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SUCCESSIONS AND DONATIONS

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COLLATION

The Louisiana Civil Code defines collation as the return that an heir makes to the mass of the succession to be partitioned, of all donations *inter vivos* or bequests that the *de cujus* may have made in his favor, for the purpose of maintaining equality among all the heirs of the deceased, the presumption being that what was given was in the nature of an advance on the hereditary portion of the donee.[1] This presumption, however, is inapplicable where the *de cujus* has expressed his intention to the contrary, so that no collation will be required where the disposer has dispensed the donation or legacy from collation by declaring that what was given was intended as an advantage or extra portion.[2] There is no difficulty in the application of these principles to donations *inter vivos*: The articles of the Civil Code make it abundantly clear that unless the donor declares that the gift is made as an extra portion, the donee is required to restore or return the gift unless he elects to renounce the succession of the donor, in which case he will be permitted to keep the gift, but only to the extent of the disposable portion.[3] But article 1227 of the Civil Code also speaks of legacies, and question has been raised as to whether a person may prefer one heir over another by simply making a donation *mortis causa* without more. In *Jordan v. Filmore*,[4] decided by a divided court, three justices dissenting, Chief Justice O'Niell,

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1. LA. CIV. CODE art. 1227. It should be noted that the Code Napoleon does not have a corresponding definition article. The definition contained in article 1227 of the Louisiana Civil Code, however, is the definition generally accepted by the French commentators and jurisprudence. *Cf.* 3 MARCADE, EXPLICATION DU CODE CIVIL No. 315, at 226 (6th ed. 1873) who defines "*rapport*" (collation) as the restoration to the mass to be partitioned that the heirs make of all liberalities made to them by the deceased the object being to maintain equality among the various successors of the *de cujus*. And see 2 TOUILLIER-DUVERGIER No. 452, at 283 (6th ed.) in which it is said: "It is thus an equitable principle, that every heir . . . coming to the succession must collate to his coheirs, that is to say, must return to, *or leave* in the mass to be partitioned, everything he has received from the deceased by donation inter vivos or mortis causa, directly or indirectly."

2. LA. CIV. CODE arts. 1228, 1231, 1501.

3. An heir who renounces the succession of the donor in order to retain the gift made to him becomes a stranger to the succession (*See* LA. CIV. CODE arts. 946, 1014, 1022) and must therefore suffer a reduction of the disposition in his favor by what is necessary to make up the legitime of the other heirs. LA. CIV. CODE art. 1237. Grandchamps v. Delpeuch, 7 Rob. 429 (La. 1844).

4. 167 La. 725, 120 So. 275 (1929).

speaking for the majority of the court, asserted that the right to claim collation arises only in the case of donations *inter vivos* and not in the case of legacies:

> That is rendered certain by the theory or presumption on which the obligation of an heir to collate is founded, as explained in articles 1228 and 1229 of the Code; that is, that what is given by ancestors to their offspring is presumed to be given 'in advance of what they might one day expect from their succession.' 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.*[5]

This writer perceives no absurdity. Collation may not be the proper term to use when speaking of legacies for it may very well be that a legacy may not constitute an advance to the legatee of his hereditary share; and it may very well be that a legacy cannot be returned or restored to the mass to be partitioned because it has not yet been paid out to the legatee. But the principle on which collation is founded is still the "equality which must be naturally observed between children and other lawful descendants,"[6] and therefore, under the scheme

5. *Id.* at 732, 120 So. at 277. This seems to be in direct opposition to what the chief justice himself said in *Succession of Ledbetter*, 147 La. 771, 780, 85 So. 908, 911 (1909): "The bequest of one-half of the remainder of the estate to Dr. Marion A. Ledbetter cannot be given in addition to his legitimate portion; to the prejudice of the legitimate portion due to other forced heirs *because the testator did not declare that the bequest was intended to be over and above the legitimate portion.*" (Emphasis added.)

