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SOME ASPECTS OF COLLATION

The Louisiana Civil Code provides that the patrimony of a person is divided into two parts: one reserved to forced heirs and the other which may be gratuitously donated either *inter vivos* or *mortis causa*.¹ The Code further provides that among forced heirs equality of inheritance is presumed unless their ancestor expresses an unequivocal intent to favor one or more of them with all or part of the disposable portion.² Collation, or the return to the mass of an ancestor's succession which a forced heir makes of gratuities which were not intended as advantages from the disposable portion,³ is the means by which this presumed equality is enforced.⁴

Collation had its inception in Roman law⁵ and was a part of the law of ancient France.⁶ Most of the collation provisions of our Civil Code were derived from the Code Napoleon.⁷ Despite this long history, some aspects of our law of collation remain in an unsatisfactory state. Among these are the collation of donations *mortis causa*, the time for collation, prescription of the right to demand collation and the obligation of children to collate debts owed by a predeceased parent to a grandparent.

Collation of Donations Mortis Causa

Although the Civil Code requires the collation of both *inter vivos* and *mortis causa* donations,⁸ since the 1929 case of *Jordan v. Filmore*⁹

1. LA. CIV. CODE arts. 1493-1501. *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations*, 27 LA. L. REV. 442, 448 (1967).

2. LA. CIV. CODE arts. 1229-33, 1501.

3. *Id.* arts. 1227, 1231.

4. *See, e.g.*, Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965); Succession of Gomez, 223 La. 859, 67 So. 2d 156 (1953); *Jung v. Stewart*, 190 La. 91, 181 So. 867 (1938); *Champagne v. Champagne*, 125 La. 408, 51 So. 440 (1910). "The fundamental basis of the doctrine of collation is simply the presumption of law, that an ancestor intends absolute equality among his descendants in the final distribution of his property" CROSS, LOUISIANA SUCCESSIONS 506 (Fenner ed. 1891).

5. 2 DOMAT'S CIVIL LAW, nos. 2944, 2945, at 244-45 (Strahan's transl., Cushing's ed. 1853); LEAGUE, ROMAN PRIVATE LAW 293-94 (3d ed. Pritchard 1961); MACKELDLY, HANDBOOK OF ROMAN LAW § 751, at 564 (Dropsie's transl. and ed. from the 14th German ed. 1883).

6. BRISSAUD, A HISTORY OF FRENCH PRIVATE LAW § 483, at 675 (Howell transl. 1912).

7. Succession of Gomez, 223 La. 859, 67 So. 2d 156 (1953). *See* LA. CIV. CODE arts. 1227-88 (Comp. ed., 16 West L.S.A.-Civ. Code 1972).

8. *See The Work of the Louisiana Appellate Courts for the 1968-1969 Term—Successions and Donations*, 30 LA. L. REV. 197, 212 (1969); Comment, 26 TUL. L. REV. 203 (1952). *See also* LA. CIV. CODE arts. 1228-33, 1238, 1239, 1501.

9. 167 La. 725, 120 So. 275 (1929).

the jurisprudence has indicated that the obligation to collate does not apply to legacies. *Jordan* arose when a decedent left a will in which one of two forced heirs was named as universal legatee. When the excluded heir sued to annul a donation by the decedent to a third person, the universal legatee intervened and claimed the entire estate under the will. The lower court annulled the donation and declared the decedent's will to be valid, but reduced the intervenor's legacy to one-half of the decedent's succession on the theory that since the *de cuius* had not declared an intent to bestow an advantage on either of her heirs, the universal legatee could take only half the succession—either as heir or as legatee.¹⁰ On appeal to the Louisiana supreme court, the only issue was whether the universal legatee was entitled to one-half or three-fourths of the succession, the latter being composed of the legitime of one-fourth plus the entire one-half disposable portion in the event that collation was not required. Chief Justice O'Niell, speaking for the majority, asserted that the right to demand collation arises only from donations *inter vivos* and not from legacies¹¹ since "it would be absurd to say that what is given by last will and testament, by an ancestor to his offspring, is presumed to be given *in advance of what the legatee might one day expect from his ancestor's succession.*"¹² However, the basis of the court's award of three-fourths of the succession to the universal legatee was apparently the decedent's intent since the Chief Justice added:

there is no indication . . . that a testator who bequeathes more of the disposable portion of his estate to one of his descendant heirs than to another must state, any more plainly than his favoritism itself expresses, his intention that the legacy bequeathed to the favored heir is intended as an advantage, or as an extra portion—in order to avoid the obligation of collation, strictly so called.¹³

10. In other words, the universal legatee could escape the obligation of collating only by renouncing the succession, but in that case, she could still take only the one-half disposable portion. See LA. CIV. CODE art. 1237.

11. *But cf.* Succession of Ledbetter, 147 La. 771, 780, 85 So. 908, 911 (1920) (Chief Justice O'Niell said that a bequest to a forced heir could not be an extra portion "because the testator did not declare that the bequest was intended to be over and above the legitimate portion.")

12. *Jordan v. Filmore*, 167 La. 725, 732-33, 120 So. 275, 277 (1929). For the source of this contention, see Civil Code article 1227 which defines collation as the "supposed or real return to the mass of the succession which an heir makes of property which he received in advance of his share or otherwise," and article 1229 which provides that the obligation to collate is founded "on the presumption that what was given or bequeathed to children by their ascendants was so disposed of in advance of what they might one day expect from their succession." See also note 16 *infra*.

13. 167 La. 725, 735, 120 So. 275, 278 (1929).

Thus, the assertion that donations *mortis causa* need never be collated was clearly dicta;¹⁴ nevertheless it has frequently been repeated in subsequent cases.¹⁵

Several Civil Code articles indicate that a forced heir who claims a share of his ancestor's succession must collate all donations *inter vivos* and *mortis causa* which were not declared by the donor to be an extra portion.¹⁶ However, the declaration that the gift or legacy is intended as an extra portion need not be made in sacramental terms so long as it is indicated "in an unequivocal manner" that such was

14. Justice Thompson dissented on the ground that the majority was usurping a function of the legislature. Also dissenting, but without written reasons, were Justices Land and Brunot. *Id.* at 746, 120 So. at 282. Although these dissents have gone largely unnoticed, in *Succession of Levy*, 172 La. 602, 134 So. 906 (1931), Justice Brunot referred to his dissent in *Jordan* and opined that both donations *inter vivos* and *mortis causa* should be collated.

15. See cases cited in notes 23-25 *infra*.

16. See note 8 *supra*. In *Jordan*, Chief Justice O'Niell made a contrary argument on the basis of articles 1227, 1228 and 1229. With reference to articles 1227 and 1229, he declared that "[i]t would be absurd to say that what is given by last will . . . is presumed to be given in advance . . ." *Jordan v. Filmore*, 167 La. 725, 732, 120 So. 275, 277 (1929). See also note 12 and the accompanying text *supra*. Recently, a writer commenting on this opinion stated that he failed to see any absurdity, despite his concession that collation may not be the proper term to use when dealing with legacies. See *The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Successions and Donations*, 34 LA. L. REV. 219, 220 (1974). See also 10 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 627 (La. St. L. Inst. transl. 1971).

