim, they applied it indistinctively to liberative and acquisitive prescription, according to the tradition.¹⁴⁴ Although the instances in which the maxim applies are few and far less frequent than in the realm of liberative prescription, one must consider their utility nonetheless. Some caution against the invocation of *contra non valentem* to acquisitive prescription,¹⁴⁵ and we share those concerns. Here, we offer a provocative perspective on the maxim with the intent of fostering a bolder understanding of its fundamental value and the nature of acquisitive prescription.

Let us first reflect on the nature of acquisitive prescription. The “purpose of acquisitive prescription is to assure certainty and stability to the title of an innocent person in a normal sales

141. See *La Plaque*, 638 So. 2d at 356 (noting that, while *contra non valentem* is “in direct contradiction to the articles in the Civil Code,” it “should be strictly construed”); *Perrodin*, 254 So. 2d at 708 (“Be this as it may, the Supreme Court has many times recognized the underlying justice of the doctrine and has applied it on many occasions.”). Notwithstanding the fact that Louisiana courts routinely acknowledge that *contra non valentem* is against the Civil Code and the intent of the legislature, the authors question whether Louisiana courts “strictly construe” its application.

142. See Nichols, *supra* note 11, at 359–62; Joyce M. Cossich, Comment, *The Suspension and Commencement of the Running of Liberative Prescription*, 34 LOY. L. REV. 341, 369–70 (1988).

143. See Janke & Licari, *supra* note 3.

144. See LÉVY & CASTALDO, *supra* note 41. One must also consider that the French *Code civil*, unlike the Louisiana Civil Code, did not separate liberative and acquisitive prescription into two separate titles until the 2008 revision.

145. It is worth noting that one important author of the middle of the twentieth century criticized the resurrection of *contra non valentem* in the field of acquisitive prescription. According to Louis Josserand, the function of this institution, which is to prove and consolidate the right of ownership, should prevail in the particular interest of the owner against whom the possessor prescribes: “[E]lle [i.e., the court of cassation] continue à faire prévaloir l’intérêt particulier d’un propriétaire à l’encontre de l’intérêt général qui veut que la propriété soit prouvée et consolidée par la prescription.” Louis Josserand, 1 COURS DE DROIT CIVIL POSITIF FRANÇAIS No. 1594 (1938) (Fr.).

transaction.”¹⁴⁶ More broadly (i.e., considering both “good faith” and “bad faith” acquisitive prescription), acquisitive prescription seeks to maintain the “status quo . . . in order to promote peace and stability and to avoid resort to self-help when disputes arises as to ownership and possession of property.”¹⁴⁷ As for liberative prescription, its “fundamental purpose . . . is only to afford a defendant economic and psychological security if no claim is made timely, and to protect him from stale claims and from the loss of non-preservation of relevant proof.”¹⁴⁸

The redactors of the French *Code civil* regarded “that the two prescriptions have many points of contact,”¹⁴⁹ not the least of which is the sharp and precise moment that follows the passage of time. At this point, the quality of the parties changes instantaneously. In liberative prescription, the debtor’s right (the right to be free from the creditor’s action) becomes vested. In acquisitive prescription, the right of ownership becomes vested with the adverse possessor.

Taking again the *restitutio* as a model, *contra non valentem* operates as a protective measure for the creditor under liberative prescription. Why then can it not operate to save the owner against an adverse possessor?

We acknowledge that notions of certainty and stability of property rights operate somewhat differently in the realm of

146. *Bd. of Comm’rs v. Elmer*, 268 So. 2d 274, 283 (La. Ct. App. 4th 1972); see also Catherine N. Garvey, Comment, *Acquisitive Prescription—The 1982 Revision of the Louisiana Civil Code*, 58 TUL. L. REV. 618, 619 (1983).

147. *Todd v. State*, 474 So. 2d 430, 432 (La. 1985) (“The concept of possession, established by our Civil Code, is designed as a *first step* in protecting ownership, whether acquired by acquisitive prescription, title, or otherwise. The series of real actions set forth in our Code of Civil Procedure has been carefully structured to establish an orderly procedure by which questions concerning possession, and subsequently ownership, can be determined. Thereunder, the status quo is maintained in order to promote peace and stability and to avoid resort to self-help when disputes arise as to ownership and possession of property.”).

148. *Giroir v. S. La. Med. Ctr.*, 475 So. 2d 1040, 1045 (La. 1985).