6. LA. CIV. CODE art. 1229. In this connection see 9 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANCAIS § 627 (6th ed. 1954) in C. LAZARUS, 4 CIVIL LAW TRANSLATIONS 364 (1971) where it is said: "In its proper acceptation, the term collation signifies only the return to the hereditary mass of the things that the deceased had disposed of inter vivos in favor of his heirs ab intestato, to be reunited therewith. The provisions of the Civil Code which preclude the heirs from claiming the legacies made to them by the deceased, did not constitute collation properly speaking because, different from things given inter vivos, the things bequeathed were retained in the succession where they were found at the time of the death of the deceased, rather than returned thereto. This difference 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. CIV. CODE art. 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.

"Thus, in the broad sense attributed to this expression by the Civil Code, collation meant both, the return to the hereditary mass of donations inter vivos, and the retention in this mass of the legacies which the deceased had made in favor of one or more

of the Civil Code, if a parent wishes to prefer a child over another, whether that preference be conferred by way of an *inter vivos* donation or a donation *mortis causa,* the donor or testator must have "formally expressed his will that what he thus gave was an advantage or extra part . . . ."[7] As applied to legacies, therefore, collation simply means what the Code explicitly provides, *viz.* that the legatee cannot *claim* his legacy in addition to his hereditary share unless the legacy is declared to have been made as an advantage or extra portion.[8] In the Louisiana Civil Code, therefore, collation is used in its broadest sense to include not only the return to the hereditary mass of the things given *inter vivos,* but also the retention in that mass of the things bequeathed.

Although the dispensation from collation that the disposer may make must be express,[9] no sacramental words are required,[10] and therefore, any declaration from which the disposer's intention to make the dispensation is clearly manifested should suffice.[11] By the same token, if from the context, or from the dispositions *inter vivos* or testamentary, taken as a whole, it is evident that the disposer does not intend to prefer one of his heirs over the others, the obligation to collate what was given or bequeathed will necessarily result.[12] This

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of his heirs ab intestato, the purpose of such return and retention being to include the objects given or bequeathed in the partition to be made among all the coheirs in conformity with the rules established in matters of legal succession."

7. LA. CIV. CODE art. 1231.

8. And the same is true also where the disposable quantum has been bequeathed to one of the forced heirs to the prejudice of the others. *See* LA. CIV. CODE art. 1501. It provides that in such cases the legatee will be entitled to his legacy *in addition to his legitime* only if "it be expressly declared by the donor that this disposition is intended to be over and above the legitimate portion."

9. LA. CIV. CODE arts. 1228, 1231, 1501.

10. LA. CIV. CODE art. 1233.

11. Thus, where a testator first makes a particular legacy to one of his children, and then disposes of the remainder of his property to be divided equally between all his children, it should be evident that he intends to prefer the particular legatee over the other heirs. The same result would obtain where the testator, having but two forced heirs bequeaths the whole of his estate to one of them. *Cf.* Jordan v. Filmore, 167 La. 725, 735, 120 So. 275, 278 (1929): "There is no indication in article 1501 . . . that a testator who bequeathes more of the disposable portion of his estate to one of his descendant heirs than to another must express, any more plainly than his favoritism itself expresses, his intention that the legacy bequeathed to the favored heir is intended as an advantage over the other heir, or as an extra portion in order to avoid the obligation of collation, strictly so called."