Actually, reliance upon the *principle* of collation to justify the collation of legacies seems unnecessary. Article 1227 states that collation is the "supposed or real return" which an heir makes. Although the word "supposed" may refer especially to collation by "taking less" under article 1253, it can also be construed as referring to the *supposed* return of testamentary bequests which actually remain a part of the mass to be divided. Furthermore, the phrase "which he received in advance of his share or otherwise" seems to require collation not only of donations *inter vivos* which are received "in advance," but also of donations *mortis causa* which are received "otherwise" than in advance. Corroborating this conclusion is a statement by the supreme court that "the word 'otherwise,' as used in Civ. Code, art. 1227 . . . must, as we take it, be construed with reference to the provisions contained in other articles, such as article 1230, which provides that: ' . . . collation is always presumed, where it has not been expressly forbidden.' In other words, it is intended (by the word 'otherwise' as used in the article quoted) to include anything and everything that may have been received, taken, or in any manner acquired by the heir from the parent himself, save where the latter has indicated unequivocally that it was intended as an advantage." *Sibley v. Pierson*, 125 La. 478, 512, 51 So. 502, 513 (1910). But see *Succession of Higgins*, 275 So. 2d 447, 450 (La. App. 4th Cir. 1973), where it was said that the phrase "or otherwise" in article 1227 "was not intended to apply to legacies (but to methods by which an advance may be accomplished during the life of the testator other than by donations *inter vivos*) since there was no reluctance on the part of the redactors of the Code to make specific use of the term 'legacy' in the succeeding articles in the collation section." However, the latter contention has previously been refuted. "This difference

the will of the donor.¹⁷ Although an unequivocal intent to bestow an extra portion may be evident in some testamentary donations to forced heirs, the non-collation of all donations *mortis causa* cannot be justified on the same basis. Thus, if the *de cuius* bequeathes all or a large portion of his property to a forced heir, it may be presumed to be an extra portion.¹⁸ The testator's intent is likewise apparent if the legacy is specifically from the disposable portion.¹⁹ In other cases, the testator's intent is not so obvious,²⁰ and there may be an express

between donations and legacies did not escape the redactors of the Code. Nevertheless, after having made and noted it in articles 843 and 845 [*Cf.* La. C.C. Arts. 1228, 1237], they did not deem it necessary to conform thereto when drafting the subsequent articles. Sacrificing exactness of terminology for brevity of language, they applied the word *collation* indifferently to the prohibition imposed on the heir-legatee from claiming the things bequeathed to him, as well as to the obligation imposed on the heir-donee to return the things given to him." 10 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 627 (La. St. L. Inst. transl. 1971).

Article 1229 refers to dispositions *made* in advance of what the heirs might one day expect from the succession; it does not speak of dispositions *received* in advance. In addition, the article expressly requires heirs to collate what has been *bequeathed*.

Article 1228 requires that donations *inter vivos* to forced heirs be collated unless they were made as an extra portion, and it strongly implies that the same rule is applicable to legacies. Prior to its amendment in 1898, article 843 of the French Civil Code read substantially the same as article 1228 of the Louisiana Civil Code. The effect of the 1898 French amendment was to provide that French law did not presume an obligation on the part of forced heirs to collate donations *mortis causa*. Since article 1228 of the Louisiana Civil Code was derived from article 843 of the French Civil Code, Chief Justice O'Niell indicated in *Jordan* that the 1898 French amendment should reflect the proper construction of its unamended Louisiana counterpart. However, the purpose of the 1898 French amendment to article 843, as well as a contemporaneous amendment to the French counterpart of Louisiana Civil Code article 1501 (French Civil Code article 919), was to change French law so as to establish a legal presumption that all legacies are intended as an extra portion unless the testator declared otherwise. Because the Louisiana Civil Code provides that all legacies are presumed *not* to be an extra portion unless the testator declares otherwise, judicial assimilation of French law into the law of Louisiana cannot be justified.

17. LA. CIV. CODE art. 1233.

18. This was the case in *Jordan v. Filmore*, 167 La. 725, 120 So. 275 (1929). *See, e.g.*, Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945); Succession of Levy, 172 La. 602, 134 So. 906 (1931); Succession of Fath, 144 La. 463, 80 So. 659 (1919); Succession of Ford, 130 La. 442, 58 So. 141 (1912).

Prior to the 1898 amendment to French Civil Code articles 843 and 919, the jurisprudence of France was to the effect that an exemption from collation was necessarily inferred in the case of universal legacies. Comment, 26 TUL. L. REV. 203, 215 (1952).

19. *See* Succession of Maltry, 161 La. 1032, 109 So. 827 (1926); Succession of Schonekas, 155 La. 401, 99 So. 345 (1924).

20. This may occur where special legacies of rather insubstantial amounts are involved. Thus, if a testament merely states that \$100 is left to a forced heir, it may be impossible to determine whether the legacy was intended as an extra portion. *Cf.* Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945).

indication that a legacy is *not* intended as an extra portion.²¹ In such cases, there is no justification for exempting advantages from collation merely because they were received by donation *mortis causa*.

Although the non-collation of donations *mortis causa* appears to be a settled jurisprudential rule since *Jordan*, the result in every case in which this rule has been cited was determined by other considerations.²² In *Winbarg v. Winbarg*,²³ the decedent's testament expressly indicated that there should be no collation. The terms of the will under attack in *Succession of Meyer*²⁴ were contradictory, possibly indicating the testator's intent to dispense with collation. In any event, that suit was based upon a claim for the reduction of an excessive donation rather than for collation. What was said about the collation of *mortis causa* donations in *Doll v. Doll*²⁵ was clearly extraneous since the issue there was whether a judgment of possession barred a demand for collation. In *Succession of Fertel*,²⁶ the testatrix had bequeathed her entire estate, less \$100 per month to her son, to her two daughters. The daughters were not required to collate their legacies, allegedly because of the prohibition against collating donations *mortis causa*, yet the son was required to collate his legacy because the court interpreted the intent of the testatrix to so require. The testatrix in *Roach v. Roach*²⁷ bequeathed all her property to certain of her eight surviving children; collation was not required because of her intent to favor the named legatees.

The most recent discussion of the collation of donations *mortis causa* occurred in *Succession of Higgins*.²⁸ There the *de cuius* had willed her entire estate, "share and share alike," to James and William English, her only children. William had predeceased the testatrix, leaving seven children who claimed their father's share *ab intestado* by representation. When the testamentary executor proposed to distribute three-quarters of the succession to their uncle, the

21. See *Winbarg v. Winbarg*, 177 La. 1071, 150 So. 21 (1933); *Succession of Higgins*, 275 So. 2d 447 (La. App. 4th Cir. 1973).