149. See Gabriel Baudry-Lacantinerie & Albert Tissier, *Traité théorique et pratique de droit civil, Prescription*, in 5 CIVIL LAW TRANSLATIONS § 34, at 22 (La. State Law Inst. trans., 1972). Jean Domat observed:

All types of prescription which cause a right to be acquired or lost are based on the presumption that the person who enjoys a right must have some just title, without which he would not have been allowed to enjoy it for such a long period; that he who ceases to exercise some right has been deprived of it for some just cause; and that he who has failed to claim his debt for a long time has either been paid or has recognized that nothing is owed to him.

Id. § 27, at 17.

acquisitive prescription than in liberative prescription. These goals are, to be sure, present in liberative prescription as well. But in acquisitive prescription, one must consider that the need for certainty and stability is often broader. Property rights (more particularly, ownership in immovable property) tend to last longer than rights to a single cause of action. One's cause of action is less likely to last more than a generation or to affect anyone other than the debtor and creditor, but one's right of ownership in property (particularly immovable property) is more likely to last longer and more likely to affect the rights of third parties.

It should also be noted that acquisitive prescription has a "built in" safety net of sorts. Unlike liberative prescription, where the beneficiary of this regime does nothing but wait in order for his right to vest, the beneficiary under the acquisitive prescription regime must actively pursue his right through possession.

We do not mean to suggest that *contra non valentem* applies to acquisitive prescription the same way it applies to liberative prescription, nor do we seek to inject broad notions of equity into a regime in which certainty and stability are paramount. Rather, we seek to identify instances in which the maxim could (and perhaps should) apply—where the owner is *non valens agere*. Our reflection of both the French and Louisiana jurisprudence leads us to acknowledge that the appropriate case does not present itself very often and suggests that courts in both jurisdictions are (rightly) very cautious in applying the maxim to acquisitive prescription. The dearth of cases also suggests that they are perhaps too cautious.

A. The French Jurisprudence

Our gloss of French jurisprudence reveals three categories of cases applying *contra non valentem* to acquisitive prescription. The first category concerns "absolute legal impossibilities," where one cannot acquisitively prescribe property because the law imposes a barrier preventing the creditor (the true owner) from bringing his action timely.

In one exemplary French case, a father partitioned his property by donation *inter vivos* among his children in 1844, but the partition significantly benefited one of his daughters over the other children.¹⁵⁰ Three years later, in 1847, the favored daughter sold her property to a third party.¹⁵¹ When the father died in 1867, his heirs attacked the 1844 partition for lesion and sued to re-partition

150. CA Montpellier, Jan. 10, 1878, S. 1878, II, 313, 314 (Fr.).

151. *Id.*

the property according to law.¹⁵² The re-partition effectively nullified the daughter's sale to the third party vendee.¹⁵³ The vendee sued to reclaim his ownership in the land and sustained that if the contract of sale was null, he acquired the property by acquisitive prescription of ten years.¹⁵⁴ The lower court agreed with the vendee, but the court of appeal reversed this *arrêt*.¹⁵⁵ The court of appeal held that prescription could not run in favor of the vendee because the heirs were *non valens agere*, as they could not bring their action to annul the partition until after the death of the father.¹⁵⁶

152. *Id.* at 315.

153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.* The court noted:

la prescription n'a pu courir contre les appelants du vivant des ascendants du donateur, puisqu'il est de principe que l'action en rescision ou en nullité contre un partage de présuccession ne s'ouvre pour les copartageants qu'après le décès du donateur; que tant qu'il vit, ils sont sans qualité, sans titre et sans droit pour l'exercer. Or, comment le tiers détenteur d'un bien qui y a figuré pourrait-il prescrire contre eux, alors qu'ils sont eux-mêmes dans l'impuissance d'agir (*contra non valentem agere non currit praescriptio*);- Attendu que la prescription décennale invoquée n'est donc pas admissible.

