Personal Services About the Home

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COMMENTS

PERSONAL SERVICES ABOUT THE HOME

INTRODUCTION

"[A]ccording to the elevated morality of the civil law, no one ought to enrich himself at the expense of another." From the cases considered in this Comment it is manifest that this principle applies when one renders to another nursing, boarding, and sundry other personal services about the home. The rendition of such services presents three basic situations in which this principle may be invoked. First, if no recompense has been made to the renderer during the life of the recipient, the former may file a claim against the latter's estate to recover for the services. Next, an onerous donation made on condition the donee support the donor for a certain time may be attacked after the donee has rendered services in compliance with the charge of support. Finally, a remunerative donation made in recognition of past services may be attacked by either the donor or his heirs.

CLAIM AGAINST ESTATE OF RECIPIENT IN ABSENCE OF DONATION TO RENDERER

Contracts Implied in Fact, Quantum Meruit, and Quasi-Contract Distinguished

If there is an agreement for services and compensation which

2. The methods of recovery for such services will be discussed. These include remunerative and onerous donations, contracts implied in fact and law, and quantum meruit. The writer is aware that the different methods of recovery discussed in this Comment are quite disconnected. However, they are treated together, for regardless of the legal principles applicable, the invocation of each arises from the same factual situation, i.e., services have been rendered about the home without formal contract.

Although some reference will be made to French law on the subject, a comparison of Louisiana law with the common law jurisdictions will not be made. The primary reason is that Louisiana law in this area is based for the most part on civil law theories, especially the French. When it differs, a Louisiana innovation has usually been engrafted upon the civil law, with no common law counterpart. E.g., La. Civil Code art. 1526 (1870).

Without the coverage of this Comment are personal services for repair and upkeep of buildings, yards, etc.; legal, medical, and other professional services; services performed in a business such as clerk, salesman, supervisor, etc.; and services of a mandatary or agent.

3. Throughout this Comment, the party receiving the services will be referred to as the "recipient," and the party rendering the services, as the "renderer."

4. It should be noted that any suit against an estate based on parol evidence
is not expressed, an implied-in-fact contract may be proved.\(^5\) This is done by establishing that under the peculiar facts and circumstances of the case there was an implied agreement that services were to be rendered and compensation received for them.\(^6\) Consequently, the recipient is under a duty to pay, and the renderer has a right to payment. Once the implied-in-fact contract is proved, the same principles that govern express contracts apply.

Parties may agree either expressly or impliedly that services are to be rendered and recompensed without specifically agreeing to the amount of recompense. There will then be a right in the renderer to be compensated with a correlative duty in the recipient to compensate, and the question is simply one of quantum. In such a case, recovery must be on the amount deserved (quantum meruit).\(^7\) A plaintiff must prove an agreement for services and payment before being allowed to prove the value of his services.\(^8\) Recovery can never exceed the fair and reasonable

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\(5\). LA. CIVIL CODE art. 1816 (1870). See also id. arts. 1766, 1811, 1903.

\(6\). See, e.g., Beall v. Bibber, 19 La. Ann. 434, 435 (1867) ("When one renders services beneficial to another, at his request, an implied contract is raised for remuneration."); Camfrancq v. Pilie, 1 La. Ann. 197, 198 (1846) ("For actions without words, either written or spoken, are presumptive evidence of a contract, when they are done under circumstances that naturally imply a consent to such contract."); Succession of Burgierres, 12 La. App. 66, 125 So. 320 (1st Cir. 1929) ("[A]n agreement may be inferred to pay from the nature of the services rendered, and the relations of the parties."); Succession of Dunn, 6 La. App. 683 (1st Cir. 1927).

\(7\). E.g., Succession of Joublanc, 199 La. 250, 257, 5 So.2d 762, 764 (1941) ("[I]t is not necessary that the value of the services shall have been agreed upon by the employer and employee."). Although dictum, the language of the court in Succession of Gesselly, 216 La. 731, 741, 44 So.2d 838, 841 (1950) points this out very well: "[S]ince the [deceased] had . . . placed this evaluation on the services rendered by her nephew, the question of quantum meruit does not enter. That would enter only if the value of the services had not been fixed."

See Note, 18 LA. L. REV. 209 (1957), for a general discussion of quantum meruit and its development in Louisiana.

\(8\). Condran v. City of New Orleans, 43 La. Ann. 1202, 9 So. 31 (1891); Bright v. Metairie Cemetery Association, 33 La. Ann. 58 (1881); Duncan v. Blackman, 3 La. App. 421, 423 (2d Cir. 1926) ("In order for plaintiff to recover judgment against defendant on a quantum meruit it must appear that there was a contract express or implied between them."). Although none of these cases dealt with services rendered about the home, they clearly express the rule that the contract must be proven first in order to recover on quantum meruit. The rule should be the same for any type of services rendered. Succession of Francke, 219 La. 288, 52 So.2d 855 (1951), a case which did concern such services, appears to conform to this rule. The court there said: "Where such promise or intent
value of the services.*

Recovery may be allowed under the theory of quasi-contract, or contract implied in law, if services have been rendered where there is neither an express nor an implied-in-fact contract, but the recipient or his estate would be unjustly enriched if not made to return an equivalent amount.¹⁰ Unlike quantum meruit, recovery is here limited, at least theoretically, to the extent of enrichment of the recipient, even should this be less than the fair value of the services.¹¹ Hence, the purpose of recovery on a quasi-contract basis is prevention of unjust enrichment of the recipient or his estate.

[by a parent to compensate a child for services rendered] can be established and the nature of the services performed is proven, the Court will proceed to the question of quantum." Id. at 293, 52 So. 2d at 857.

9. E.g., Succession of Twohey, 222 La. 697, 63 So. 2d 429 (1953); Succession of Francke, 219 La. 288, 52 So. 2d 855 (1951).
10. LA. CIVIL CODE arts. 2292-2294 (1870). Cf. id. arts. 1965, 2301. See generally Nicholas, Unjustified Enrichment in Civil Law and Louisiana Law, 36 TUL. L. REV. 605 (1962), 37 TUL. L. REV. 49 (1962). Here again, there is a right in the renderer to compensation, and a correlative duty in the recipient to make remuneration. Technically, the justification for this is the assumption that had the renderer not performed the services, the recipient would have had to hire someone to do so. This is recognized in at least one case, Succession of Pereuilhet, 23 La. Ann. 294, 295 (1871) ("[T]he estate of [deceased] was considerably enriched by [opponent's services]. If he had hired other servants and nurses, the amount coming to the heirs who now resist her claim would have been considerably reduced.") And in another case, Succession of Berthelot, 24 So. 2d 185, 188 (La. App. 1st Cir. 1945) (although not involving quasi-contract since the court found that the parties intended there be remuneration), the court noted: "[T]he deceased needed these services and the claimant faithfully attended to her needy father, and had she not rendered him the services she did, it would have been necessary for him to pay some one else for the same services far more than she is claiming."

11. 2 PLANIOL, CIVIL LAW TREATISE (AN ENGLISH TRANSLATION BY THE LOUISIANA STATE LAW INSTITUTE) no. 93713 (1959) ("The plaintiff cannot claim more than the impoverishment suffered by him, for the action has the character of an indemnity; but he cannot obtain more than the enrichment procured for the defendant, for the latter has only the obligation to restore what he has received without cause. There is, therefore, a double limitation on the amount of the reparation.") David, Unjustified Enrichment in French Law, 5 CAMBR. L.J. 205, 222 (1934) (The amount recoverable under the civil law theory of unjust enrichment "must not exceed the enrichment of the defendant or the impoverishment of the plaintiff, whichever is smaller.") (Note, 19 LA. L. REV. 900, 901 (1959) gives a concise statement of the common law rules relating to contracts implied in law and fact, quantum meruit, quasi-contract, and unjust enrichment.) The practical importance of this limitation is minimal, for the extent of the unjust enrichment of the recipient will usually be the fair and reasonable value of the renderer's services. Consequently, the courts often do not clearly make this distinction.

Nor do the courts clearly differentiate the doctrines. In Succession of Pereuilhet, 23 La. Ann. 294, 295 (1871), the court said: "No one is readily presumed to give such useful and tedious labors except under a quasi-contract for a fair compensation."