22. See cases cited in notes 23-28 *infra*. See also L. OPPENHEIM, SUCCESSIONS AND DONATIONS § 33, at 107 (1973); *The Work of the Louisiana Appellate Courts for the 1968-1969 Term— Successions and Donations*, 30 LA. L. REV. 197, 212 (1969); Note, 23 TUL. L. REV. 279, 280 (1948).

23. 177 La. 1071, 150 So. 21 (1933).

24. 198 La. 53, 3 So. 2d 273 (1941).

25. 206 La. 550, 19 So. 2d 249 (1944).

26. 208 La. 614, 23 So. 2d 234 (1945).

27. 213 La. 746, 35 So. 2d 597 (1948).

28. 275 So. 2d 447 (La. App. 4th Cir. 1973). See *The Work of the Louisiana Appellate Courts for the 1972-1973 Term— Successions and Donations*, 34 LA. L. REV. 219, 222 (1974).

children filed an opposition. The trial court maintained the opposition and ordered the executor to distribute the succession equally between James and the children of William. On appeal to the Fourth Circuit Court of Appeal, James claimed that he should be entitled to receive three-quarters of the succession by virtue of a one-half interest under his own legacy and an additional one-quarter interest from the intestate part of the succession (being one-half of the half share of his deceased brother's legacy).²⁹ The court decided that since the succession was partially testate and partially intestate,³⁰ it was subject to the laws governing dispositions *mortis causa* and legal successions. The court then found that by the terms of her testament, the decedent had expressed no intention to favor either of her sons, and it therefore concluded that James would either have to accept his legacy and renounce the legal succession, or collate his legacy and share as a forced heir in the legal succession.³¹ In either event, the court held that James could recover only one-half of his mother's succession.³² However, the author of the opinion then proceeded to contradict the court's holding by stating that he personally felt that the right to demand collation should not extend to legacies, even though he acknowledged that statements to that effect in earlier cases were dicta.

Although the holding in *Higgins* was correctly based upon the testator's intent, the dicta concerning the collation of legacies evidences a continuing problem in this area of the law. Henceforth, questions relating to the collation of donations *mortis causa* should be settled by application of the rules of the Civil Code which state that forced-heir legatees cannot claim their legacies in addition to their hereditary shares unless the legacies are *unequivocally* declared to have been made as an advantage or extra portion.³³ Otherwise, the Civil Code provisions on collation, as well as the rule that the fundamental goal in the probate of testaments is the ascertainment and

29. This contention was based on Civil Code article 1709 which provides that every legacy remaining undisposed of because the legatee has not been able to claim it shall devolve upon the legitimate heirs. *Cf.* Succession of McCarron, 247 La. 419, 172 So. 2d 63 (1965). *See generally, The Work of the Louisiana Appellate Courts for the 1965-1966 Term— Successions and Donations*, 26 LA. L. REV. 468, 472 (1966).

30. *See* LA. CIV. CODE art. 1697.

31. This is required by Civil Code article 1237. *See* note 10 and the accompanying text *supra*.

32. It should be noted that the holding in *Higgins* contradicted the dicta in *Jordan* which indicated that donations *mortis causa* are not to be collated.

33. *See* note 8 *supra*.

execution of the testator's true intent,³⁴ may be circumvented.³⁵

The Proper Time for Collation

No legislation specifically indicates the proper time for a forced heir to demand collation from a co-heir;³⁶ consequently, rules governing this matter have evolved jurisprudentially. It is settled that a demand for collation during the life of the *de cuius* is premature.³⁷ Ostensibly likewise settled is a rule barring the demand for collation after a judgment of possession in favor of the forced heirs.³⁸ Whereas the prohibition against a demand for collation prior to the death of the *de cuius* seems correct, the notion that a judgment of possession forecloses the right to demand collation appears questionable.

Those cases which indicate that a judgment of possession vitiates the right to demand collation are based on the proposition that by

34. LA. CIV. CODE art. 1712. *See, e.g.*, Succession of Eliot, 237 La. 457, 111 So. 2d 344 (1959); Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945); Succession of Maltry, 161 La. 1032, 109 So. 827 (1926).

35. Although the *results* of post-*Jordan* cases have actually been predicated on the testator's intent, a return to the candor of pre-*Jordan* cases is a necessity. *See, e.g.*, Succession of Maltry, 161 La. 1032, 109 So. 827 (1926); Succession of Schonekas, 155 La. 401, 99 So. 345 (1924); Succession of Fath, 144 La. 463, 80 So. 659 (1919); Succession of Williams, 132 La. 865, 61 So. 852 (1913); Succession of Ford, 130 La. 442, 58 So. 141 (1912). *But see* Miller v. Miller, 105 La. 257, 29 So. 802 (1901).

36. Note, 25 LA. L. REV. 983, 987 n.25 (1965).

37. *See, e.g.*, Taylor v. Brown, 223 La. 641, 66 So. 2d 578 (1953); Roach v. Roach, 213 La. 746, 35 So. 2d 597 (1948); Succession of Waterman, 183 La. 1006, 165 So. 182 (1935); Jackson v. Jackson, 175 So. 2d 360 (La. App. 2d Cir. 1965).

38. *See, e.g.*, Himel v. Connely, 221 La. 1073, 61 So. 2d 876 (1952); Succession of McGeary, 220 La. 391, 56 So. 2d 727 (1951); Doll v. Doll, 206 La. 550, 19 So. 2d 249 (1944); Mitcham v. Mitcham, 186 La. 641, 173 So. 132 (1937); Prichard v. McCranie, 160 La. 605, 107 So. 461 (1926); Milano v. Milano, 243 So. 2d 876 (La. App. 1st Cir. 1971); Succession of Delesdernier, 184 So. 2d 37 (La. App. 4th Cir. 1966); Comment, 27 TUL. L. REV. 232, 241 (1953). An exception to the general rule arises when the judgment of possession is annulled. LA. CODE CIV. P. arts. 2001-06; Succession of Trouard, 281 So. 2d 863 (La. App. 3d Cir. 1973); Succession of Delesdernier, 184 So. 2d 37 (La. App. 4th Cir. 1966); Note, 25 LA. L. REV. 983, 988 n.27 (1965); Note, 3 LA. L. REV. 460 (1941). Recently, Judge Hood, speaking for the Third Circuit Court of Appeal, gave this explanation: "We are aware of the established rule that if there are nullities in the succession proceedings and the judgment therein is attacked and set aside because of those nullities, the right to demand collation would not be precluded by the former judgment. That rule, however, does not authorize the annulment of a judgment of possession solely on the ground that some of the heirs later discovered facts which indicated that they may demand collation. Our interpretation of the above-stated rule is that if the judgment of possession is annulled on other grounds, then the right to demand collation may be asserted, since the void judgment must be regarded as never having had any effect." Succession of Trouard, 281 So. 2d 863, 866 (La. App. 3d Cir. 1973).

the judgment of possession co-heirs become co-owners, thereby extinguishing the succession, and with it, the right to demand collation.³⁹ While there is no doubt that collation can only be made to a succession, there appears to be no justification for the conclusion that a judgment of possession changes the character of ownership and results in an extinguishment of the succession.