12. *Cf.* Succession of Fertel, 208 La. 614, 23 So. 2d 234 (1945); Succession of Ledbetter, 147 La. 771, 85 So. 908 (1920); Succession of Fath, 144 La. 463, 80 So. 659 (1919); Miller v. Miller, 105 La. 257, 29 So. 802 (1901).

was the conclusion reached in *Succession of Higgins,*[13] recently decided by the Fourth Circuit Court of Appeal. In that case, the testatrix bequeathed her entire estate to her two sons "share and share alike." One of the sons having predeceased the testatrix, the testamentary executor proposed to distribute the succession in the proportions of three-fourths to the surviving legatee and one-fourth to the children of the predeceased son on the theory that the surviving legatee was entitled not only to his legacy of one-half,[14] but also to share equally in the distribution of the other one-half *ab intestato,* concurrently with the representatives of his predeceased brother.[15] The district court rejected this proposed distribution and ordered the succession to be divided in the proportions of one-half to the surviving legatee and one-half to the grandchildren of the testatrix. The court of appeal affirmed, holding that since the obvious intention of the testatrix was not to favor either of her sons to the prejudice of the other, the legacy was subject to collation and that therefore, under the express provisions of article 1237 of the Civil Code, the surviving legatee was entitled either to his legacy upon his renouncing the succession, or to his hereditary share *ab intestato* in the entire succession of the deceased.[16] The decision is correct,[17] but it seems that the

13. 275 So. 2d 447 (La. App. 4th Cir. 1973).

14. All parties agreed that the legacy of the entirety to the two sons "share and share alike" was not a conjoint universal legacy but a legacy by universal title giving to each one-half of the property. *See* Succession of McCarron, 247 La. 419, 172 So. 2d 63 (1965); Succession of Lambert, 210 La. 636, 28 So. 2d 1 (1946). *But see* Gregory v. Hardwick, 218 La. 346, 49 So. 2d 423 (1950)(holding that the addition of the words "share and share alike" to an otherwise universal legacy does not change the character thereof).

15. The theory being that since the legacy to the predeceased son had lapsed, it remained in the succession of the deceased to be inherited *ab intestato* by the heirs of the *de cujus* under the provisions of article 1709 of the Louisiana Civil Code. *Cf.* Succession of McCarron, 247 La. 419, 172 So. 2d 63 (1965), discussed in *The Work of the Louisiana Appellate Courts for the 1965-1966 Term—Successions and Donations,* 26 LA. L. REV. 468, 472 (1966) (legacy was to the two brothers of the testatrix).

16. "As we have previously noted the succession of the decedent has a dual nature: testate as to the legacy of James and intestate as to the lapsed legacy of William. In this circumstance Article 1237 of the Civil Code affords the surviving son, James, the right to elect to either accept the legacy and renounce the legal succession or to collate the legacy and share as a forced heir in the legal succession." Succession of Higgins, 275 So. 2d 447, 449 (La. App. 4th Cir. 1973).

17. But only on the basis that the disposition of the entirety to the two forced heirs constituted a disposition of one-half to each. Had the surviving legatee taken the position that the legacy of the entirety to the two forced heirs was a universal legacy, and that the addition of the words "share and share alike" did not change the character thereof, accretion would have taken place with a resulting legacy of the entirety to the survivor. In such a case reduction, and not collation, would have been the only remedy

court missed the opportunity to dispel any doubts that might yet exist regarding the collation of legacies.[18]

In light of the foregoing, what was said in *Jordan* in this regard does not hold true even in the decision itself, for a careful reading of the opinion will reveal that the court eventually found a sufficient manifestation of the testator's intent to prefer one child over the other, and thus to exempt the legacy to the preferred child from collation to the extent of the disposable portion.

PROHIBITED SUBSTITUTIONS

In *Succession of Dinwiddie,*[19] the testator executed an olographic will bequeathing to his wife the disposable portion of the estate (both separate and community), and at her death, the property was to go to her heirs.[20] The forced heirs of the testator, his two children by a prior marriage, sought to annul the entire will[21] on the ground that the disposition in favor of the wife contained a prohibited substitution. The Fourth Circuit Court of Appeal held, however, that the bequest in question was not a prohibited substitution because the testator had failed to name the substitute *eo nomine.*[22] The court

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of the opponents, which would have resulted in an award of three-fourths to the survivor and one-fourth to the representatives of the predeceased child. *See* Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929).