(Emphasis added.) However, the court then went on to say that the deceased's estate was "considerably enriched" by plaintiff's services, and thus there was "a quasi-contract on the part of the deceased to compensate the opponent for the services mentioned." Ibid. For other cases where the doctrines were
Intention To Compensate

The general rule regulating recovery of compensation (as distinguished from unjust enrichment) by the renderer against the succession of the recipient is that both renderer and recipient must have intended compensation would be paid for the services. In determining this intention factors of prime importance seem to be the nature of the services and the relationship of the parties. A promise or intimation by the recipient that apparently confused, see, e.g., Succession of Burgant, 148 La. 1041, 88 So. 391 (1921); Succession of McNamara, 48 La. Ann. 45, 18 So. 908 (1896); Dauenhauer v. Succession of Browne, 47 La. Ann. 341, 16 So. 827 (1895); Gaines v. Del Campo, 30 La. Ann. 245 (1878); Camfrancq v. Pilie, 1 La. Ann. 197 (1846); Brown v. Lagemans Succession, 182 So. 543 (La. App. 1st Cir. 1939); Caraway v. Leblanc, 1 La. App. 192 (1st Cir. 1924).

12. If recovery is sought on a quasi-contract basis, there is no necessity for finding the parties intended compensation, i.e., there need be no contract, express or implied, for remuneration. Here, the purpose of recovery is the prevention of unjust enrichment of the recipient or his estate, and recovery is limited to the actual enrichment. However, the courts often fail to distinguish between recovery on a quasi-contract basis and recovery on contract implied in fact or quantum meruit. See note 11 supra.

13. Succession of Joublanc, 199 La. 250, 5 So. 2d 762 (1941); Succession of Arnold, 178 La. 658, 152 So. 322 (1933); Farrar v. Johnson, 172 La. 30, 133 So. 352 (1931); Vercher v. Roy, 171 La. 524, 151 So. 658 (1933); Succession of Brand, 162 La. 880, 111 So. 267 (1927); Succession of Pons, 142 La. 721, 77 So. 515 (1918); Succession of Templeman, 134 La. 738, 94 So. 718 (1914); Succession of Oubre, 109 La. 516, 33 So. 583 (1903); Succession of Benton, 109 La. 494, 31 So. 122 (1901); Adams v. Succession of Mills, 49 La. Ann. 775, 22 So. 257 (1897); Succession of Guidry, 40 La. Ann. 671, 4 So. 893 (1888); Gaines v. Del Campo, 30 La. Ann. 245 (1878); Camfrancq v. Pilie, 1 La. Ann. 197 (1846); Story v. Story, 131 So. 2d 913 (La. App. 1st Cir. 1961); Succession of Berthelet, 24 So. 2d 185 (La. App. 1st Cir. 1945); Succession of Savant, 132 So. 263 (La. App. 1st Cir. 1931); Succession of Dunn, 6 La. App. 663 (1st Cir. 1927); Wall v. Heslin, 2 Orl. App. 112 (La. App. Orl. Cir. 1905); Succession of Schulte, 1 Orl. App. 70 (La. App. Orl. Cir. 1903).


Succession of Oubre, 109 La. 516, 33 So. 583 (1903) intimated that there might be no intention to charge when the services were commenced, but that later such an intention might arise. Presumably, recovery should be limited to the services rendered after there was an intention to charge.

14. Succession of Burgieres, 12 La. App. 66, 125 So. 320 (1st Cir. 1929) ("[A]n agreement may be inferred to pay from the nature of the services rendered, and the relations of the parties."). (Emphasis added.) Further support for the statement in the text may be found in note 18 infra.

15. Succession of Dunn, 6 La. App. 663 (1st Cir. 1927). But mere hope of the renderer that the recipient will reward him in his will is not sufficient. Suc-
he will remember the renderer in his will suffices to show an intention that payment be made.\textsuperscript{16} The intention requirement is not, of course, limited to claims against the recipient's succession; the governing principle is that claims for services rendered to a decedent derive no added validity by reason of his demise.\textsuperscript{17} 

\textit{sundry rules regarding the services rendered}

The burden rests upon the claimant to prove the services were rendered.\textsuperscript{18} If the recipient has contributed to the render-
er's household expenses, these disbursements must be set off against the services rendered. Similarly, if the renderer has had the use of pension or other payments belonging to the recipient to help defray the expense of caring for the latter, these must be deducted from the claim of the former for remuneration. The services must be such that there could arise an obligation to pay for them; thus, services arising merely out of friendship or insignificant services such as calling for a priest or physician are not compensable. If a wife subject to a com-

Easterling v. Bagwell, 21 So. 2d 770 (La. App. 2d Cir. 1945). However, difficulty in arriving at a fair evaluation of the services, once they are proved, is not (Succession of Peres, 174 So. 130 (La. App. Orl. Cir. 1937)), provided the services can be given a value in money. Cf. notes 77, 183-88 infra, and accompanying text. However, it appears that it is not alone sufficient that the services are proved and can be given a monetary value; the court goes further, and examines the relationship of the parties to ascertain whether recovery should be allowed. See note 14 supra, and accompanying text. Apparently, the nearer the kinship or the dearer the friendship the less the chance of recovery. This conclusion is gleaned by implication of a multitude of opinions. Illustrative are White v. Succession of Candebat, 210 La. 995, 29 So. 2d 39 (1946); Succession of Brand, 162 La. 880, 111 So. 267 (1927); Succession of Oubre, 109 La. 516, 33 So. 583 (1903); Adams v. Succession of Mills, 49 La. Ann. 775, 22 So. 257 (1897); Succession of Savant, 132 So. 263 (La. App. 1st Cir. 1931); Succession of Burgieres, 12 La. App. 66, 125 So. 320 (1st Cir. 1929); Burger v. Larman, 4 Orl. App. 158 (La. App. Orl. Cir. 1907). See also the text accompanying notes 21-23 (nature of the services) and 36-49 (relationship of the parties) infra.

Apparently, the services must be of a more meritorious and significant nature when the renderer attempts to recover against the estate of the recipient than when the renderer is attempting to sustain a remunerative or onerous donation under attack. In the following cases involving a suit against the recipient's estate without a valid donation the court expressly referred to the very devoted or onerous nature of the services: Succession of Twohey, 222 La. 697, 63 So. 2d 429 (1953); Succession of Francke, 219 La. 288, 52 So. 2d 855 (1951); Succession of Joublanc, 199 La. 250, 5 So. 2d 762 (1941); Succession of Burgant, 148 La. 1041, 88 So. 391 (1921); Succession of Palmer, 137 La. 190, 68 So. 405 (1915); Succession of Alexander, 110 La. 1027, 35 So. 273 (1903); Succession of Stuart, 48 La. Ann. 1484, 21 So. 29 (1896); Dauenhauer v. Succession of Browne, 47 La. Ann. 341, 16 So. 827 (1895); Succession of Peres, 174 So. 130 (La. App. Orl. Cir. 1937); Succession of Crawford, 134 So. 269 (La. App. 1st Cir. 1931); Succession of Burgieres, 12 La. App. 66, 125 So. 320 (1st Cir. 1929); Caraway v. Leblanc, 1 La. App. 192 (1st Cir. 1924) (remunerative donation involved, but held invalid). Compare the nature of the services involved in these cases with those involved in Succession of Formby, 243 La. 120, 142 So. 2d 157 (1962) (remunerative donation upheld).

19. Succession of Francke, 219 La. 288, 52 So. 2d 855 (1951); Succession of Arnold, 178 La. 658, 152 So. 322 (1933); Succession of Pons, 142 La. 721, 77 So. 515 (1918); Succession of Benton, 106 La. 494, 31 So. 123 (1901). Cf. Succession of Stuart, 48 La. Ann. 1484, 21 So. 29 (1896) (claim of renderer not to be reduced by value of clothing and board furnished her by recipient when former had rendered services to latter previous to commencement of account sued on).


21. Succession of Tito, 188 So. 174 (La. App. Orl. Cir. 1939) (services customarily rendered by hired housekeeper not of sufficient importance or frequency to allow claim for nursing).


23. Succession of Daste, 125 La. 657, 51 So. 677 (1910); Succession of Peres,
munity property regime rendered the services, her husband must sue, as the claim is counted a debt owed the community.24

Prescription

Actions for the value of services in the nature of nursing prescribe in one year.25 As prescription begins to run only upon accrual of the right in question,26 it is important to determine when the right for remuneration of these services accrues. If the time for payment is left uncertain, prescription begins to run upon rendition of the services, so that recovery is limited to services rendered in the twelve months preceding the filing of suit for their recovery.27 However, if there is an agreement that payment will be made by the will of the recipient, prescription does not begin to run until the recipient's death, for the renderer could not enforce his claim before then.28

174 So. 130 (La. App. Orl. Cir. 1937); Succession of Burgierres, 12 La. App. 66, 125 So. 320 (1st Cir. 1929).

24. Vercher v. Roy, 171 La. 524, 131 So. 658 (1930); Succession of Guidry, 40 La. Ann. 671, 4 So. 893 (1888); Story v. Story, 131 So. 2d 913 (La. App. 1st Cir. 1961); Succession of Berthelot, 24 So. 2d 185 (La. App. 1st Cir. 1945).