A judgment of possession merely constitutes judicial recognition of rights which come into existence by operation of law⁴⁰ at the moment of an ancestor's death. This conclusion is supported by several articles of the Civil Code. For example, article 944 provides that the heir succeeds to rights of the deceased *from the moment of his death*; article 946 indicates that a succession is acquired by an heir *from the moment of the death of the deceased*; and article 1292 states that heirs become undivided "proprietors" *upon the death of the person from whom they inherit*.⁴¹ Furthermore, the comments of the redactors in the *Projet of the Code of 1825* expressly indicate that the Roman and Spanish law, by which the transmission of the succession did not take effect until the acceptance by the heir, was rejected in favor of a rule by which the heir's rights vest at the moment of death.⁴²

A succession is not a fictitious entity subject to extinguishment by the judgment of possession.⁴³ Although such a theory may have been valid under a provision of the *Digest of 1808*,⁴⁴ it is no longer

39. See, e.g., *Succession of McGeary*, 220 La. 391, 56 So. 2d 727 (1951); *Doll v. Doll*, 206 La. 550, 19 So. 2d 249 (1944); *Mitcham v. Mitcham*, 186 La. 641, 173 So. 132 (1937); *Prichard v. McCranie*, 160 La. 605, 107 So. 461 (1926); *Succession of Delesdernier*, 184 So. 2d 37 (La. App. 4th Cir. 1966).

40. LA. CODE CIV. P. art. 3062; LAZARUS, *CASES AND READING MATERIALS ON SUCCESSIONS AND DONATIONS* 171 (1970). See also *Johnston v. Burton*, 202 La. 152, 11 So. 2d 513 (1942); *Tulane Univ. v. Board of Assessors*, 115 La. 1025, 40 So. 445 (1905); *State v. Brown*, 32 La. Ann. 1020 (1880); *Succession of Christensen*, 248 So. 2d 45 (La. App. 1st Cir. 1971); *Culpepper v. Slater*, 131 So. 2d 76 (La. App. 2d Cir. 1961).

41. See LA. CIV. CODE arts. 940-43, 945, 947.

42. "By the Roman law and by the Spanish, the transmission of the succession did not take effect until the acceptance of the heir; the acceptance had merely a retroactive effect from the death of the deceased. The heir was also obliged to apply to the judge to be put into possession, on which subject the *Partidas* contains a whole title.

"We have thought it best to adopt the rule which vests the right of the heir from the moment of death of the deceased; which is also in accordance with the other dispositions of our Code, which dispense with the necessity of the heirs applying to the judge for an order to be put into possession, and give him the right of transmitting to his heirs, the succession acquired by him even if he dies before he has accepted it." *PROJET OF THE CIVIL CODE OF 125*, 1 La. Legal Archives 115 (1937).

43. *But cf.* cases cited in note 38 *supra*.

44. La. Digest of 1808, bk. III, tit. I, art. 74.

appropriate since that article was deleted by the redactors of the Civil Code of 1825⁴⁵ in accord with their announced intention to abandon the fictitious entity concept. Moreover, article 872 of the present Civil Code states that, in addition to signifying the transmission of rights and obligations of the deceased and the right of the heir to the possession thereof, "succession signifies also the estates [estate], rights and charges which a person leaves after his death" It therefore seems illogical to describe a succession as "extinguished" so long as its effects continue to remain in existence.

The barring of collation by a judgment of possession can have harsh practical effects. It is not unusual for forced heirs to hold a succession in common for many years after the death of either of their parents, especially if any of the heirs are unmarried and continue to live in the family home. Formerly, heirs often possessed this property without first having obtained a judgment of possession, but the present inheritance tax law makes this practice ill-advised since it prohibits such heirs from later renouncing their inheritance and subjects them to personal liability for the tax.⁴⁶ The result is that heirs usually obtain a judgment of possession soon after their ancestor's death⁴⁷ but may not make a demand for collation at that time since the succession may not be immediately partitioned. Later, when the property is partitioned, collation is unavailable because of the previous judgment of possession, which may have been obtained solely for inheritance tax purposes, and the principle of equality among forced heirs is thereby frustrated.

The scheme of the Civil Code indicates that collation is an incident of the judicial partition of a succession.⁴⁸ This view, advocated by most French commentators,⁴⁹ is supported in several Louisiana cases.⁵⁰ Although collation claims have been advanced and adju-

45. See PROJET OF THE CIVIL CODE OF 1825, 1 La. Legal Archives 123 (1939).

46. See LA. R.S. 47:2413 (1950), as amended by La. Acts 1960, No. 35 §1. It should be noted that this statute does not prevent heirs from becoming owners of the ancestor's property at the moment of his death. Succession of Scardino, 215 La. 472, 40 So. 2d 923 (1949); Succession of Blumberg, 148 La. 1030, 88 So. 297 (1921); Peterson v. Herndon, 221 So. 2d 615 (La. App. 2d Cir. 1969).

47. See LA. CODE CIV. P. art. 3461, comment (a).

48. Chapter 12—*Of the Partition of Successions*—immediately follows the chapter on collation and includes detailed provisions for effecting the rules of collation.

49. Comment, 27 TUL. L. REV. 232, 245 (1953); Note, 3 LA. L. REV. 460 (1941); see, e.g., 10 LAURENT, PRINCIPLES DE DROIT FRANCAIS n° 590, at 650 (2d ed. 1876); 9 BAUDRY-LACANTINIERE ET WAHL, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL n° 2944 (3d ed. 1905).

50. Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965) (dissenting opinions); Taylor v. Brown, 223 La. 641, 66 So. 2d 578 (1953); Succession of Schonekas, 155 La. 401, 99 So. 345 (1924); Sibley v. Pierson, 102 La. 478, 51 So. 502 (1910) (on rehearing);

cated independently of partition proceedings,⁵¹ in only one instance⁵² does a court appear to have been aware of the inconsistency of an attempt to equalize the distribution of a succession which is to remain intact. It is no statutory coincidence that the same section of the Civil Code which provides for the manner in which judicial partitions are to be accomplished also regulates the procedure for collation.⁵³ If the partition is to be made among forced heirs, and collation is necessary, the decree of partition is exhibited to the heir bound to collate who then decides whether the collation is to be made in kind or by taking less.⁵⁴ The active mass of the succession, when formed by the officer appointed to effect the partition, includes all the objects collated in kind, as well as a credit for the appraised value of all property collated by taking less.⁵⁵ When the effects of the succession are divided among the heirs, allowances are made for collation in order to equalize the share of each heir.⁵⁶ Other Civil Code articles indicate even more explicitly that collation is an incident to the partition of a succession. Article 1227 declares that the purpose of collation is "in order that such property *may be divided together* with the other effects of the succession;" article 1229 indicates that collation is founded on the equality of descendant heirs "who *divide* among them [selves]" the succession of their ascendants; and articles 1283 and 1255 respectively allow movables and immovables to be collated by *taking less*.⁵⁷

Since it clearly appears that collation is an incident to the partition of a succession, the proper time for a forced heir to demand collation must arise concurrently. It follows that a forced heir may either institute a suit for partition coupled with a demand for colla-

Lamotte v. Martin, 52 La. Ann. 864, 27 So. 291 (1899); Succession of Couder, 46 La. Ann. 265, 14 So. 907 (1894); Benoit v. Benoit's Heirs, 8 La. 228 (1835); Jackson v. Jackson, 175 So. 2d 360 (La. App. 2d Cir. 1965). See generally, Note, 25 LA. L. REV. 983, 986-87 (1965).

51. Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965); *In re Andrus*, 221 La. 996, 60 So. 2d 899 (1952); Roach v. Roach, 213 La. 746, 35 So. 2d 597 (1948); Himel v. Connelly, 195 La. 769, 197 So. 424 (1940); Naudon v. Mauvezin, 194 La. 739, 194 So. 766 (1940).

52. See Succession of Webre, 247 La. 461, 172 So. 2d 285 (1955)(dissenting opinions).

53. Book III, Title I, Chapter 12, Section 4—"How The Recorder of the Parish or The Notary is Bound to Proceed in the Judicial Partition." LA. CIV. CODE arts. 1347-81.

54. LA. CIV. CODE art. 1352.

55. *Id.* art. 1356.

56. *Id.* arts. 1359-64.

57. How can an heir take "less" unless he takes "something" by virtue of a partition of the succession? See LA. CIV. CODE art. 1253.

tion or may simply demand collation during partition proceedings instituted by a co-heir.⁵⁸ In either case, a previous judgment of possession should have no effect so long as the succession was never previously partitioned. However, if no demand for collation is raised prior to the homologation of the partition, all claims for collation should thereafter be barred.⁵⁹

Prescription of the Right to Demand Collation

Initial judicial attempts to establish a prescriptive period for the right to demand collation culminated inconclusively in *In re Andrus*.⁶⁰ There the supreme court expressly overruled an earlier case⁶¹ which had held that the prescription of five years in Civil Code article 3542 applied to collation. But since it was superfluous to the facts presented in *Andrus*, the question of whether the prescription of ten or thirty years might apply to collation was left unanswered.

The issue of a prescriptive period for the right to demand collation was ostensibly resolved in *Succession of Webre*.⁶² In that case, certain children and grandchildren of the *de cujus* sought to have annulled as simulations separate conveyances of land which had been made to other forced heirs. Alternatively, the petitioners prayed for collation of the allegedly simulated conveyances.⁶³ Since more than ten years had elapsed since their father's death, the defendant heirs raised pleas of prescription of five and ten years. The court of appeal⁶⁴

58. A limited exception to this rule may arise if the only asset of the succession is a sum due by way of collation. *Champagne v. Champagne*, 125 La. 408, 51 So. 440 (1910); *Grandchamps v. Delpauch*, 7 Rob. 429 (La. 1844); *Benoit v. Benoit's Heir*, 8 La. 228 (1835). In such cases, it seems both reasonable and equitable to allow an heir to bring a direct action for collation. Note, 3 LA. L. REV. 460 (1941).

59. See LA. CIV. CODE art. 1382; see also LA. CODE CIV. P. arts. 4608-12. If the partition is later rescinded, the right to demand collation should again become available. Note, 3 LA. L. REV. 460 (1941). See notes 77-80 and the accompanying text *infra*.

60. 221 La. 996, 60 So. 2d 899 (1952).

61. *Naudon v. Mauvezin*, 194 La. 739, 194 So. 766 (1940). In that case, the court seemed to think that collation and the reduction of an excessive donation were synonymous. In overruling *Naudon*, the court in *In re Andrus* said that "[t]he difference between the right to demand collation and the right to demand reduction of an excessive donation or legacy to the disposable portion is that collation can be demanded only from a co-heir, but does not depend upon the extent of inequality in the disposition of the ancestor's estate; whereas the right to demand a reduction of an excessive donation or legacy to the disposable portion may be demanded from any heir or legatee—whether he be an heir or a stranger—but it can be demanded only when—and to the extent that—the donation or legacy exceeds the disposable portion." *In re Andrus*, 221 La. 996, 1010-11, 60 So. 2d 899, 904 (1952); accord, *Jordan v. Filmore*, 167 La. 725, 731, 120 So. 275, 277 (1929).

62. 247 La. 461, 172 So. 2d 285 (1965).

63. See LA. CIV. CODE art. 1248.

64. *Succession of Webre*, 164 So. 2d 49 (La. App. 4th Cir. 1964).

refused to annul the conveyances but instead found them to be disguised donations, normally subject to collation. However, the court concluded that collation is a "personal action" governed by Civil Code article 3544, and it therefore upheld the exception of ten years prescription. On certiorari, the supreme court determined that the transfers to the defendants were simulated conveyances which should have been annulled by the lower court.⁶⁵ Since a reversal and remand thereby became necessary, the court need have said no more. Nevertheless, the majority proceeded to affirm the court of appeal's opinion that collation is a personal action which prescribes ten years after the death of an ancestor.⁶⁶

The ten-year prescription embodied in article 3544 can be applied to collation only if it can be classified as a "personal action." Yet, the Civil Code speaks of collation as an obligation of forced heirs,⁶⁷ enforcement of which is a right of any co-heir,⁶⁸ and the Code of Civil Procedure defines a personal action as "one brought to enforce an obligation against the obligor, personally and *independently of the property which he may own, claim, or possess.*"⁶⁹ It is therefore disputable whether the right to demand collation can be categorized as a personal action.⁷⁰ In any event, the right to demand collation should not prescribe ten years after the death of the *de cuius*, principally because of the inseparable nexus between collation and the action of partition.⁷¹ Since the right to compel the partition of a succession held in common is imprescriptible,⁷² the right to demand

65. An action to annul a sale under Civil Code article 2239 is imprescriptible. *Schalaida v. Gonzales*, 174 La. 907, 142 So. 123 (1932); *Smelley v. Ricks*, 174 La. 734, 141 So. 445 (1932); *Houghton v. Houghton*, 165 La. 1019, 116 So. 493 (1928); *Guilbeau v. Thibodaux*, 30 La. Ann. 1099 (1878).