18. The judge who wrote the opinion appears somewhat ambivalent on the question. Although holding that the legacy in this case was subject to collation because there was no indication that the testator intended it as an extra portion, he concludes: "While my colleagues are not in accord, I agree in principle with the dicta expressed by Chief Justice O'Niell in Jordan v. Filmore, supra, and Doll v. Doll, supra, that legacies should not be subject to collation. . . ." Succession of Higgins, 275 So. 2d 447, 450 (La. App. 4th Cir. 1973).

19. 263 So. 2d 739 (La. App. 4th Cir. 1973).

20. The dispositions are as follows: "II. I hereby bequeath to my wife Ruth . . . the remainder of all my disposable portion of my half of the community property existing between me and Ruth . . . .

III. I hereby bequeath to my wife Ruth . . . all my disposable portion of my separate property . . . .

IV. On her death all of the property representing my disposable portion (both community and separate) shall be paid to her heirs." 263 So. 2d at 744-45.

21. The will contained other dispositions as well, and it is clear that the presence of a prohibited substitution would not have had the effect of invalidating the entire will. In cases of prohibited substitutions it is only the disposition that contains the substitution that is null. Succession of Walters, 258 La. 249, 245 So. 2d 717 (1971), discussed in *The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Persons; Property; Successions and Donations,* 32 LA. L. REV. 165, 172, 194, 200, 204 (1972).

22. "The bequest to Ruth and on her death to her heirs permits Ruth the choice to will the property to whomever she pleased. Mr. Dinwiddie did not designate a

seems to have gone to great lengths to maintain the validity of the disposition under the guise of *interpreting* the will of the testator.[23] Granting that in cases of ambiguity a will and the dispositions it contains should be "understood in the sense in which [they] can have effect, rather than in which [they] can have none,"[24] there was no ambiguity as to what the testator meant or intended; there was nothing to interpret. The intention of the testator was clear; the property comprised in the disposition was to go first to the widow for life and in full ownership,[25] and then at her death, it was to go to her heirs.[26] This is the classic example of a prohibited substitution in which the disposer charges the donee or legatee to preserve during his life the things given or bequeathed and to transmit the same at his death to a second person designated by the disposer.[27] The prohibited substitution must thus contain three essential elements: (1) a double disposition of the same thing in full ownership;[28] (2) a charge to preserve and to return to another;[29] and (3) a successive order.[30] In

named party. Absent this designation of a named substitute legatee for Ruth, we do not find a prohibited substitution." Succession of Dinwiddie, 263 So. 2d 739, 743 (La. App. 4th Cir. 1972).

23. *See* LA. CIV. CODE arts. 1712-1723. In view of the textual provisions of the will and the use of the technical terminology used, the implication made by the court that the deceased had had no legal advice does not seem to be borne out.

24. LA. CIVIL CODE art. 1713.

25. The testator gave not only the "disposable portion" of his separate and community property, which would have been sufficient, but also "the usufruct" of the same property.

26. As the court itself states, the narrow issue before it was whether the bequest to Ruth and on her death to her heirs was a prohibited substitution.

27. The substitution is the means whereby the donor regulates not only his own succession but also the succession of his legatee, at least concerning the things that he transmits, and in that manner attempts to determine the devolution, by future inheritance, indefinitely from one generation to another. *See* 5 PLANIOL ET RIPERT ET TRANSBOT, DROIT CIVIL FRANCAIS no. 282, at 389 (2d ed. 1957).

28. The disposition is made in such a manner that the *ownership* of the thing given must, in accordance with the will of the disposer, vest *successively* in the designated beneficiaries, one *after* the other. *See* 10 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANCAIS § 694 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS 307 (1969).

29. The charge on the first legatee to preserve and to return to the second beneficiary necessarily results from the tenor of the disposition. The words "charged to preserve for and to return" in article 1520 of the Civil Code are not sacramental and it suffices that the charge result as the necessary consequence from the terms or from the disposition taken as a whole. The question should be, is it impossible to execute the disposition without preserving and making restitution of the things given?