Of course, if the renderer has transferred his claim to a third party, that person stands in the shoes of the renderer, under the general rule that a transferee's rights can rise no higher than those of his transferor. Succession of Guidry, 40 La. Ann. 671, 4 So. 893 (1888).

25. LA. CIVIL CODE art. 3534 (1870) ("The following actions are prescribed by one year: . . . That of . . . laborers . . . for the payment of their wages."); nurses are considered as laborers. Vaughn v. Terrell, 23 La. Ann. 62 (1871); Succession of Bierce, 171 La. 1047, 132 So. 783 (1931); Succession of Fellon, 145 La. 967, 83 So. 208 (1919); Succession of Landry, 120 La. 790, 45 So. 699 (1908); Succession of Alexander, 110 La. 1027, 35 So. 273 (1898); Succession of Oubre, 109 La. 516, 33 So. 583 (1903).

Succession of Fellon, supra, had held the language of Article 3534 — "innkeepers and such others, on account of lodging and board" — applied to anyone who furnished board and lodging, and therefore their action also prescribed in one year. However, Succession of Bierce, supra, expressly overruled Fellon on this point. On the authority of the definition of "innkeepers" contained in LA. CIVIL CODE art. 3232 (1870), Bierce held that "a claim for board or lodging by one who does not make it a business to keep boarders or lodgers is prescribed by ten years." 171 La. at 1094, 132 So. at 784. Bierce appears to be the last expression of the Supreme Court on this question.


27. LA. CIVIL CODE art. 3535 (1870); Succession of Burgant, 148 La. 1041, 88 So. 391 (1921); Succession of Fellon, 145 La. 967, 83 So. 208 (1919); Succession of Palmer, 137 La. 190, 68 So. 405 (1915); Caldwell v. Turner, 129 La. 19, 55 So. 695 (1911); Succession of Alexander, 110 La. 1027, 35 So. 273 (1903); Succession of Oubre, 109 La. 516, 33 So. 583 (1903); Succession of Schulte, 1 Orl. App. 70 (La. App. Orl. Cir. 1903). But cf. White v. Succession of Candebat, 210 La. 905, 52 So. 2d 30 (1946) (facts do not show a promise of remuneration in will of recipient, but prescription held not to begin to run until death of recipient).

The Amount of Recovery

Lack of an agreed value of services rendered is not fatal to a renderer's claim, for recovery can be had on a quantum meruit. In the leading case of Succession of Palmer, it was held that the renderer is not precluded from a further claim by a legacy so utterly inadequate that it must be presumed out of respect to the testator that it was not intended as payment for the services. Conversely, if it is not proved with reasonable certainty that the legacy is insufficient to provide adequate compensation for the services, the renderer is precluded from claiming more from the recipient's estate. That the renderer is named in the will of the recipient does not, however, preclude additional recovery for services performed subsequent to the confection of the will. Likewise, if a specific sum for remuneration has been agreed upon, the renderer may recover the difference between this sum and that devised. It has been held the renderer's claim of remuneration against the recipient's succession is not affected by a donation inter vivos if the recipient did not intend that the donation stand in payment for the services.

Presumption of Gratuity

Subject to several exceptions, services will not be presumed

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29. Succession of Twohey, 222 La. 697, 63 So. 2d 429 (1953); Succession of Francke, 219 La. 288, 52 So. 2d 855 (1951); Succession of Gesselly, 216 La. 731, 44 So. 2d 838 (1950); White v. Succession of Candebat, 210 La. 995, 29 So. 2d 99 (1946); Succession of Joubanc, 199 La. 250, 5 So. 2d 762 (1941); Succession of Williams, 159 La. 814, 106 So. 314 (1925); Story v. Story, 131 So. 2d 913 (La. App. 1st Cir. 1961); Succession of Dunn, 6 La. App. 663 (1st Cir. 1927); Wall v. Haslin, 2 Orl. App. 112 (La. App. Orl. Cir. 1905).
30. 137 La. 190, 68 So. 405 (1915).
31. The renderer had performed extremely onerous services for her brother, a priest whose illness made his "odor . . . as that of dead rats." Id. at 191, 68 So. at 405. The brother had often promised that he would richly reward his devoted sister in his will for her faithful services. The eventual legacy consisted of "$100 and an old nongoing iron clock." Id. at 192, 68 So. at 406.
32. Succession of Wilder, 232 La. 905, 95 So. 2d 493 (1957).
33. Delaureal v. Rouget's Succession, 177 La. 815, 149 So. 464 (1933); Succession of Pellon, 145 La. 967, 83 So. 208 (1919).
34. Succession of Gesselly, 216 La. 731, 44 So. 2d 838 (1950).
35. Succession of Crawford, 134 So. 269 (La. App. 1st Cir. 1931). The recipient had made a donation inter vivos to the renderer of the home in which the nursing services in question were rendered. The court said: "We also, after giving it due consideration, believe that it was really a donation by [the recipient], with no intention on her part of it standing as a payment for the nursing and care given her by [the renderer]. That she acknowledged she was under obligation to [the renderer] for this is shown by the admission she made to her that she would pay her after she would get well." Id. at 271. Accord, Succession of Bairdain, 200 So. 661 (La. App. 1st Cir. 1941) (Counter letter indicated transfer was in payment for services rendered before time for which remuneration was claimed and further admitted this payment was inadequate.).
gratuitous if of an onerous nature. Dicta in early cases indicated a presumption of gratuity if services were rendered by one close relative to another, even a collateral; however, this dicta has been expressly repudiated as to collaterals.

An early case intimated that the relationship between parent and child gave rise to a presumption that compensation had been intended. However, beginning with Succession of Daste, 36 White v. Succession of Candebat, 210 La. 995, 29 So. 2d 39 (1946); Succession of Williams, 159 La. 814, 106 So. 314 (1925); Succession of Alexander, 110 La. 1027, 35 So. 273 (1903); Succession of Guidry, 40 La. Ann. 671, 4 So. 893 (1888); Succession of Pereuilhet, 23 La. Ann. 294 (1871); Beall v. Bibber, 19 La. Ann. 434 (1867); Camfrancq v. Pilie, 1 La. Ann. 197 (1846); Succession of Burgiemes, 12 La. App. 66, 125 So. 320 (1st Cir. 1929); Succession of Dunn, 6 La. App. 663 (1st Cir. 1927); Caraway v. Leblanc, 1 La. App. 192 (1st Cir. 1924); Wall v. Heaslin, 2 Orl. App. 112 (La. App. Orl. Cir. 1905).

In Succession of Pereuilhet, 23 La. Ann. 294, 295 (1871), the court intimated that concubinage would not bar recovery for services rendered during the illicit relationship unless it was “alleged and proved to have been the motive and cause of the parties living together in the same house in the first instance, and the services in question to have been merely incidental to such a state of living . . . An employer can not pay off a female employee by robbing her of her virtue. Such a method of extinguishing an obligation is not known to the law."

For further discussion of the nature of the services and its effect on recovery, see text accompanying notes 18-24 supra.

37. Succession of Templeman, 134 La. 798, 64 So. 718 (1914); Succession of Daste, 125 La. 657, 51 So. 677 (1910); Succession of Oubre, 109 La. 516, 33 So. 583 (1903) (by implication).

38. Succession of Dugas, 215 La. 13, 39 So. 2d 750 (1949), reversing 33 So. 2d 133 (La. App. 1st Cir. 1947). This holding was approved in a strong dictum in Muse v. Muse, 215 La. 238, 40 So. 2d 21 (1949), reversing 33 So. 2d 128 (La. App. 1st Cir. 1947). It is interesting to note that the main basis for the holding of Muse was overruled in Dugas. Yet, as indicated above, Muse approved the Dugas holding. After noting that services rendered between parent and child are presumed gratuitous particularly when the parent is in penurious circumstances, the court in Dugas held that the presumption of gratuity did not apply between brothers and sisters because the law does not impose an obligation of support between collaterals. Yet, Muse held that not only was the obligation of support between parent and child (when one is in penurious circumstances) not the basis of the presumption of gratuity, but such obligation made the presumption completely immaterial; since the law imposes the obligation on the children, they may not recover compensation for their services rendered pursuant thereto, and resort to the presumption of gratuity is superfluous. (See the text accompanying notes 44-49 infra for further discussion of the Muse case.) It might seem that the status of the rule as to collaterals is doubtful in view of the foregoing. However, Dugas also noted that this lack of a presumption of gratuity is “in accord with the general law on the subject,” citing certain common law authorities. 215 La. at 21, 39 So. 2d at 752. Moreover, Muse noted in dictum that “there is no reason to presume that such services are administered solely for reasons of love and affection and are, therefore, gratuitous" where collaterals are involved, 215 La. at 243, 40 So. 2d at 23, n. 2. Considering the composition of the court at the time of rendition of the Dugas and Muse opinions and that at present, and the emphatic dictum in Muse, it is probable that the presumption will be held to be inapplicable with reference to collaterals if the matter arises again.