66. Dissenting from the majority opinion insofar as it affirmed the application of a ten-year prescriptive period to collation were Justice McCaleb and Chief Justice Fournet, who both considered that part of the opinion as merely advisory and premature since the suit did not involve a partition of the decedent's succession. *Succession of Webre*, 221 La. 996, 60 So. 2d 899 (1952)(dissenting opinions). See note 58 and the accompanying text *supra*.

67. See LA. CIV. CODE arts. 1229, 1235-36, 1238, 1240.

68. *Id.* art. 1235.

69. LA. CODE CIV. P. art. 422 (Emphasis added.)

70. See generally, Note, 25 LA. L. REV. 983, 990-92 (1965). There the author expressed doubt as to the validity of classifying collation as a personal action, especially where immovable property is involved.

71. See notes 48-59 and the accompanying text *supra*.

72. LA. CIV. CODE art. 1304. However, if one heir possesses the whole or part of a succession separately and continuously for thirty years, the other heirs can be prevented from partitioning that property. LA. CIV. CODE art. 1305. This has been classified as a special type of acquisitive prescription. See, e.g., *Lee v. Jones*, 224 La. 231, 69 So. 2d 26 (1953); *Liles v. Pitts*, 145 La. 650, 82 So. 735 (1919)(dissenting opinion); *Tyler v. Lewis*, 143 La. 229, 78 So. 477 (1918).

collation should not be independently subject to prescription. Otherwise, the illogical consequence is that the right to demand a partition may be partially extinguished by prescription, insofar as it relates to collation, while simultaneously remaining in full force and effect indefinitely, insofar as it relates to the distribution of the effects of the succession.⁷³ Moreover, there are some circumstances under which collation within ten years of an ancestor's death may be impractical or impossible.⁷⁴

Even if it be conceded that ten years prescription under article 3544 should apply to collation, the practical effect seems negligible. The running of prescription should commence only when partition proceedings are instituted since prior to that time there is no effective opportunity to demand collation.⁷⁵ The fact that the prescriptive period for the action to reduce excessive donations begins upon the death of the *de cuius* does not justify a similar rule for the right to demand collation, since the reduction of an excessive donation, unlike collation, is independent of the action of partition.⁷⁶ As noted previously,⁷⁷ demands for collation made after a partition should be barred⁷⁸ unless the partition is later rescinded.⁷⁹ Since the action to rescind a partition prescribes in five years, a ten-year prescriptive period for collation would usually be irrelevant.⁸⁰

73. "Collation is an incident of the operation of partition. It cannot be separately subjected to prescription without holding that the action of partition may be partially extinguished in so far as it relates to collation, though in full force and effect in so far as it relates to the distribution of the property. This would be contradictory, for of properties to be contributed [to the mass to be divided] are the donations to the heirs that are subject to collation; therefore, during the time that the action for a partition lies, the action 'en rapport' [of collation] is unextinguished." *Sibley v. Pierson*, 125 La. 478, 518, 51 So. 502, 515 (1910)(rehearing); *accord*, *Succession of Couder*, 46 La. Ann. 265, 272, 14 So. 907, 909 (1894).

74. For example, the surviving spouse's usufruct under Civil Code article 916 cannot be impaired by the heirs who are naked owners. LA. CIV. CODE art. 600.

75. See note 58 and the accompanying text *supra*. Prescription begins to run only when a cause of action arises. See, e.g., *Dalton v. Plumbers Local*, 240 La. 246, 122 So. 2d 88 (1960); *Succession of Dancie*, 191 La. 518, 186 So. 14 (1939); *McGuire v. Monroe Scrap Mat. Co.*, 189 La. 573, 180 So. 413 (1938); *Succession of Oliver*, 184 La. 26, 165 So. 318 (1936); *Succession of Clark*, 155 So. 2d 37 (La. App. 4th Cir. 1963).

76. See LA. CIV. CODE arts. 1502-18. See also note 61 *supra*.

77. See note 59 and the accompanying text *supra*.

78. See LA. CIV. CODE art. 1382. A distinction between prescription and a bar by operation of law is that the former is based solely on the passage of time whereas the latter is dependent upon the doing of some act or the occurrence of some event other than the passage of time. Comment, 27 TUL. L. REV. 232, 241 (1953).

79. See LA. CIV. CODE art. 1397-1414.

80. *Id.* art. 1413. An exception may arise if the partition is rescinded due to error or fraud discovered more than five years after the homologation of the partition since in that case more than ten years would have elapsed from the institution of the partition proceedings.

The adverse effects of the present jurisprudential rule of prescription⁸¹ are readily apparent. Forced heirs who take no action regarding an ancestor's succession for ten years after his death may be deprived of an opportunity to obtain their rightful inheritance. Apparently the only argument in favor of the current rule is that it may promote the alienability of gifts and legacies which forced heirs have received from an ancestor.⁸² However, this is an illusory contention since a forced heir who wishes to alienate such property need not wait ten years before so doing. Both movables and immovables can be collated by taking less;⁸³ thus, a forced heir can always alienate or mortgage the property which he holds up to the value of his legitime. Moreover, any heir who desires to clarify his rights need only demand a partition of the succession.⁸⁴ Third party purchasers and mortgagees are already protected by other provisions of the law.⁸⁵

Collation of Debts

The obligation to collate is not confined to only those advantages received through simple donations *inter vivos* and *mortis causa*. Except for certain enumerated exceptions,⁸⁶ the obligation extends to *all* advantages received from the *de cuius* "though in any other manner than by donation or legacy."⁸⁷ Consequently, a child must collate unpaid debts which he had owed to his deceased parent.⁸⁸ Similarly, grandchildren who represent a predeceased parent in a grandparent's succession are required by the Civil Code to collate their own advantages as well as those of the parent whom they represent.⁸⁹ Neverthe-

81. See Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965); Cannon v. Cannon, 244 So. 2d 64 (La. App. 1st Cir. 1971); Milano v. Milano, 243 So. 2d 876 (La. App. 1st Cir. 1971); Pounds v. Yancy, 224 So. 2d 1 (La. App. 1st Cir. 1969).

82. See Note, 25 LA. L. REV. 983, 988 (1965).

83. LA. CIV. CODE arts. 1255, 1283.

84. *Id.* art. 1289.

85. *Id.* arts. 1264, 1265, 1280, 1282.

86. *Id.* arts. 1244-47, 1250.

87. *Id.* art. 1248.