30. By this is meant that the first legatee is required to transmit the things given at his death to the second beneficiary who acquired it, not from the grantor, because he has already divested himself thereof, but *directly* from the succession of the first beneficiary. The definition of the prohibited substitution given in *Marshall v. Pearce,*

this connection it must be noted that it is not necessary that the disposer individually designate the ultimate beneficiaries of his bounty. A substitution will be created where the disposer has stipulated a right of reversion either in favor of a person designated by him by name, or in favor of the "heirs" of a named legatee. One must admit that in both cases a second disposition has been made in favor of a third person. So much so, that if such a disposition were valid, "the heirs" would receive the thing bequeathed in the first place, not in their quality as nearest relations of the legatee or by virtue of a right conferred upon them by operation of law, but by virtue of the disposition itself.[31] In both cases, the substitute would be taking from the succession of the institute, in accordance with the express wishes of the grantor; in both cases the charge on the institute to preserve is implicit in the disposition itself; in both cases the grantor is virtually controlling the will of the institute.

The statement of the court in *Dinwiddie,* that "[t]he bequest to Ruth and on her death to her heirs permits Ruth the choice to will the property to whomever she pleases"[32] is thus unacceptable, and it is evidently based upon the erroneous assumption that a "legatee" is an "heir." True it is that the Louisiana Civil Code sometimes speaks of "testamentary or instituted heirs,"[33] but from an examination of the history of the articles of the Civil Code contained in the titles of Successions and Donations, it is clear that the term "heir" designates only those persons who are called by law to the succession of the deceased, as distinguished from those whom he has instituted as his

34 La. Ann. 557 (1882), which unfortunately has been repeated and sometimes enlarged upon in subsequent decisions as in *Succession of Simms,* 250 La. 177, 195 So. 2d 114 (1967), is not accurate. The substitute *does not* take *directly* from the testator as it is there stated; it is evident that if he takes at all, he must take *directly from the institute* who had the full ownership of the thing given, for the grantor has completely and absolutely divested himself thereof.

31. "Finally, it is not necessary for the existence of a double disposition, that the disposer individually designate the ultimate beneficiaries, nor even that they be called to receive the benefit of the donation or legacy. It suffices if there is no doubt as to their individuality and that a disposition has actually been made in their favor. Thus, for example, if the disposer had stipulated a right of reversion either in favor of a third person named by him, or in favor of his heirs, one should admit that there is a second disposition made in favor of those for whose benefit the reversion has been reserved." 10 AUBRY ET RAU ET ESMEIN, DROIT CIVIL FRANCAIS § 694 (6th ed. 1954) in LAZARUS, 3 CIVIL LAW TRANSLATIONS 307, 313 (1969). This is the reason there is not a prohibited substitution where the return is to be made to the grantor himself. LA. CIVIL CODE art. 1534. If the return were to be made to the heirs of the grantor, however, a substitution would be created.

32. Succession of Dinwiddie, 263 So. 2d 739, 734 (La. App. 4th Cir. 1972).

33. *See* LA. CIVIL CODE art. 879.

legatees.[34] Under *Dinwiddie,* there will be no prohibited substitution even though all the necessary elements are present, unless the grantor actually names the substitute *eo nomine.* With this the writer cannot agree.

DISPOSABLE PORTION

An interesting proposition was presented to the Third Circuit Court of Appeal in *Succession of Fuselier,*[35] namely, whether in certain cases, it is possible to have different disposable portions depending upon whether the property of the disposer is his separate property or whether it happens to be his share of the pre-existing community.

34. Actually, the term "testamentary or instituted heir" used in certain articles of the Civil Code is a misnomer; a remnant of Roman concepts which were discarded and abolished by both the French and the Louisiana Civil Codes.