39. Estate of Olivier, 18 La. Ann. 594 (1806). The claim of the renderer (the son of the deceased) was allowed on rather meager evidence, “considering the relations which must naturally exist between a mother and son.” Id. at 595.

40. 125 La. 637, 51 So. 677 (1910). The Daste case appears to be the first
there has been an unbroken line of Supreme Court cases holding
that services in the nature of nursing and care voluntarily ren-
dered by a child to a parent are presumed gratuitous. Con-
expressly holding that there is a presumption of gratuity when services are
rendered about the house to a parent by a child. One of the Louisiana cases
cited in support of the proposition — Succession of Ploton, 36 La. Ann. 211
(1884) — dealt with the services of a steamboat agent, and the other — Succe-
sion of Fink, 13 La. Ann. 103 (1858) — concerned a general business agent.
The only authorities cited in support of the specific proposition advanced were
common law ones. Although not mentioned in Daste, Succession of Guidry, 40
La. Ann. 671, 4 So. 893 (1888), has been cited as standing for the presumption
of gratuity. However, nowhere in the opinion of Guidry is there any mention
of a presumption of gratuity; the opinion is based exclusively on LA. CIVIL
CODE art. 229 (1870) that provides children are bound to maintain their parents when
in need. The tenor of the opinion is exemplified in the following quotation: “The
fulfillment of that obligation [imposed by Article 229] does not transform the
child into a creditor capable of claiming reimbursement in any contingency. He
has paid a debt imposed upon him by law, and simply remains in the condition
of a debtor who has discharged an obligation.” 40 La. Ann. at 673, 4 So. at 893.
Thus, it may safely be said that the Daste case is the fountainhead of the pre-
sumption of gratuity. Further discussion of the obligation to support a parent
in penurious circumstances may be found in the text accompanying notes 44-49
infra. Parenthetically, it might be added that the Guidry case appears to be the
strongest jurisprudential authority for the Muse case.
41. Notwithstanding an early holding that a step or foster child did not fall
within the presumption of gratuity — Succession of Stuart, 48 La. Ann. 1484,
21 So. 29 (1896) — at least three later cases have held otherwise. Succession
of Brand, 162 La. 880, 111 So. 267 (1927); Succession of Daste, 125 La. 657,
51 So. 677 (1910); Succession of Savant, 132 So. 263 (La. App. 1st Cir. 1931).
However, a son-in-law or daughter-in-law is not considered a child for purposes
of the presumption. Succession of McKnight, 129 So. 2d 573 (La. App. 1st Cir.
1961).
42. Succession of Francke, 219 La. 288, 52 So. 2d 855 (1951); Muse v. Muse,
215 La. 288, 40 So. 2d 21 (1949); Succession of Dugas, 215 La. 13, 39 So. 2d
750 (1949) (dictum); Succession of Roque, 176 La. 711, 146 So. 477 (1933);
Farrar v. Johnson, 172 La. 30, 136 So. 352 (1931); Succession of Brand, 102
La. 580, 111 So. 267 (1927); Succession of Pons, 142 La. 721, 77 So. 515
(1918); Succession of Templeman, 134 La. 798, 64 So. 718 (1914). Courts of
appeal cases so holding include Story v. Story, 131 So. 2d 913 (La. App. 1st
Cir. 1961); Succession of McKnight, 129 So. 2d 573 (La. App. 1st Cir. 1961)
(dictum); Succession of Bertholot, 24 So. 2d 185 (La. App. 1st Cir. 1945)
(dictum); Succession of Savant, 132 So. 263 (La. App. 1st Cir. 1931); Caraway
v. Leblanc, 1 La. App. 192 (1st Cir. 1924).
A statement in Kiper v. Kiper, 214 La. 733, 743, 38 So. 2d 507, 510 (1948),
itimated that the presumption of gratuity applied only where there was a
single child. “From a review of the jurisprudence [no cases cited] of this State,
it appears that the presumption arises that services rendered to a parent by a
child are gratuitous if he be the only child, but the jurisprudence seems to be
conflicting as to whether this presumption arises if there be more than one child.”
However, the statement was dictum, as the court then promptly and properly
pointed out that “however that may be, where there is an expressed intention
shown to compensate a child for the services rendered the presumption of gratuity
does not arise.” Ibid. Although no case was found which actually decided the
point, the proposition was reiterated, again in dictum, in Placid Oil Co. v.
Pruiser, 126 So. 2d 500, 503 (La. App. 2d Cir. 1963). It is respectfully sub-
mitted that there is no distinction to be made as regards the applicability vel non
of the presumption on the ground of the number of children. The distinction
properly to be made depends rather on the pecuniary circumstances of the parent,
as properly pointed out in Muse v. Muse, 215 La. 288, 40 So. 2d 21 (1949). See
text accompanying and following note 44 infra. This confusion in the Kiper case
was probably prompted by the distinct situation involved when one child who
sequently, the child is now allowed recovery for such services only if there is an express or implied contract for remuneration, or an otherwise clear intention rebutting the presumption is shown.\(^4\)

The First Circuit Court of Appeal attempted to limit the presumption of gratuity to cases in which the parent was in need;\(^4\) the court reasoned that the presumption results only from Civil Code Article 229, which obliges a child to support his parent in necessitous circumstances.\(^4\) Consequently, where

has cared for a parent in necessitous circumstances seeks contribution from the other children as co-obligors. (This point is discussed in detail in the text accompanying and following note 50 infra.) As noted above, the court in \textit{Kiper} merely referred to a “review of the jurisprudence” without mentioning any specific cases. Perhaps the court had reference to the case of Succession of Guidry, 40 La. Ann. 671, 4 So. 883 (1888), discussed in note 40 supra. In that case the court, in denying recovery for services rendered by the child of the deceased, said in dictum: “The case would be different if, instead of being the only child, the son had had brothers or sisters. . . .” \textit{Id.} at 673, 4 So. at 895. At this point the \textit{Guidry} case might appear as support for the only-child distinction suggested in \textit{Kiper}. But, the court continued in the same sentence, “for in that case [when there is more than one child], as each and all would have been bound to provide entirely, as it were in solido, for the wants and necessities of the mother, the child performing his obligation could have had recourse against the other issue for contribution.” \textit{Ibid.} Thus, the court was merely trying to point out that the question of contribution is affected by the number of children. Obviously, if there is only one child, there is no one against whom the child can recover contribution, as there is no co-obligor. As pointed out in note 40 supra, the \textit{Guidry} case did not expressly deal with the presumption of gratuity; only by reading the first part of the sentence quoted supra out of context could a distinction in reference to the presumption be gleaned by implication from the \textit{Guidry} case. It is submitted that the dictum expressions in the \textit{Kiper} and \textit{Placid Oil} cases, supra, should be disregarded.

43. See cases cited in the first paragraph of note 42 supra. An example of an otherwise clear intent to the contrary is illustrated by a strong dictum in \textit{Vercher v. Roy}, 171 La. 524, 131 So. 658 (1930), in which a parent executed what purported to be a last will and testament before a notary, bequeathing all his property to his daughter in remuneration for her having cared for him. The will was abortive in that it was “virtually devoid of every essential of a will.” \textit{Id.} at 526, 131 So. at 659. The court said that the will nevertheless indicated “the decedent evidently intended to reward his daughter for the services she had performed.” \textit{Ibid.} Another example is seen in Succession of Francke, 219 La. 288, 52 So.2d 855 (1951). The following statement by the recipient mother to her attorney was held sufficient to indicate an intention to compensate: “'Sister [the renderer daughter] should be compensated for all the services she rendered to me. 'Be sure and pay her for her services.'” \textit{Id.} at 296, 52 So.2d at 858. See also Succession of Berthelot, 24 So.2d 185 (La. App. 1st Cir. 1945) (renderer paid in part by recipient prior to latter’s death; also, recipient had paid other daughters for similar services); \textit{Caraway v. Leblanc}, 1 La. App. 192 (1st Cir. 1924) (donation inter vivos to remunerate for services, although void as a donation, is evidence of intention to compensate).