Id. cmt. J.-E. Labbé; see also CA Paris, Mar. 16, 1949, 1949 LA SEMAINE JURIDIQUE, édition générale, II, 4960, cmt. Emile Becqué (Fr.). This case concerned a father's donation of a house to his natural son, which was absolutely null because it was a donation disguised as a contract of sale of immovable property and, furthermore, because there was an interposition of person. According to the court, there could be no just title. Moreover, because the natural son was in bad faith, he could only acquire ownership of the house by a prescription of 30 years. But the court refused to accept that the 30 years had been accomplished, considering that the father's legitimate son (and also forced heir) could not contest the possession of the illegitimate son until the succession was opened. Indeed, until this moment, the legitimate son had no right of ownership in the house. He could assert no act of possession—he was absolutely impeded to act:

Considérant, au regard de la prescription trentenaire, qu'elle ne saurait être opposée à celui qui se trouve dans l'impossibilité de faire valoir ses droits d'une manière quelconque;- Qu'il en est ainsi vis-à-vis de l'héritier réservataire pour lequel la prescription ne peut courir que du jour de l'ouverture de la succession de son auteur, puisque jusqu'à cette date, il se trouvait sans qualité pour accomplir des actes même seulement conservatoires et que ce n'est que depuis ce jour qu'il a pu faire valoir ses droits;- Considérant par suite qu'à l'égard de l'intimé, héritier réservataire de son père, la prescription n'a commencé à courir qu'à la date du décès de ce dernier . . .

This case applies *contra non valentem* in principle but without name. For a more recent case in which the petitioner invoked *contra non valentem* by name, see Cass. 3e civ., Feb. 13, 1979, Bull. civ. III, No. 37 (Fr.), which stated that a

The second category is reserved for impediments that prevent the owner to act in order to stop an adverse possession (generally, cases of *force majeure*: war, invasion, flood, etc.).¹⁵⁷ These applications are quite rare, where the impediment presents itself at the end of a delay period. For example, if one waits to protect his real rights against an adverse possessor until the last day before the expiration of a 30-year delay period, but is prevented from doing so because of *force majeure*, *contra non valentem* should permit him to bring the action after the cessation of the impediment. Although one may be disinclined to allow the invocation of *contra non valentem* if the owner of the land knew about the adverse possessor, but failed to exercise his right against him until the last minute, one must consider that the harsh consequences of prescription do not vest until the very end of the delay and not a minute sooner.

The third category is even rarer. It concerns the absolute ignorance of the right of ownership: the acquisitive effect of adverse possession is suspended because the owner did not know of a condition necessary to preserve his right of ownership against an adverse possessor. This situation has to be carefully distinguished from the situation where the owner is ignorant of an adverse possession because the possession is not visible (clandestine). In those cases, the possession has no effect and, consequently, acquisitive prescription does not begin to run.¹⁵⁸

foreclosure proceeding is an absolute impediment suspending the acquisitive prescription as long as the foreclosure is pending. However, a proceeding is not *per se* an absolute impediment; it depends on its effects. Cass. 1e civ., Jan. 20, 1880, D. 1880, I, 65, 67 (Fr.) (impossibility to act not recognized *in casu*, because its nature did not impede the owners to protect their rights).

157. Cass. 1e civ., Feb. 18, 1835, S. 1835, I, 72 (Fr.) (deciding that the French state cannot prescribe against an *émigré* whose property was sequestered by virtue of a statute enacted during the French revolution); James B. Thayer et al., *The Effect of a State of War upon Statutes of Limitation or Prescription*, 17 TUL. L. REV. 416, 420–22 (1943).

158. It is a well-established rule in France and in Louisiana that the commencement of prescription requires a possession that is so adverse to the rights of the true owner that he is put on actual or constructive notice of the fact that a non-owner is asserting a claim to his right of ownership. Otherwise, the possession is vitiated because it is clandestine. See, e.g., *Delacroix Corp. v. Perez*, 794 So. 2d 862, 868–69 & n.1 (La. Ct. App. 4th 2000); Cass. 1e civ., July 7, 1965, Bull. civ. I, No. 459 (Fr.); TERRÉ & SIMLER, *supra* note 52, No. 166; Mervin H. Riseman, Comment, *Elementary Considerations in the Commencement of Prescription on Immovable Property*, 12 TUL. L. REV. 608, 611 & n.14 (1938). But sometimes the jurisprudence is not free from conceptual confusion. See Cass. 3e civ., Mar. 27, 2002, No. 00-16643 (Fr.); *infra* note 164.