In Roman Law, which was in effect in some parts of France (in the regions of the written law) there were numerous ways of making gratuitous dispositions among which were: (1) the donation *inter vivos*; (2) the institution of heir; and (3) the bequest or legacy. The *instituted heir* was considered as the immediate successor of the *person* of the deceased and, as such, was entitled to all his property and liable for all his debts, unless he accepted with benefit of inventory. The *legatee,* on the other hand, was only a particular assignee, not charged with any of the obligations or debts of the deceased. In order to be valid, every testament *had to have an instituted heir.* Under the customary laws of France, on the other hand, the institution of the heir was not recognized and some of the "customs" went so far as to provide that a testament in which an heir had been instituted was null, for under no circumstances could a stranger be made an heir of the *de cujus.* The heir had to be blood relation of the deceased. Some customs, however, merely disregarded the institution, and gave effect to the testament that contained it, giving the instituted heir the status of a simple legatee. *See* 3 MARCADE, EXPLICATION DU CODE CIVIL no. 436, at 364 (7th ed. 1873).

The redactors of the Code Napoleon discarded this complicated mass of rules and substituted therefor a simple one, namely: thenceforth there shall be only two ways of making gratuitous disposition; (1) by donations between living persons; and (2) by legacy, the first to be evidenced by a formal act of donation and the other by an act denominated a testament. *See* 3 MARCADE, EXPLICATION DU CODE CIVIL no. 436, at 364 (7th ed. 1873).

Thus it is that article 1467 of the Louisiana Civil Code, which is taken from Code Napoleon article 893, provides that property can only be acquired and disposed of gratuitously by donation *inter vivos* and by testament, and that article 1570 of the Louisiana Civil Code, which is taken from article 967 of the French Code, provides that no matter what name is given to the disposition of last will, whether under the title of "institution of heir," or of legacy, or codicil, it will have the effect of an ordinary legacy or bequest, provided the disposition is made in the form of a testament. There is, therefore, no longer an institution of heir as such. A testator can create simple legatees only, and there are no heirs other than those who come to the succession *ab intestato* of the deceased by operation of law.

35. 265 So. 2d 334 (La. App. 3d Cir. 1972), *cert. denied,* 262 La. 971, 265 So. 2d 616 (1972).

In that case, the deceased, who had no children and was survived only by his mother, his brothers and sisters, and his widow, left a will bequeathing everything to the latter, whereupon the mother, as his forced heir, sought to have the disposition reduced and to declare herself entitled to one-half of the property of the deceased which consisted solely of his one-half interest in the pre-existing community. The sole issue before the court was, therefore, whether the disposable portion was three-fourths, as would have been the case had the estate consisted of the separate property of the deceased,[36] or only two-thirds. The court concluded that since, in the absence of a testament the mother would have inherited one-half of the interest of the deceased in the community under article 915 of the Civil Code,[37] the so-called "legal portion" was more than one-third and consequently, the proviso of article 1494 was inapplicable. Accordingly, under the very terms of the first sentence of article 1494, the disposable portion was two-thirds and the corresponding legitime of the mother was one-third. Under the factual situation presented, the decision is correct. The writer wonders, however, whether the time has come to re-examine the rationale of *Succession of Greenlaw*.[38] Why should the size of the disposable portion in a situation such as that presented in *Fuselier,* depend upon the nature of the property? And if the succession consists solely of the separate property of the deceased, why should the size of the disposable portion depend upon the presence or absence of brothers and sisters of the deceased, who are not forced heirs of the deceased, and who could not even participate in the succession *ab intestato?*[39] In *Fuselier,* had the succession of the deceased consisted of both separate and community property,

36. Succession of Greenlaw, 148 La. 255, 86 So. 786 (1920). *Cf.* LA. CIV. CODE art. 1494. The rationale is that, by application of articles 904 and 911, where the deceased is survived by a father or mother *and* brothers and sisters, the parent's share *ab intestato* would amount to only one-fourth, and that therefore, the legitime, which should not be greater than the intestate share, should remain at one-fourth, despite the precise language of article 1494 of the Civil Code prior to its amendment in 1956 which provided in all cases for a disposable portion of two-thirds, with a corresponding legitime of one-third.