It should be noted that where the parent makes a remunerative donation to the child the presumption of gratuity is obviously negated. This is discussed in detail in the text accompanying notes 170-72 infra.


45. \textit{LA. CIVIL CODE} art. 229 (1870): “Children are bound to maintain their father and mother and other ascendants, who are in need; and the relatives in
the parent was not in need, there was no reason to presume the child rendered the services gratuitously. This holding was reversed by the Supreme Court case of Muse v. Muse because the lower appellate court's ruling was "predicated on [an] inconsistent theory." The Supreme Court noted that if the parent is in penurious circumstances there is no possibility of the child's recovering against the parent's estate; the services rendered by the child in compliance with Article 229 could not be charged as a debt of the parent's succession inasmuch as the child is merely fulfilling his legal obligation in rendering the services. It is only when the parent is not in need, so that Article 229 imposes no obligation on the child to support the parent, that the presumption of gratuity arises. If there should ever be a presumption of gratuity when a child renders services to his parent, the Supreme Court's position seems sound; its rejection of the First Circuit's rationale certainly seems correct.

Contribution.—In at least three cases, the Supreme Court has stated in dictum that a child who has cared for a parent in penurious circumstances has a cause of action against all other children individually for contribution to the extent of their

the direct ascending line are likewise bound to maintain their needy descendants, this obligation being reciprocal. . . ."

46. 215 La. 238, 40 So. 2d 21 (1949).
47. Id. at 241, 40 So. 2d at 22.
48. See the quotations from the Guidry case, note 40 supra.
49. The doctrine appears to be too well entrenched to be evicted without very compelling reasons. None occur to the writer. It could be argued that today's family unit is not so close knit as that of yesteryear—see, e.g., Cavers, Change in the American Family and the "Laughing Heir," 20 IOWA L. REV. 203 (1935) — and thus when a child renders personal services to his parent he intends to receive compensation therefor. The short answer to this is that the presumption of gratuity is just that—a rebuttable presumption; and if the child desires compensation he simply need so agree with his parent. It is submitted that the presumption is justified; by the very nature of their relationship it seems that when a child renders care and attention to the wants of his parent there is no intention to charge for these services unless there is an agreement for compensation. In fact, it might be asked whether the presumption should extend to close collaterals. As was said by Judge Estopinal in Burger v. Larman, 4 Orl. App. 158, 160-61 (La. App. Orl. Cir. 1907): "[W]e do not think that it ever occurred to plaintiff's mind while he cared for and watched over his mother's uncle [likened unto plaintiff's foster grandfather by the court], that he would after the latter's death claim compensation for his services. . . . [P]laintiff's services were valuable but considering his relationship to the deceased . . . we are constrained to conclude that he did no more nor less than he was in conscience and duty bound to do and it is regrettable that the hasty action resulting in this proceeding should now stand as a bar to the sweet satisfaction which should have been plaintiff's. . . . " Plaintiff and the person nearer and dearer to him in all the world, his mother, were the recipients of [the deceased's] love, kindness and favor and plaintiff was but paying the debt in kind when he voluntarily hastened to the old man's bedside and endeavored to give him hope and comfort during his last days."
virile shares, on the rationale that the obligation of support placed by Article 229 is one in solido on all the children.\textsuperscript{50} But it has been emphasized that the child rendering the services has no claim against the succession of an indigent parent.\textsuperscript{51} Conversely, if the parent is not in need, no child is obliged to support him, and a child rendering services cannot claim contribution from the other children regardless of whether there is a contract, express or implied, of support.\textsuperscript{52} However, in this event the renderer may have a claim against his parent's estate.\textsuperscript{53}

\section*{Remunerative and Onerous Donations and Their Role in the Law of Obligations\textsuperscript{54}}

\textbf{Moral, Natural, and Civil Obligations}

The Code declares that there are three kinds of obligations: moral or imperfect, natural, and civil or perfect.\textsuperscript{55} The moral or imperfect obligation operates only in the moral sense, and has no legal operation.\textsuperscript{56} A natural obligation, though binding on the obligor "in conscience and according to natural justice," cannot be enforced.\textsuperscript{57} Nevertheless, it has legal operation in that what has been given in compliance with a natural obligation cannot be recovered.\textsuperscript{58} Moreover, it is "sufficient considera-
tion” for a new contract, and therefore may give rise to a civil obligation. The civil or perfect obligation may arise from the conventional agreement known as contract, and is legally enforceable.

One might justly expect that the rendition of services without a view to remuneration would at least give rise to a natural obligation in the recipient to compensate for them. But the Code declares “natural obligations are of four kinds,” and lists the four without mention of prior services. It has been expressly held that this listing is exclusive. Moreover, the Code gives as an example of a merely moral obligation “the duty of exercising gratitude.”

**Gratuitous and Onerous Contracts**

It might appear that a party rendering services in circumstances that give rise to no right in contract or quasi-contract is remediless to recover even if the recipient later promises to compensate him for his services, since a moral or imperfect obligation to compensate is not “sufficient consideration” to support a new contract. However, the Code divides contracts into two types based upon the motive for making them. The object of a gratuitous contract is to benefit the obligee without a

59. *Id.* art. 1759(2).
60. *Id.* arts. 1757(3), 1760(2). Civil obligations may also originate by operation of law. *Id.* art. 1760(1). These types of civil obligations are treated in Title V, “Of Quasi Contracts, And Of Offenses and Quasi Offenses” of the Louisiana Civil Code.
61. *Id.* art. 1758.
62. Succession of Miller v. Manhattan Life Insurance Co., 110 La. 651, 34 So. 723 (1903). Accord, Succession of Burns, 109 La. 1081, 7 So. 2d 359 (1942). *Contra,* In re Atkins Estate, 30 P.2d 761 (5th Cir. 1929). However, without mention of the exclusiveness vel non of Article 1758, the courts have allowed “obligations” not mentioned in that article to support a new and binding contract. *E.g.,* Breaux v. Breaux, 218 La. 795, 51 So. 2d 73 (1951). (*fidei commissum* declared to create at least a natural obligation); Blanc v. Banks, 10 Rob. 115 (La. 1845) (new promise to pay debt discharged in bankruptcy may be enforced; court did not mention natural obligations); Cook v. City of Shreveport, 144 So. 145 (La. App. 2d Cir. 1932) (payment of illegal tax not recoverable; natural obligation on owner-taxpayer to pay improperly recorded paving lien). The cases, and natural obligations in general, are discussed in Comment, 12 LA. L. REV. 79 (1951); Note 7 LA. L. REV. 445 (1947). At other times the courts have used the terms “moral obligation” and “natural obligation” interchangeably. *E.g.,* White v. White, 7 So. 2d 255 (La. App. 2d Cir. 1942). It appears the redactors of the Civil Code of 1825 intended the listing to be exclusive, and were very careful to distinguish between natural and moral obligations. 1 LOUISIANA LEGAL ARCHIVES, PROJET DE LA LOIS CIVILE DE 1825, 226 (1937). But see note 77 infra for an argument that Article 1758 is not exclusive.
63. LA. CIVIL CODE art. 1767(1) (1870).
64. *Id.* art. 1772.
corresponding benefit to the obligor;\textsuperscript{65} as its name implies, the obligor is engaged in giving. An \textit{onerous} contract arises when the obligor receives a thing or promise in return for his obligation;\textsuperscript{66} it involves roughly the exchange of equivalents, and the obligor is not giving, but paying.

\textit{Donations: Pure, Onerous, and Remunerative}

Although there are others,\textsuperscript{67} the principal gratuitous contract is the donation.\textsuperscript{68} Donations proceed from a spirit of liberality emanating from the donor to the donee. They are divided, according to the time at which they are made, into donations inter vivos and donations mortis causa, the former “between living persons,” and the latter “in prospect of death.”\textsuperscript{69} Donations are also categorized, according to the donor’s cause or motive in making them, into three further classes: the gratuitous donation, made from a pure spirit of liberality without conditions; the onerous donation, in which the donee is burdened with charges imposed by the donor; and the remunerative donation, the object of which is to compensate for services previously rendered.\textsuperscript{70}

Because a donation depletes the donor’s patrimony, it must conform to certain rules of form and substance not imposed upon other contracts. Among these are the requirement of authentic form,\textsuperscript{71} the inability of the donor to reserve to himself the usufruct of donated immovable property,\textsuperscript{72} the incapacity of the donor to divest himself of so much of his property that he does not reserve enough for his subsistence,\textsuperscript{73} and the prohibition against a donation’s exceeding the disposable portion.\textsuperscript{74}