We can note one case in this category discussing this application of *contra non valentem* but declining to apply it *in casu*.¹⁵⁹ In this case, the inhabitants of the town of Moirans failed to take cognizance of the terms of a seigneurial charter (*charte seigneuriale*) granted in 1313—a type of servitude in which the town inhabitants were permitted to take wood from a forest that was owned by the town.¹⁶⁰ More than 500 years later, the town argued that the servitude expired and that it had acquired a modified servitude by acquisitive prescription.¹⁶¹ The basis of the town's argument was that the inhabitants had to pay a tax for the wood (a tax that was not mentioned in the charter) and that the quantity of the wood taken by the inhabitants was different from what was originally written in the charter.¹⁶² The inhabitants urged that the town could not modify the servitude through acquisitive prescription because the inhabitants were *non valens agere*, based on the language of the original town charter (which was written in Latin).¹⁶³ The Court of Appeal of Besançon declined to apply *contra non valentem* because the seigneurial charter had been translated into French and was in the hands of one of the defendants, so that ignorance could not be reasonable.¹⁶⁴ The Court further explained that if it were to recognize ignorance at all with regard to acquisitive prescription, the ignorance would have to be

159. CA Besançon, May 20, 1891, D. 1894, I, 181 (Fr.)

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

164. The Cour d'appel of Besançon expressed the "discovery rule" à la française in a very elegant and cautious manner:

Attendu que, dès que la jurisprudence a admis, par interprétation de l'article 2251, que la prescription ne court point contre celui qui est dans l'impossibilité d'agir par suite d'un empêchement quelconque résultant de la loi, de la convention ou de la force majeure (Civ. req. 28 juil. 1870, 1870 Dalloz Périodique, 1, 309), il est bien difficile de ne pas reconnaître par voie de conséquence, que l'ignorance absolue de son droit, assimilable à la force majeure, pourra, dans certaines hypothèses, être classée parmi les impossibilités d'agir suspensives de la prescription; mais qu'il faudra cependant avoir soin de distinguer entre le cas le plus fréquent où l'ignorance sera le résultat de la négligence, de l'incurie, d'une faute, en un mot, à laquelle la loi ne peut attacher aucune faveur, et le cas plus rare ou un obstacle invincible ou bien des circonstances tout à fait exceptionnelles auront empêché l'intéressé, malgré ses diligences, de connaître le titre d'où dérive son droit

Id. A fortiori, there can be no ignorance equivalent to *force majeure* when the owner lives on the land and can also easily see the acts of adverse possession. Cass. 3e civ., Mar. 27, 2002, No. 00-16643 (Fr.).

absolute, likened to *force majeure*, and that such a case would be very rare.¹⁶⁵

We express doubt that such a case would ever arise and fear the consequences of permitting ignorance in the context of *acquisitive prescription* at all, even under a rigid standard.¹⁶⁶ After all, acquisitive prescription requires inaction that is usually the result of ignorance. If courts were to permit ignorance to suspend the running of acquisitive prescription, it may open Pandora's box and shake the foundation of acquisitive prescription—to maintain certainty and stability in property rights.

B. The Louisiana Jurisprudence

Does *contra non valentem* apply to acquisitive prescription in Louisiana as well? The question may sound strange to Louisiana ears. Historically the maxim developed alongside acquisitive prescription, both at Roman law and in French law.¹⁶⁷ Thus, one would expect the same solution in Louisiana law.

In *Broh v. Jenkins*, the famous jurist Edward Livingston convincingly argued before the Louisiana Supreme Court in favor of the application of the maxim in order to suspend the acquisitive prescription of a slave sold by a non-owner in South Carolina, where there could be no adverse possession because the vendee possessed the slave outside of the jurisdiction of Louisiana. To support his argument, Livingston cited French doctrine (Pothier).¹⁶⁸

165. *Id.*

166. It would seem that the 2008 French revision of prescription was not so cautious in this regard. See C. CIV. art. 2227 (Fr.) ("Real property rights are imprescriptible. Subject to this, real property rights prescribe thirty years from the date on which the holder of a right knew or should have known of the facts to enable it to exercise it.").

167. L. Solidoro Maruotti, *La perdita dell'azione civile per decorso del tempo nel diritto romano. Profili generali*, 2010(3) *TEORIA E STORIA DEL DIRITTO PRIVATO* 170–71 (It.).