88. See Rizan v. Rizan, 139 La. 364, 71 So. 581 (1916); King v. King, 107 La. 437, 31 So. 894 (1902); Succession of Skipwith, 15 La. Ann. 209 (1860); Succession of McLellan, 159 So. 2d 351 (La. App. 4th Cir. 1964); Comment, 26 TUL. L. REV. 203, 219 (1952). See also Himel v. Connelly, 195 La. 769, 197 So. 424 (1940); Succession of Bougere, 28 La. Ann. 743 (1976); Succession of Cucullu, 9 La. Ann. 96 (1854); cf. Succession of Waterman, 183 La. 1006, 165 So. 182 (1936); Destrehan v. Destrehan's Executors, 4 Mart. (N.S.) 557 (1826).

89. See LA. CIV. CODE arts. 1238, 1240. It should be noted that such grandchildren are obligated to collate only gifts made or legacies left to them by their grandfather or grandmother after the death of the parent whom they represent, for it is only at that time that they appear in the quality of forced heirs.

less, the jurisprudence⁹⁰ since the 1826 case of *Destrehan v. Destrehan's Executors*⁹¹ indicates that such grandchildren need not collate the unpaid debts due by their parents to their grandparents.

Destrehan arose out of an adjustment and partition of the succession of Jean Destrehan who was survived by several children as well as grandchildren who were the children of a predeceased son, Guy. The grandchildren, who had previously accepted their father's succession with benefit of inventory,⁹² claimed his share of their grandfather's succession by right of representation.⁹³ They were opposed by uncles and aunts who insisted that the grandchildren should first be required to collate a loan from their grandfather to their father evidenced by the latter's unpaid note for over \$58,000. Primarily because a substantial portion of the note represented interest,⁹⁴ the supreme court in its original opinion found the loan to have been an onerous contract rather than a donation. As a result, the court concluded that the *de cujus* had not intended to bestow an advantage upon his son, and on the authority of a provision in the Digest of 1808 which stated that "burthensome obligations" did not have to be collated,⁹⁵ held that the grandchildren were not required to collate their father's unpaid debt. On rehearing, the court acknowledged that in originally classifying the loan as a "burthensome obligation" not subject to collation, it had overlooked another provision of the Digest of 1808 which required an heir to collate "debts by him due."⁹⁶ But even though the court admitted that Guy would have been obligated to collate the \$58,000 debt had he survived his father, it held that his children were not so obligated, on the ground that grandchildren representing a parent in their grandparent's succession have greater

90. Succession of Meyer, 44 La. Ann. 871, 11 So. 532 (1892); Calhoun v. Crossgrove, 33 La. Ann. 1001 (1881); Succession of Morgan, 23 La. Ann. 290 (1871); *Destrehan v. Destrehan's Executors*, 4 Mart. (N.D.) 557 (1826); see Succession of Schneidau, 182 La. 613, 162 So. 197 (1935); *McKensie v. Bacon*, 40 La. Ann. 157, 4 So. 65 (1888).

91. 4 Mart.(N.S.) 557 (1826).

92. When an heir accepts under the benefit of inventory, he does not personally obligate himself to pay the debts of the *de cujus*. LA. CIV. CODE art. 1058.

93. See LA. CIV. CODE arts. 894, 895, 898. See also notes 98-100 and the accompanying text *infra*.

94. The proportion of the note which represented interest was unsettled; however, it was agreed that the interest rate was the maximum allowed by law.

95. La. Digest of 1808, bk. III, tit. I, art. 206, par. 2. This provision was deleted from the Civil Code of 1825.

96. *Id.* art. 178. This provision was superceded by article 1356(4) of the Civil Code which states that the active mass of the succession to be partitioned shall include the "sums" which the heirs may owe the succession. LA. CIV. CODE art.1356 (comp. ed. 16 West LSA-Civ. Code 1972). See note 105 *infra*.

rights than the parent whom they represent and are therefore not required to collate the parent's unpaid debts.⁹⁷

Civil Code article 894 defines representation as "a fiction"⁹⁸ of the law, the effect of which is to put the representative in the place, degree, and *rights* of the person represented."⁹⁹ The fundamental principle upon which the theory of representation is founded is that it prevents grandchildren from being excluded from their grandparent's succession merely by the premature death of their parent.¹⁰⁰ However, to insure that other forced heirs of a nearer degree are not unjustly prejudiced by representation, the Civil Code provides that the representatives shall take only the virile share of the parent whom they represent.¹⁰¹

There is no legislative justification for the heretofore unchallenged holding in *Destrehan* that children who represent a predeceased parent are possessed of greater rights than their parent. Neither article 900 nor 901, both cited in *Destrehan* in support of the court's holding requires the result reached by the court. Article 900 provides that a child may renounce the succession of his parent and still represent him. Although this article allows a child to escape the obligation of paying the debts of the parent represented, it does not allow him to avoid the obligation of collating them. Likewise, article 901¹⁰² states that a child may represent a parent who has been disin-

97. The court concluded that the loan was not a "gift" and therefore it determined that the children were not required to collate it since article 1240 of the Civil Code requires children who represent a parent to collate only what "had been given" to their parent. *But see* note 104 and the accompanying text *infra*.

98. Use of the word "fiction" has been criticized. *See generally*, 9 AUBREY ET RAU, DROIT CIVIL FRANCAIS § 597, at 391 (6th ed. 1953); 9 MARCADE, EXPLICATION DU CODE NAPOLEON n° 112, at 73-74 (5th ed. 1852); 3 PLANIOL, TRAITE ELEMENTAIRE DE DROIT CIVIL n° 1761 (11th ed. 1938).

99. (Emphasis added.)

100. 9 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 597, at 391 (6th ed. 1953). For example, if the predeceased son of a *de cuius* has surviving brothers and sisters, his own children could not participate in the succession in their own right because they would be excluded by the still living descendants in the first degree, their uncles and aunts. Representation prevents this inequity by permitting the children of the predeceased son to participate in their grandparent's succession in place of their father.

101. *See* LA. CIV. CODE art. 898.

102. Since a child can never represent a parent while the parent is alive due to Civil Code article 899, part of article 901 is superfluous at best. "The unworthy heir who is living at the opening of the succession is excluded by his unworthiness. His children cannot represent him, not because he is unworthy, but because no one can represent a living person." 9 LAURENT, PRINCIPLES DE DROIT CIVIL n° 72, at 84 (2d ed. 1876). The confusion may result from the fact that article 901 is an aberration, not contained in the Code Napoleon, which represents the minority French interpretation of Code Napoleon article 730. LAZARUS, CASES AND READING MATERIALS ON SUCCESSIONS AND DONATIONS 19 (Rev. ed. 1970); *see* 3 MARCADE, EXPLICATION DU CODE CIVIL n° 84-

herited or declared unworthy; but it does not dispense with the representative's obligation to collate the advantages received by the person represented.¹⁰³

Civil Code article 1240 literally requires grandchildren who come to a grandparent's succession by representation to collate only that which "had been *given*" to the parent represented. To restrict this article to simple donations is not only unwarranted, but it is alien to the overall scheme of the law of collation¹⁰⁴ as well as directly contradictory to the positive statement in article 1248 that *all* advantages bestowed by a parent upon his child are subject to the requirement of collation. Accordingly, article 1240 should be construed as supplementary legislation designed to insure that the broad concept outlined in article 1248 will be applied whenever a grandchild inherits by representation, so that *all* advantages received by the parent represented—including unpaid debts—will be collated.