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{65} Id. art. 1773.
\item \textsuperscript{66} Id. art. 1774.
\item \textsuperscript{67} Id. art. 2991 (mandate), art. 2894 (loan for use), art. 2929 (deposit), art. 3035 (nonremunerative suretyship).
\item \textsuperscript{68} Id. art. 1467.
\item \textsuperscript{69} Id. arts. 1468, 1469.
\item \textsuperscript{70} Id. art. 1523.
\item The nature of the transaction, and not the title given the act by the parties, determines whether a donation is onerous or remunerative. Thus, where the donor referred to the donation as onerous, but intended it to compensate for services rendered, the court treated the donation as remunerative. Succession of Formby, 127 So.2d 352 (La. App. 2d Cir. 1961), \textit{aff’d on rehearing}, 243 La. 120, 142 So.2d 157 (1962).
\item \textsuperscript{71} LA. CIVIL CODE arts. 1536, 1538 (1870).
\item \textsuperscript{72} Id. art. 1533.
\item \textsuperscript{73} Id. art. 1497.
\item \textsuperscript{74} Id. arts. 1483-1518.
\end{itemize}
\end{footnotesize}
Article 1526 and its Role in Contract Characterization

In certain cases transfers made to compensate for services rendered or to be rendered are relieved of conformance with the exacting formal and substantive requirements pertaining to donations. The Code provides that the onerous donation is not a real donation "if the value of the object given does not manifestly exceed that of the charges imposed on the donee"; nor is the remunerative donation a real donation if the value of the services rendered is little inferior to the value of the thing given, provided the services may be "appreciated in money.”

75. Id. art. 1524: "The onerous donation is not a real donation, if the value of the object given does not manifestly exceed that of the charges imposed on the donee.”

76. Id. art. 1525: "The remunerative donation is not a real donation, if the value of the services to be recompensed thereby being appreciated in money, should be little inferior to that of the gift.”

77. Ibid. This requirement (apparently borrowed from the French jurisprudence and commentators; see the last paragraph of note 78 infra) serves to differentiate those services which are so insubstantial that they could not give rise to a debt in any respect from those services which will support a remunerative donation. Thus, if a monetary value cannot be given the services, they will not support a remunerative donation; any donation given to "recompense" therefore must arise out of mere gratitude, i.e., the transaction is a pure donation. The courts have made limited use of this requirement (see notes 184-88 infra), usually mentioning it only in passing, with no attempt to define what services can or cannot be measured in money. The requirement that the services be appreciable in money seems less rigidly enforced against onerous or remunerative donations than against contractual or quasi-contractual claims against the recipient’s estate. See note 18 supra. Apparently the courts feel that if the donor saw fit to donate money or valuable property to compensate for the services, they were appreciable in money so far as the donor was concerned, and his wishes should be respected.

The “appreciable in money” requirement might also be useful in determining whether a natural obligation arises when one renders services to another. It might be argued that the listing of natural obligations in Article 1758 is not exclusive by reading Articles 1525, 1526, 1737, 1758, and 1759 in pari materia. It seems clear that one should not restrict the application of the principles of remunerative donations embodied in Articles 1525 and 1526 to cases in which a duty to pay would never arise. Otherwise, there would arise the following anomalous situation: If the services were rendered under circumstances such that a duty to pay would arise, were appreciable in money to the extent of $500, and the value of the thing given were $749, the “donation” would be reduced to $500; but if the services were not such as to give rise to an obligation to pay, and the same monetary figures were involved, under Article 1526 the donation would stand for the full sum of $749. (See text accompanying notes 162-69 infra for further discussion of the question of reduction under Article 1513, and when it is applicable.) The redactors of the Civil Code surely did not intend such a result. It is suggested the moral obligation described in Article 1737(1) comprehends only those situations in which the services rendered cannot be appreciated in money. If this is so, then in those situations in which the services can be so appreciated, they must give rise to a civil or natural obligation of at least a limited kind. Remembering that Article 1759 provides that (1) whatever has been given in compliance with a natural obligation cannot be recovered, and (2) a natural obligation is sufficient “consideration” for a new contract, consider the following hypothetical situation: Suppose A has rendered services to B
Thus, the legislature has determined that onerous and remunerative donations in certain cases partake more of the nature of onerous contracts than of donations. Specifically, Article 1526 provides that unless the value of the thing given exceeds by one-half the value of the charges imposed in an onerous donation or the services rendered in a remunerative donation, the rules peculiar to donations do not apply.78

78. LA. CIVIL CODE art. 1526 (1870): "In consequence, the rules peculiar to donations inter vivos do not apply to onerous and remunerative donations, except when the value of the object given exceeds by one-half that of the charges or of the services." Note that the article actually reads "rules peculiar to donations inter vivos," rather than "rules peculiar to donations." Throughout this Comment the article will be treated as if it read the latter way but with certain restrictions. This is discussed later in the Comment. See note 159 (2d) infra. Throughout this Comment the phrases "meet the test of Article 1526," "the test of Article 1526 is met," etc., will be used for brevity. When they are used, it is meant that the value of the thing given does not exceed by one-half the value of the services rendered, and therefore the rules peculiar to donations do not apply in the situation under consideration. Conversely, when it is said that a transaction "runs afoul of Article 1526," "does not meet the test of Article 1526," etc., it is meant that the rules peculiar to donations do apply.

The correct mathematical meaning of Article 1526 has been a constant source of confusion in the jurisprudence. The article clearly states that the rules peculiar to donations apply only when the value of the thing given exceeds by one-half the value of the charge or service, i.e., the former is at least one and one-half times greater than the latter. Another, and perhaps clearer, statement of this rule is that the rules peculiar to donations do not apply if the value of the charges imposed or the services rendered exceeds two-thirds of the value of the thing given. The opinion in Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944) several times states the rule in this manner. E.g., "the services rendered by the donee in this instance... greatly exceeded two-thirds of the value of the property donated; which is the same as to say that the value of the property donated did not amount to one and one-half times the value of the services rendered by the donee." Id. at 22, 18 So. 2d at 640. The Whitman case is probably the clearest jurisprudential example of the correct application of Article 1526. Other cases correctly stating the rule of the article include In re Andrus, 221 La. 996, 60 So. 2d 899 (1952); Bowlus v. Whatley, 129 La. 509, 56 So. 423 (1911) (not a case of personal service rendered about the home); Fulford v. Dimmick, 107 La. 403, 31 So. 879 (1902) (same); Placid Oil Co. v. Frazier, 126 So. 2d 800 (La. App. 2d Cir. 1961); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942); Robinson v. Guedry, 181 So. 882 (La. App. Orl. Cir. 1938);
COMMENTS

ONEROUS DONATIONS MADE SUBJECT TO A CHARGE OF SUPPORT IN THE DONEE

Article 1497 (Donations Omnium Bonorum) and Its Effect on Onerous Donations

Civil Code Article 1497 prohibits a donation omnium bonorum: one cannot by donation inter vivos79 divest himself of so much of his property that he does not reserve to himself enough for his subsistence.80 The purpose of this "prohibitory law,

Steen v. Louisiana Central Lumber Co., 2 La. App. 39 (2d Cir. 1925). Frequent misstatements of the rule are that the value of the services rendered or charges imposed must exceed one-half the value of the object given for the rules peculiar to donations to be inapplicable; and that the rules peculiar to donations will be applied if the value of the thing given is double that of the services or charges. E.g., Castelman v. Smith, 148 La. 233, 86 So. 778 (1920); Latour v. Guillory, 130 La. 570, 58 So. 341 (1912); Succession of Dopler v. Feigle, 40 La. Ann. 848, 6 So. 106 (1888); Lagrange v. Barre, 11 Rob. 302 (La. 1845); Bordelon v. Brown, 84 So. 2d 867 (La. App. 2d Cir. 1956); Lemoine v. Lemoine, 27 So. 2d 650 (La. App. 2d Cir. 1946); Lafield v. Balzrette, 21 So. 2d 156 (La. App. 2d Cir. 1945). That in all these cases the court, immediately prior or subsequent to its incorrect statement of the rule, either quoted or paraphrased Article 1526 indicates failure to realize there was any difference between the rule as misstated by the court and as laid down by Article 1526. The difference is easily illustrated. Assume that the value of the thing given is $9,000. If the article is correctly interpreted, the value of the services appreciated in money (pretermitting fractions of dollars) would have to be at least $6,001 in order that the rules peculiar to donations would not apply; whereas, under the usual incorrect interpretation the services would only have to be valued at $4,501. Although the case was decided correctly on other grounds, Moore v. Sucher, 234 La. 1068, 102 So. 2d 459 (1958), illustrates a situation where this different result would follow. The Moore case is discussed in The Work of the Louisiana Supreme Court for the 1957-1958 Term—Sales, 19 LA. L. REV. 319, 322 (1959).