168. *Broh v. Jenkins*, 9 Mart. (o.s.) 526 (La. 1821). Edward Livingston argued:

[N]o suit could be brought, until the slave or the holder came within the jurisdiction of our courts; and, therefore, it would seem both unjust and against the spirit of the law, to give effect to a prescription which the true proprietor could not have avoided, by bringing his action. Poth. Ob. n. 678, gives us the reasons on which the prescription (of action) is founded, which he says, are two; 1. Presumption of payment; 2. As a penalty for negligence, in not prosecuting a right. The first of those reasons cannot apply in the case of a prescription, founded on possession; it must then be for the second reason, and for the obvious one, of the interest which every community has of protecting long

But Louisiana courts have expressed hostility to the application of *contra non valentem* to acquisitive prescription. The same scenario (the adverse possession of a slave) was at issue in *Reynolds v. Batson*,¹⁶⁹ one of the leading cases of prescription law. Here, the Louisiana Supreme Court excluded the application of the venerable maxim from acquisitive prescription.¹⁷⁰

Chief Justice Merrick gives two grounds for the exclusion of the maxim. First, "[t]he suspension of prescription in order to allow for the *utile tempus* has generally been held by the civilians to occur only in the short prescriptions. The long prescriptions, and those by which property was acquired, . . . were reckoned continuously."¹⁷¹ Second, Chief Justice Merrick does not

think there can be found any case in our Reports, where the maxim "*contra non valentem agere non currit prescriptio* [sic]," has yet been applied to relieve the plaintiff in a case where the plea of prescription was set up by the defendants *acquirendi causa*. It has been applied to prescriptions *liberandi causa* in three classes of cases . . .¹⁷²

Let us further explore these two grounds. First, a contemporary Louisiana lawyer may be surprised that a Chief Justice supported his opinion with a quotation of a German jurisconsult writing on modern Roman law, Friedrich Karl von Savigny (1779-1861).¹⁷³ The reference to Savigny as authority may be explained by the

possessions, that the prescription of this kind, here pleaded, was established. But the negligence, for which the party is to be punished, must surely be one which respects our own laws; so heavy a penalty would never be imposed to make our citizens vigilant with respect to the laws of other countries; but there can be no negligence imputed to a man, who has no opportunity of applying to the laws of his own country, and thus Pothier teaches us expressly, n. 679. Il résulte de ce qui vient d'être dit, que le temps de la prescription ne peut commencer à courir que du jour que le créancier a pu intenter sa demande; car on ne peut pas dire qu'il a tardé à l'intenter tant qu'il ne pouvoit pas l'intenter; de là, cette maxime générale sur cette matière: *contra non valentem agere, nulla currit prescriptio*.

Id. Other Louisiana jurists of the time argued for the application of *contra non valentem* in the realm of acquisitive prescription. See *Davis v. Prevost*, 12 Mart. (o.s.) 445, 466-74 (La. 1822) (appellate argument of Bullard).

169. 11 La. Ann. 729 (1856).

170. *Id.*

171. *Id.*

172. *Id.*

173. For biographical notes on Savigny, see J.E.G. de Montmorency, *The Great Jurists of the World*, 11 J. SOC'Y COMP. LEGIS. (n.s.) 32 (1910); Friedrich Engel-Janosi, *The Intellectual Background of Savigny*, 5 SEMINAR 39 (1947).

enormous prestige of this author¹⁷⁴ and the influence of Roman law in the first decades of Louisiana law.¹⁷⁵ But the book to which Chief Justice Merrick referred, *Das Recht der Besitz* (1803), in which Savigny expounds his theory on possession, was harshly criticized by juriconsults of the time.¹⁷⁶ We see Chief Justice Merrick's reliance on Savigny's comments (that the suspension of prescription generally only applies to short prescriptions) as misguided for practical reasons. Of course there are fewer instances in which courts suspend longer delays as the need for suspension is necessarily diminished over time. Infrequency is no reason to deny the maxim.

Chief Justice Merrick's second ground is even less convincing. The fact that no Louisiana court ever had the opportunity to apply the maxim in the field of acquisitive prescription does not permit us to deduce its inapplicability as a matter of law.¹⁷⁷ Silence is not

174. See, e.g., Michael H. Hoeflich, *Savigny and His Anglo-American Disciples*, 37 AM. J. COMP. L. 17 (1989); Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535 (2000). For an overview of the positions of Savigny compared to those of O.W. Holmes, Jr., see Posner, *supra*, at 535–51.

175. See Shael Herman, *The Contribution of Roman Law to the Jurisprudence of Antebellum Louisiana*, 56 LA. L. REV. 257 (1995). Nevertheless, one would have expected the quotation of a French or Spanish source.