The collation of debts is merely a corollary of the principle of equality which demands the collation of all advantages which were not intended as an extra portion.¹⁰⁵ A debt which has been gratui-

89, at 55-60 (5th ed. 1852); 13 DEMOLOMBE, COURS DU CODE NAPOLEON n° 292, at 351-54 (1879). As such, article 901 cannot easily be reconciled with Louisiana Civil Code article 973 which appears to indicate that the children of the person declared unworthy must succeed in their own right rather than by representation. This is the view of most French commentators with regard to Code Napoleon article 730. LAZARUS, CASES AND READING MATERIALS ON SUCCESSIONS AND DONATIONS 19 (Rev. ed. 1970); see 9 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 597, at 395 (6th ed. 1953); 1 BAUDRY-LACANTINERIE ET WAHL, DES SUCCESSIONS n° 289, at 228 (2d ed. 1899); 9 LAURENT, PRINCIPLES DE DROIT CIVIL n° 72, at 84 (2d ed. 1876); 3 RIPERT ET BOULANGER, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL DE PLANIOL n° 1552, at 505-06 (1951); 2 ZACHARIAE, LE DROIT CIVIL FRANCAIS § 356, at 247 (1855).

103. The majority of the French commentators, including those from whom Louisiana Civil Code article 901 was derived, agree that the representative can take no greater rights than those of the person represented. See 9 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 597, at 396 (6th ed. 1953); 13 DEMOLOMBE, COURS DU CODE NAPOLEON n° 433 (1879); 10 LAURENT, PRINCIPLES DE DROIT CIVIL FRANCAIS n° 563, at 616-17 (2d ed. 1876); 9 MARCADÉ, EXPLICATION DU CODE NAPOLEON n° 112, at 73-74 (5th ed. 1852); 3 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2224, at 83 (11th ed. 1938); 2 TOULLIER-DUVERGIER, LE DROIT CIVIL FRANCAIS n° 459, at 286 (6th ed. 1839).

104. That is, the supposed or real return to the mass of the succession of *all* property which the forced heir received from the *de cuius* in advance of his share or otherwise. LA. CIV. CODE art. 1227 (1870).

105. 3 PLANIOL, TRAITÉ ÉLÉMENTAIRE DE DROIT CIVIL n° 2301, at 113 (11th ed. 1938). See Civil Code article 1356(4) which provides that the active mass of the succession to be partitioned shall be composed of "all the sums which the heirs may owe to the succession." Although not expressly so indicated, this provision, when read in context, appears to require debts to be collated. The predecessor of article 1356(4) left no doubt about this requirement since each co-parcener was expressly required to collate "debts by him due" to the *de cuius*. La. Digest of 1808, bk. III, tit. I, art. 178.

tously remitted by the *de cuius* is plainly nothing more than a donation.¹⁰⁶ Even though a debt was not expressly remitted, there may be strong evidence that the *de cuius* never intended to demand its payment, such as where the loan was for a protracted term or required no security. In such cases, the requirement that a debt be collated raises no difficulties. However, in limited cases where an *unmatured* debt represents an arms-length transaction between a parent-creditor and a child-debtor it is unclear whether the debt should be collated immediately or merely *paid* when the obligation matures.¹⁰⁷ In any event, the presumption of equality among co-heirs which underlies the collation of gifts and legacies is compromised if an insolvent heir is allowed to receive his hereditary share without having to *account* for a debt to his parent which remains partially or totally unpaid.¹⁰⁸ A similar subversion of the principle of collation results if a grandchild who has renounced his parent's succession is allowed by representation to recover his parent's entire hereditary portion from the succession of his grandparent while simultaneously escaping the obligation of paying or collating his parent's unpaid debts.

Lastly, it should be noted that the *extinguishment of a debt* owed the *de cuius* does not relieve the forced-heir debtor or his representative from collation.¹⁰⁹ Hence, there is no merit to a contention that renunciation or acceptance of a parent's succession with benefit of inventory obviates the necessity to collate any unpaid debts which

106. See Comment, 26 TUL. L. REV.] 203, 220 (1952).

107. See generally, 3 PLANIOL, TRAITÉ ELEMENTAIRE DE DROIT CIVIL n° 2303, at 115 (11th ed. 1938). A conflict may arise if the unmatured debt to be collated exceeds the share of the heir obligated to collate, for then the heir would be obligated to *return* the debt when the succession is partitioned, possibly resulting in an impairment of the contract under which the debt is not yet due. But if the debt to be collated is less than the share of the heir obligated to collate, it can be collated by taking less, and the contract between the parties is thereby only indirectly affected. See LA. CIV. CODE art. 1285. In the only Louisiana case shedding any light on this problem, the court required remitted interest to be collated at the time of the partition and allowed the credit right to the unmatured principal to be divided among the forced heirs. *LeBlanc v. Bertant*, 16 La. Ann. 294 (1861).

108. See 9 AUBRY ET RAU, DROIT CIVIL FRANCAIS § 634(a) (6th ed. 1954) in C. LAZARUS, 4 CIVIL LAW TRANSLATIONS 408 (1971).

109. Thus, neither remission of the debt by the *de cuius*, bankruptcy, nor prescription relieves the forced-heir debtor of the obligation to collate. See *Rizan v. Rizan*, 139 La. 364, 71 So. 581 (1916); *King v. King*, 107 La. 437, 31 So. 894 (1902); *LeBlanc v. Bertant*, 16 La. Ann. 294 (1861); Comment, 26 TUL. L. REV. 203, 220 (1952) (remission of debt); *Himel v. Connelly*, 195 La. 769, 197 So. 424 (1940); Succession of Bougere, 28 La. Ann. 743 (1876); Succession of Cucullu, 9 La. Ann. 96 (1854); *contra* 3 PLANIOL, TRAITÉ ELEMENTAIRE DE DROIT CIVIL n° 2305, at 115 (11th ed. 1938) (bankruptcy); Succession of Skipwith, 15 La. Ann. 209 (1860); Succession of McClellan, 159 So. 2d 351 (La. App. 4th Cir. 1964) (prescription).

the represented parent owed the *de cuius*. Although the obligation to pay such debts may be extinguished by the renunciation or acceptance with benefit of inventory, the obligation to collate them still subsists.¹¹⁰

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110. *See generally*, 10 LAURENT, PRINCIPLES DE DROIT CIVIL FRANCAIS n° 563, 616-17 (2d ed. 1876).