37. In the absence of descendants, the share of the deceased in the community is inherited in equal portions by the surviving parent or parents and the surviving spouse. LA. CIV. CODE art. 915.

38. 148 La. 255, 86 So. 786 (1920).

39. There appears to be no reason why the legatee of the disposable portion should receive only two-thirds where the testator had no brothers and sisters, and three-fourths where there are surviving brothers and sisters of the deceased. By the same token, there is no logical reason why the legitime of the surviving parent be reduced or increased depending upon the presence or absence of these collateral relations.

the disposable portion would have amounted to three-fourths of the separate property and two-thirds of the community. And if the testator had left no brothers or sisters, then the disposable portion would have been two-thirds all around. The effect of *Fuselier* is to require a separation of the property of the deceased according to its source and to require a separate appraisement thereof for the calculation of the different disposable portions.[40]

DONATION OMNIUM BONORUM

Although article 1497 of the Civil Code provides that a donation *omnium bonorum* is a nullity,[41] and the jurisprudence is constant to the effect that a suit to set aside such a transaction is imprescriptible,[42] nonetheless, the imprescriptibility of the action to annul the donation does not mean that the property conveyed cannot be adversely acquired by acquisitive prescription. This is the tenor of the decision in *Givens v. Givens*[43] in which the Second Circuit Court of Appeal properly points out that where the claim to ownership was based on possession for thirty years, it is of no moment that the donee might have originally gone into possession under an invalid conveyance, or that the donee might not have been in good faith.[44] Although the court does not go that far, it might be suggested that the donation *omnium bonorum,* particularly where it is disguised in the form of a sale, constitutes a title translative of ownership which can be the

40. *Cf* LA. CIV. CODE art. 1505 (which requires the formation of the active mass of the succession of the deceased by making an aggregate of *all the property* which belonged to the deceased at the time of his death); LA. CIV. CODE art. 885.

41. In adopting this article (article 1484 of the Civil Code of 1825) the redactors note: "RECOPILACION DE CASTILLE bk. 5, tit. 10, 1. 8. We propose to reestablish the wise disposition which before existed and which the Code had abolished, wherefore we have not learned." *See* PROJET OF THE CIVIL CODE OF 1825, 1 LA. LEGAL ARCHIVES 207 (1939). *See also* LA. CIV. CODE art. 1533. *Cf.* LA. CIV. CODE art. 1503.

42. *See* Lagrange v. Barre, 11 Rob. 302 (La. 1845). The difficulty is that since donations *inter vivos* retain their effect during the life of the donor under article 1503, and since the law seems to have been passed to protect the donor, it is difficult to concede a right of action on anyone other than the donor himself during his life. *Cf.* Maxwell v. Maxwell, 180 La. 35, 156 So. 166 (1934); Succession of Turgeau, 130 La. 650, 58 So. 497 (1912); Bernard v. Noel, 45 La. Ann. 1135, 13 So. 737 (1893); Caraway v. LeBlanc, 1 La. App. 192 (1st Cir. 1924).

43. 273 So. 2d 863 (La. App. 2d Cir. 1973).

44. "The fact that the donee originally went into possession under an invalid conveyance or that the donee was not in good faith is of no importance under the rules relating to thirty years prescription. In fact, thirty years prescription specifically contemplates and applies to the situation where there is no valid deed translative of title and 'good faith' on the part of the possessor is not required." 273 So. 2d at 866.

basis for the acquisitive prescription against anyone other than the donor himself.[45]