176. Chief Justice Merrick probably read the review of the French translation of this renowned treatise, written by Gustavus Schmidt some years before. See Gustavus Schmidt, *Traité de la possession, d'après les principes du droit romain, par Mr. Fr. Ch. De Savigny, Conseiller intime de justice, Professeur ordinaire à la Faculté de Droit de l'Université, et membre de l'Académie des Sciences de Berlin* [*A Treatise of Possession According to the Roman Law, by F.C. Savigny, Counsellor of State, Professor of Law at the University of Berlin*], LA. L.J., May 1841, at 47. In the conclusion of his criticisms, Schmidt states that "his work is of little practical value in the United States." *Id.* at 64. Another review, written originally in French by Leopold August Warnkönig, a colleague and friend of Savigny, was published three years before. See Leopold August Warnkönig, *Analysis of Savigny's Treatise on the Law of Possession*, 19 AM. JURIST & L. MAG. 13 (1838). Of course, the subjective concept of possession sustained by Savigny was and still is shared by French civilians. See PIERRE ORTSCHIEDT, *LA POSSESSION EN DROIT CIVIL FRANÇAIS ET ALLEMAND* 19–21 (1977) (Fr.). But the author shows in his subsequent developments that the classical opposition between the subjective conception of the French *Code civil* and the objective conception of the German BGB has to be seriously nuanced.

177. Louisiana courts are not subject to the common law rule of *stare decisis*. See Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 LA. L. REV. 775, 792 (2005); Jason Edwin Dunahoe, Note, "Jurisprudence Desorientée": *The Louisiana Supreme Court's Theory of Jurisprudential Valuation*, *Doerr v. Mobil Oil and Louisiana Electorate of Gays and Lesbians v. State*, 64 LA. L. REV. 679 (2004). For an older contrary opinion,

dictum, much less law. We regret that Chief Justice Merrick discounted out of hand the application of *contra non valentem* to acquisitive prescription and find his reasoning unpersuasive.

Nevertheless, would the few jurists who faced this question follow Chief Justice Merrick's "precedent"?¹⁷⁸ They would not, as some recent cases expressly recognize the applicability of *contra non valentem* to acquisitive prescription.

One can count only a few Louisiana state court decisions addressing *contra non valentem* in the realm of acquisitive prescription. In at least two such cases, the courts did not reject the application of *contra non valentem* as a matter of principle, but determined it as inapplicable *in casu* because of the factual situation presented.¹⁷⁹ But when one considers cases in which Louisiana courts qualified actions as personal that were indeed real,¹⁸⁰ and applied liberative prescription instead of acquisitive prescription, one discovers even more instances in which Louisiana courts applied *contra non valentem* to acquisitive prescription.¹⁸¹

For example, *McGuire v. Monroe Scrap Material Co.*¹⁸² is a wrongful misappropriation of movables case in which the plaintiff invoked *contra non valentem* because he did not know the identity of the thief.¹⁸³ Although the action was technically in tort, the case implicates acquisitive prescription.¹⁸⁴ The plaintiff was able to recover his property by suing the defendant.¹⁸⁵ The court accepted the plaintiff's plea of *contra non valentem*, but had the court

see C. Girard Davidson, Comment, *Stare Decisis in Louisiana*, 7 TUL. L. REV. 100, 116 (1932).

178. Favrot, *supra* note 107, at 246.

179. See, e.g., *Jordan v. Richards*, 38 So. 206, 207-08 (La. 1905); *Adger v. Oliver*, 66 So. 2d 625, 628 (La. Ct. App. 2d 1953) ("We are further impressed with the considered conclusion that the maxim above quoted, which is strongly relied upon by counsel, is without any application whatsoever under the facts of the instant case.").

180. See *Songbyrd, Inc. v. Bearsville Records, Inc.*, 104 F.3d 773, 778 (5th Cir. 1997) ("[A] number of older Louisiana decisions . . . applied either one-year or ten-year periods of *liberative* prescription on the erroneous assumption that the revindictory action is personal in nature, either delictual or quasi-contractual." (footnote omitted)).

181. See Jarrell E. Godfrey, Jr., Note, *Civil Law Property—Prescription—Prescriptive Period Applicable to Actions Based on Article 667*, 26 LA. L. REV. 409, 412 (1965) ("The Louisiana courts have recognized that actions which appear to be delictual in nature may not be.").