One case even stated the rule to be that the rules peculiar to donations are applicable only if the value of the thing given exceeds one-half of the value of the services. Succession of Spann, 169 La. 412, 417, 125 So. 289, 291 (1929). Fortunately, this seems to be the only instance of such an interpretation of Article 1526.

The French have no articles corresponding to LA. CIVIL CODE arts. 1523-1526 (1870), and are not bound by such automatic restrictions. However, the result reached is substantially the same, the French using the theory of cause coupled with an expanded concept of natural obligations to distinguish donations from onerous contracts. If the services to be recompensed, valued in money, fairly correspond to the value of the thing given, the French determine that the giver was not moved by a spirit of liberality but by a duty of conscience; his cause is not to give but to pay. Consequently the transaction is not treated as a donation but as an onerous contract. Smith, A Refresher Course in Cause, 12 LA. L. REV. 2, 18 (1951). A discussion and review of the French and German jurisprudence in this area may be found in Schiller, The Counterpart of Consideration in Foreign Legal Systems, in REPORT OF THE NEW YORK (STATE) LAW REVISION COMMISSION 187, 209-12 (1936).

79. Ackerman v. Larner, 116 La. 101, 40 So. 581 (1906) applied Article 1497 to manual gifts (LA. CIVIL CODE art. 1539 (1870)).

80. LA. CIVIL CODE art. 1497 (1870): "The donation inter vivos shall in no case divest the donor of all his property; he must reserve to himself enough for subsistence; if he does not do it, the donation is null for the whole." See Comment, 6 LA. L. REV. 98 (1944) for a general discussion of donations omnium
enacted in the interest of good morals and public order” is obvious: paupers burden society. In such case the donation is absolutely null and is neither capable of ratification nor cured by prescription. This nullity strikes the whole of a donation omnium bonorum, not merely that portion which exceeds an amount adequate for the donor's subsistence. Albeit apparently inconsistent with the rule that a donation omnium bonorum is void and not voidable, it has been held that a third party purchasing from the donee in reliance on the faith of the public records will be protected if the transaction does not purport on its face to be a donation.

Considerable textual consideration is given the donation omnium bonorum because it is the usual ground upon which an onerous donation subject to a charge of support is attacked.

82. LA. CIVIL CODE art. 1497 (1870); Litton v. Stephens, 187 La. 918, 175 So. 619 (1937) (onerous donation); Welch v. Forest Lumber Co., 151 La. 960, 92 So. 400 (1922) (same); Harris v. Wafer, 113 La. 822, 37 So. 768 (1904) (same); Lagrange v. Barre, 11 Rob. 302 (La. 1845) (same). As to remunerative donations, compare Caraway v. Leblanc, 1 La. App. 192 (1st Cir. 1924) (Article 1497 invoked to annual donation) with Tucker v. Angell, 1 La. App. 577 (2d Cir. 1925) (Article 1497 not applied; cases involving onerous donations distinguished).
83. E.g., Welch v. Forest Lumber Co., 151 La. 960, 92 So. 400 (1922); Cox v. Busch-Everett Oil Co., 131 La. 817, 60 So. 256 (1912); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942). Nor can the donor be estopped to assert the invalidity of the donation omnium bonorum. Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913); Cox v. Busch-Everett Oil Co., supra (dictum); Ackerman v. Larner, 116 La. 101, 40 So. 581 (1906); Hearon v. Davis, supra.
84. LA. CIVIL CODE art. 1497 (1870); Lagrange v. Barre, 11 Rob. 302 (La. 1845). The prescription most often pleaded is that of five years relative to the rescission of contracts and other acts. LA. CIVIL CODE art. 3542 (1870). The suit to annul a donation omnium bonorum is not to be analogized, on the ground that the heirs are creditors, to the revocatory action; thus it is not prescribed by one year under LA. CIVIL CODE art. 1994 (1870). Welch v. Forest Lumber Co., supra.
85. LA. CIVIL CODE art. 1497 (1870); Lagrange v. Barre, 11 Rob. 302 (La. 1845) (donation omnium bonorum not reducible).
86. Another inconsistency discussed in Comment, 6 LA. L. REV. 98 (1944) is that "it is definitely settled that the collateral heirs have no right to annul a donation omnium bonorum, either during the life of the donor or after his death." Id. at 100. The Comment also criticizes the holdings that forced heirs may invoke Article 1497 after the death of the donor, but not during his life. It is pointed out that after the donor's death the reason for the rule of the article has expired, i.e., the impoverished donor is no longer a charge upon society. Further, the forced heirs, under LA. CIVIL CODE art. 229 (1870), are the very ones who will have to support the penurious donor, and thus they have an interest in annulling the donation omnium bonorum during his life. It is also suggested therein that if the state is called upon to support the donor it should have the right to invoke Article 1497.
87. Prater v. Porter, 176 La. 324, 331, 145 So. 675, 676 (1933) (rule only applies where "the litigants . . . [are] the original parties to the contracts attacked"); Rocques v. Freeman, 125 La. 60, 51 So. 68 (1910); Steen v. Louisiana Central Lumber Co., 2 La. App. 39, 44 (2d Cir. 1925) ("The transfer in
To invalidate a donation under Article 1497, the party attacking it has the burden of proving the donor has not retained enough for his subsistence. Although no categorical statement can be made as to what is "enough for subsistence," the following reservations have been held insufficient for the donor's subsistence: a small government pension; almost as much land as to the value of the land in 1902 and the amount paid by the donee therefor.

Tucker v. Angell, 1 La. App. 577 (2d Cir. 1925) (dictum). But cf. the remedy provided the donor under LA. CIVIL CODE art. 1508 (1870) if the donation is revoked or rescinded for non-execution of a condition.

The exception in favor of third parties relying on the public records apparently does not apply where the transaction is on its face a donation. Litton v. Stephens, 187 La. 918, 924, 175 So. 619, 621 (1937) ("The donation in this case being void ab initio, the donee acquired no title, and the sale by the donee to her co-defendant... conveyed no title."). It has also been held inapplicable where the cash consideration recited in the deed is so insignificant that the third party purchaser must have known that the true consideration was the obligation to support, also recited in the deed. Hearon v. Davis, 8 So.2d 787, 792 (La. App. 2d Cir. 1942) ("Anyone examining the public records and reading the instrument with a view of purchasing the property [worth $800]... would unquestionably have decided that its real and true consideration was not the $25 [previously referred to by the court as a "mere bagatelle"] but the onerous condition incorporated therein; and this being true, the character of the act as a donation should have been apparent.").


Just what is sufficient for "subsistence" is a question of fact. Bourgeat v. Dumoulin, 12 La. Ann. 204 (1857); Hearon v. Davis, 8 So.2d 787 (La. App. 2d Cir. 1942). The courts generally do not elaborate the criteria used for deciding this question, but simply state the conclusion that an insufficient reservation for subsistence has or has not been shown. E.g., Welch v. Forest Lumber Co., 151 La. 900, 92 So. 400 (1922); Lagrange v. Barre, 11 Rob. 302 (La. 1845) (no mention that donor had not reserved movable property sufficient for subsistence); Hearon v. Davis, supra. But cf. Hearsey v. Craig, 126 La. 824, 53 So. 17 (1910) (court went into detailed discussion and examination of testimony to determine if donor had reserved enough for subsistence).

Ducote v. Stark, 87 So. 2d 770 (La. App. 2d Cir. 1956) contains what is probably the best discussion of "subsistence," and points out the lack of a definitive guide.

In Whitman v. Whitman, 206 La. 1, 18 So.2d 683 (1944), certain children transferred property to their brother in the form of an onerous donation, the charge being to support the parties' mother. In answer to the donors' contention that they had divested themselves of all their property the court observed that Article 1497 requires only reservation of "enough for subsistence." Consequently, since all of the donors either had a decent job or were married and amply supported by their husbands, the court doubted that their transfers came within the spirit of Article 1497; they were not left destitute by the transfer of the property. Especially was that so, reasoned the court, since the property transferred had virtually no sale value and produced no revenue, so that its transfer divested the donors of no source of revenue. The language might be considered dictum, since the court had previously found that the transfer was an onerous donation not subject to the rules peculiar to donations. See notes 140-42 infra, and accompanying text, for further discussion of the Whitman case.