REVOCATION OF DONATIONS

A declaratory judgment was sought in the case of *Bowers v. Roman Catholic Church of the Diocese of New Orleans,*[46] seeking the revocation of a bequest for nonperformance of the conditions imposed by the testatrix. The bequest consisted of a piece of land to be used "for the erection of a Church or Chappel"[47] in memory of the testator, but no time for performance was specified. On June 1, 1955, the defendant accepted the legacy "to the uses and purposes thereof as stipulated in the said last will and testament of the deceased,"[48] and acknowledged delivery thereof. As of the time of the filing of the suit, fifteen years after the delivery of the legacy, no action had been taken by the legatee to erect the church, and it was alleged by the plaintiff, the executor of the will, that by its inaction, the defendant had forfeited its right to the legacy. The defendant interposed an exception of no cause of action, as well as a plea of prescription,[49] on the ground that since the time for performance had not been stipulated, there had been no forfeiture. The appellate court reversed and remanded the case to the lower court, which had maintained the exception of no cause of action, holding that, no time for performance having been fixed, the condition would have to be fulfilled within a reasonable time, a question of fact to be determined by the court from the particular circumstances of the case, and that therefore, until such a determination was made, the plea of prescription could not be entertained. It is clear from the provisions of article 1567 of the Civil Code that the prescription of an action for the revocation of a donation for nonperformance of the conditions imposed on the donee begins to run "only from the day that the donee ceased to fulfill his obligations."[50]

45. Thus it would be possible for a possessor in good faith to *claim* ownership of the subject matter of the donation *omnium bonorum* as against the heirs of the deceased donor if he had held the property as owner for the required period of ten years. *Cf.* Jenkins v. Svarva, 131 La. 749, 60 So. 232 (1912).

46. 264 So. 2d 329 (La. App. 4th Cir. 1972), *cert. denied,* 262 La. 1152, 266 So. 2d 441 (1972).

47. *Id.* at 331. There was also a bequest of $1,000 "to be used for the foundation of the future Church" in memory of the testatrix's sister.

48. 264 So. 2d at 331.

49. LA. CIV. CODE art. 1567 (apparent basis of plea).

50. Civil Code article 1567 does not fix the prescriptive period; it provides only that the action is subject to the "usual prescription" which, by reference to articles 3542 and 1691 appears to be 5 years.

No difficulty arises where the donee subject to the resolutory condition has performed for a time and then ceases to perform, as in the *Voinche v. Town of Marksville.*[51] The difficulty arises where there has been no performance at all, and no time for performance has been established. As this writer understands the decision, the answer is that in such cases, the donee will be deemed to have ceased to perform if a reasonable time has passed and he has remained inactive. On remand, therefore, the district court will have to determine, from all the circumstances surrounding the case, whether a reasonable time has elapsed for the legatee to perform before determining whether prescription has barred the action to revoke.[52]

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51. 124 La. 712, 50 So. 662 (1909).

52. In his concurring opinion Redmann, J. states: "On the one hand, as the majority observes, where no time for performance has been specified, the law ordinarily implies a reasonable time, C.C. art. 2050. It is conceivable that such factors as population concentration, availability of the great amount of money necessary, and a myriad of other considerations might support a conclusion that the reasonable period for *beginning* performance has not yet even occurred. (If so, defendant should win on the merits.)

"On the other hand, if the charge was intended to be fulfilled forthwith . . . then the reasonable time (at least to begin) was a brief period, determinable by such factors as time to draw plans, etc. And in this case the alternative plea of prescription may be valid, since 15 years is at least five years since the passage of the reasonable time so construed." 264 So. 2d at 334.

Could it not be said, however, that since the legatee had formally accepted the legacy "to the uses and purposes thereof as stipulated" in the testament, the legatee obligated itself to perform; but since no time for performance was fixed, it became incumbent upon the succession representative to make demand upon the legatee to comply with the conditions imposed, or to put the legatee in default, as it were, in order to fix the time for the beginning of the prescriptive period? Absent such putting in default, can it be said that the donee has not performed as stipulated? It is further suggested that since no formal putting in default was made, prescription should begin to run only from the filing of the suit. LA. CIV. CODE art. 1911(2).