182. 180 So. 413 (La. 1938).

183. *Id.*

184. *Id.* at 415-16.

185. *Id.* at 416.

declined to do so, the defendants would have necessarily acquired ownership of the property through the passage of time.¹⁸⁶

The best exploration of the application of the maxim to acquisitive prescription can be seen in two federal cases interpreting Louisiana law that validate the application of *contra non valentem* to the acquisitive prescription of both immovables¹⁸⁷ and movables.¹⁸⁸ In the first case, *Cross v. Lucius*,¹⁸⁹ the plaintiffs brought a § 1983 civil rights action against landowners for wrongful deprivation of land.¹⁹⁰ The plaintiffs, whose black ancestors once occupied the land, alleged that the defendants' ancestor forged several deeds naming himself as vendee in the sale of the disputed land from the plaintiffs' ancestors.¹⁹¹ The defendants had occupied the land for nearly 50 years before the plaintiffs brought any sort of legal action.¹⁹²

The nature of the plaintiffs' claim was in tort, but the remedy they sought involved the recovery of real rights.¹⁹³ The Fifth Circuit noted that the proper mechanism (although not pleaded) to recover the land would have been a petitory action for the recognition of ownership of the property under Civil Code article 3651.¹⁹⁴ Nevertheless, the court's analysis of the plaintiff's argument is illuminating.

The plaintiffs invoked *contra non valentem*, arguing: "the ancient rule that 'statutes of limitation do not run against those incapable of acting' should apply, thereby tolling the running of the statutes."¹⁹⁵ The court summarized:

The gist of this argument is that blacks in northern Louisiana have been incapable of bringing suits against whites for the past fifty years because racial prejudice, allegedly built into northern Louisiana society, prevented them from obtaining financial backing and legal representation.¹⁹⁶

186. See also *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767 (La. Ct. App. 1st 1958) (applying *contra non valentem* and the reasoning of *McGuire*).

187. *Cross v. Lucius*, 713 F.2d 153 (5th Cir. 1983).

188. *Keim v. La. Historical Ass'n Confederate War Museum*, 48 F.3d 362 (8th Cir. 1995).

189. 713 F.2d 153.

190. *Id.* at 155.

191. *Id.*

192. *Id.*

193. *Id.*

194. *Id.* at 155–56.

195. *Id.* at 157.

196. *Id.*

The Fifth Circuit disagreed with the plaintiffs' application of *contra non valentem* in this instance because the plaintiffs failed to prove the existence of a legal barrier:

Here . . . there is no allegation that the . . . defendants, or even their ancestor, prevented the plaintiffs from pursuing their claim or kept them in ignorance of their cause of action, nor was there any legal barrier to the plaintiffs' bringing this action. It would seem that the plaintiffs did not even try to contact an attorney until they obtained their present counsel. We conclude that the Louisiana courts would not apply the *contra non valentem* doctrine to the plaintiffs' case. . . . Even if the plaintiffs' allegations that they could not have obtained legal representation during the earlier part of this century because no lawyer would represent a black person in a suit against a white person are true, the plaintiffs conceded at oral argument that this situation had improved by the 1960s, perhaps as a result of the upsurge in civil rights litigation during that period. The plaintiffs still delayed twenty years from that time until they brought this action.¹⁹⁷

Here, assuming that the original sale was indeed fraudulent, the ultimate result is that the vendees would have acquired their right in the land through acquisitive prescription. By declining to accept the plaintiffs' plea of *contra non valentem*, ownership by the vendee's successor in title is undisturbed. Had the plaintiffs been able to prove a true barrier to bringing the cause of action, the usefulness of the maxim in the arena of acquisitive prescription becomes clearer.

In the second case, *Keim v. Louisiana Historical Ass'n Confederate War Museum*,¹⁹⁸ the Eighth Circuit Court of Appeals had the rare opportunity to apply Louisiana law, including acquisitive prescription and *contra non valentem*. The plaintiff, the purchaser of a civil war flag from an artifacts collector, sued a museum to declare his ownership in the flag.¹⁹⁹ The museum also sued to declare its ownership in the flag, alleging that it had been stolen some years earlier.²⁰⁰ The Eighth Circuit affirmed the district court's conclusion that the plaintiff acquired ownership of the flag by virtue of Louisiana's acquisitive prescription statute,

197. *Id.* at 158; see also *Cent. Pines Land Co. v. United States*, 274 F.3d 881 (5th Cir. 2001) (concerning a mineral servitude).

198. 48 F.3d 362 (8th Cir. 1995).

199. *Id.* at 363.

200. *Id.* at 364.

Civil Code article 3491, having found that the plaintiff and the seller of the flag had “been in uninterrupted possession of the flag for at least sixteen years, well beyond the ten-year requirement of the acquisitive prescription statute.”²⁰¹ The court went on to decline any possible application of *contra non valentem*, not because it was inapplicable as a matter of law, but because the museum knew the flag was lost.²⁰² The court explained its understanding that the maxim applies “where the plaintiff is unaware of his injuries or their cause because of some deception on the part of the defendant.”²⁰³ Although the Eight Circuit’s recitation of the maxim is partially correct, one wonders whether the court would have been inclined to accept the museum’s invocation of *contra non valentem* if it did not know that the flag was lost.²⁰⁴

Although the occasions for applying *contra non valentem* to acquisitive prescription are infrequent, the limitation of the scope of the maxim to liberative prescription is a juridical myth. French and Louisiana courts have built a strong body of jurisprudence over time supporting *contra non valentem*, but they were always aware of significance of their power to shape a law that is contrary to the Code. The hesitancy of the courts to apply *contra non valentem* in the realm of acquisitive prescription is understandable, but there is no reason to deprive the court from using the maxim in the appropriate case.

201. *Id.* at 365.

202. *Id.* (citing *Henson v. St. Paul Fire & Marine Ins. Co.*, 354 So. 2d 612, 615 (La. Ct. App. 1st 1977) (prescription period begins to run when sufficient facts were known to the owner to enable him to commence an action to recover the property), *aff’d*, 363 So. 2d 711 (La. 1978); *Aegis Ins. Co. v. Delta Fire & Cas. Co.*, 99 So. 2d 767, 786 (La. Ct. App. 1st 1958) (prescription is suspended from the date the movable is stolen until the plaintiff has sufficient knowledge of the cause of action upon which to act)). The court explained:

Nor does the Museum qualify under the doctrine of *contra non valentem agere nulla currit prescriptio* [sic]. (“No prescription runs against a person unable to bring an action.”) Under this doctrine, the prescription period may be tolled where the plaintiff is unaware of his injuries or their cause because of some deception on the part of the defendant. Here, however, the Museum had sufficient notice of the flag’s whereabouts [that it was no longer in the museum] and, therefore, its potential cause of action, more than ten years prior to the filing of this action, but instead chose not to pursue its claim.

Id. (citation omitted).

203. *Id.*

204. Again, this case raises the question of what might qualify as “absolute ignorance,” as expressed by French courts. *See supra* note 164.

V. CONCLUSION

Contra non valentem developed in Louisiana from the French tradition. After its voyage to Louisiana, the maxim continued to experience a remarkably similar destiny in both France and Louisiana for 200 years. In both jurisdictions, legislatures constrained it, courts either applied or denied it, and commentators cautiously embraced it. Now that the French legislature has codified it, it seems timely that Louisiana should do the same so that courts are not made to apply an equitable principle that is “contrary to law” and supported at best by the jurisprudence and a faint comment to a Code article.²⁰⁵ The nature of prescription is rigid, but for that reason, a strong body of jurisprudence supports the need for *contra non valentem*. Both prescriptions, *liberandi causa* and *acquirendi causa*, vest rights with one party and take away from another in a simultaneous and harsh exchange to support the public interests of certainty and stability. And for those who are unable to act at the precise moment of this exchange, the venerable maxim offers equitable relief for those who are *non valens agere*.

205. Of course, there are already vestiges of *contra non valentem* sprinkled throughout Louisiana law where it provides some mechanism for the suspension of prescription for one who is unable to act. *See, e.g.*, LA. CIV. CODE art. 755 (2010) (“If the owner of the dominant estate is prevented from using the servitude by an obstacle that he can neither prevent nor remove, the prescription of nonuse is suspended on that account for a period of up to ten years.”); *cf.* LA. REV. STAT. ANN. § 31:59 (2000) (“If the owner of a mineral servitude is prevented from using it by an obstacle that he can neither prevent nor remove, the prescription of nonuse does not run as long as the obstacle remains.”).