Balzrette v. Hughes, 232 La. 509, 94 So. 2d 649 (1957) (by implication);
as was donated, where the land reserved produced little or no revenue;\(^91\) and mineral rights in the land donated, but of small value at the time of donation.\(^92\) However, if the act of donation imposes on the donee, in addition to the charge of care and support, an annuity for life sufficient to maintain the donor in the style to which he is accustomed, the donation may be upheld.\(^93\)

It is well settled that the subjection of a donation otherwise *omnium bonorum* to the charge or condition that the donee will thereafter maintain and support the donor is not a reservation of “enough for subsistence” under Article 1497.\(^94\) That the donee has fulfilled the charge of support is generally immaterial, for the nullity of the donation is not dependent upon a violation of the condition.\(^95\) Because the donation is null, the donee is entitled to recover from the donor any expenses he has incurred in fulfilling the charge of support.\(^96\)

One early case required tender to the donee of his expenses as a condition precedent to the bringing of the action under Ar-

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\(^91\) Litton v. Stephens, 187 La. 918, 175 So. 619 (1937) (80 acres donated; 57 1/2 acres reserved); Ducote v. Stark, 87 So. 2d 770 (La. App. 2d Cir. 1956); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942).  
\(^92\) Weems v. Medak, 231 La. 923, 93 So. 2d 217 (1957); Ducote v. Stark, 87 So. 2d 770 (La. App. 2d Cir. 1956); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942).  
\(^93\) Litton v. Stephens, 187 La. 918, 175 So. 619 (1937) (80 acres donated; 57 1/2 acres reserved); Ducote v. Stark, 87 So. 2d 770 (La. App. 2d Cir. 1956) (17 or 18 acres reserved; evaluated at $1,400); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942) (20 acres and a few head of stock provided only meager revenue).  
\(^94\) Weems v. Medak, 231 La. 923, 93 So. 2d 217 (1957).  
\(^95\) Bourgeat v. Dumoulin, 12 La. Ann. 204 (1857). Potts v. Potts, 142 La. 906, 77 So. 786 (1918) and Succession of Savory, 32 La. Ann. 506 (1880) lend support to this proposition. Of course, the annuity must be paid or the donation will not be upheld. Baker v. Baker, 125 La. 909, 52 So. 115 (1910).  
\(^96\) It is not necessary that the property reserved be immovable. Nunge v. Cegretto, 3 Orl. App. 39, 42 (La. App. Orl. Cir. 1905). *But cf.* Lagrange v. Barre, 11 Rob. 302 (La. 1845) (donation annulled as one *omnium bonorum* even though not mentioned that donor had divested himself of all his movable as well as immovable property).  
\(^97\) Litton v. Stephens, 187 La. 918, 175 So. 619 (1937); Welch v. Forest Lumber Co., 131 La. 817, 60 So. 256 (1812); Rocques v. Freeman, 125 La. 60, 51 So. 68 (1910); Harris v. Wafer, 113 La. 822, 37 So. 785 (1904); Beaulieu v. Monin, 50 La. Ann. 732, 23 So. 337 (1898); Lagrange v. Barre, 11 Rob. 302 (La. 1845); Lemoine v. Lemoine, 27 So. 2d 650 (La. App. 2d Cir. 1946). (Vick v. Deshaute, 9 Mart. (O.S.) 85 (La. 1820) might appear to be contra, but it was decided under the Code of 1808, which contained no counterpart to Article 1497; furthermore, the facts failed to show the donor divested himself of all his property.) *But see* notes 100-17 *infra*, and accompanying text.  
\(^98\) Jaco v. Jaco, 129 La. 621, 56 So. 615 (1911); Hearon v. Davis, 8 So. 2d 787 (La. App. 2d Cir. 1942). *But see* notes 118-31 *infra*, and accompanying text.  
\(^99\) LA. CIVIL CODE art. 1514 (1870); Garcia v. Dulcich, 237 La. 359, 111 So. 2d 309 (1959); Jaco v. Jaco, 129 La. 621, 56 So. 615 (1911). This, of course, pretermits any consideration of LA. CIVIL CODE art. 1526 (1870). On this question, see notes 118-31 *infra*, and accompanying text.
ticle 1497; however, later cases have held tender is not required if the donor is the plaintiff, on the rationale that an opposite holding would deprive the donor of the protection of Article 1497, inasmuch as the donation itself presumably divested him of any property with which to make the tender. The proper solution, as allowed in an analogous case, apparently is for the donee to reconvene for the value of his expenses.

Obligation of Support in Non-Donative Contracts

An oft-quoted statement of the rationale of the rule forbidding a charge of support to satisfy Article 1497 is that "it is manifest... that the law maker never intended that on a simple stipulation of alimony, a man should divest himself of all his property by donation inter vivos." It seems possible, however, that an obligation of support on the donee in a bargaining transaction may convert a donation into an onerous contract. Bargaining is inconsistent with the donor's spirit of liberality, a prerequisite for the donation. The transaction is bilateral in nature, creating rights and correlative duties in each party to the contract. On the failure of one to perform, the other may sue for a resolution of the contract. In this, the donor's rights are not enlarged by characterizing the transaction an onerous contract; a donation also may be revoked for non-fulfillment of a condition. But characterization as onerous would give the "donor" a right to damages for breach of the contract, not available upon revocation of a donation. No case was found where a donor attempted to recover damages from the donee for


100. Lagrange v. Barre, 11 Rob. 302, 309 (La. 1845).

101. See LA. CIVIL CODE art. 1467 (1870) (general article in title on donations; property can be acquired or disposed of "gratuitously" only by donation); Succession of Formby, 243 La. 120, ...., 142 So. 2d 157, 161 (1962) ("The gratuitous donation is a pure donation in its motive, which is one of liberality." Opinion on original hearing; result different on rehearing.).

102. Cf. LA. CIVIL CODE art. 1765 (1870).

103. Id. art. 2046.

104. Id. art. 1559 (2).

105. Id. arts. 1930-1944, 2046.
non-fulfillment of the charge of support. However, the only case found that dealt expressly with the question whether an obligation of support could be counted valid consideration for the transfer of property answered in the affirmative. But it must be observed that the case, Thielman v. Gahlman,106 concerned a transferor who had not divested himself of all his property, and thus was not left destitute; Article 1497 was not violated and the case is not direct authority where the article is applicable.

In Thielman the transferor conveyed to his nephew the naked ownership of certain immovable property, "for, and in consideration of, one dollar, and other good and valuable considerations, in hand paid."107 The transferee agreed to give his uncle a home for the duration of the latter's life, and bury him when dead; the uncle retained the usufruct of the property during his life. Upon the transferor's death 2½ months after the conveyance, his heirs (the record did not show whether they were forced or collateral) attacked the conveyance on the ground, inter alia, that the contract was not a valid donation since it was not in proper form. The court dismissed this contention, saying the contract was not a donation, and the consideration for the transfer of the naked ownership of the property was "the obligation of the defendant [nephew] to maintain and care for the grantor [uncle] during the remainder of his life, and to bury him, when dead."108 Plaintiffs further contended that the transfer could not be upheld as a sale because the price was uncertain, or as a donation inter vivos because the grantor retained the usufruct. The court rejected these contentions, holding the transaction an innominate contract translative of ownership.109

106. 119 La. 350, 44 So. 123 (1907).
107. Id. at 352, 44 So. at 124.
108. Id. at 353, 44 So. at 124. The court also noted in dictum: "[I]f the grantor had made the conveyance in question in consideration of the obligation of the defendant for 10 years, and defendant had fully discharged that obligation, he (the grantor) would not have been allowed to recover the property so conveyed, on the ground that such a contract is unknown to our law." Id. at 356, 44 So. at 125.
109. "[I]t was entirely competent for [the transferor] to convey the property . . . to his nephew in consideration of the obligation which the latter is shown to have assumed, it appearing that the grantor reserved 'to himself enough for his subsistence.' It is true that, whether a particular contract is a sale or a donation is a question of law, but it may be neither the one nor the other, and yet operate a transfer of property." Id. at 354, 44 So. at 125. The court relied on Articles 1777 and 1900 of the Code, and two cases, i.e., Phelan v. Wilson, 114 La. 823, 38 So. 570 (1905) and Helluin v. Minor, 12 La. Ann. 125 (1875).
Although recognizing that a then-recent case had said that "'contracts whereby individuals have transferred their property to others, burdened with the charge that they should be maintained during their lives, have heretofore been dealt with . . . as onerous donations'; and that the court found no reason for pursuing a different course in that case," the court in Thielman distinguished the case on the ground that the donor had conveyed all her property and the transfer therefore fell within the proscription of Article 1497. But the court did not rest there; it further noted: "It does not follow, however, because of that jurisprudence that every transfer of property which has for its consideration an obligation of maintenance is to be regarded as a donation." The contract based upon an obligation of support in the transferee was likened to that in a case which appears to have involved a commutative, aleatory contract. It should be noted that the court in Thielman had earlier, in repulsing an attack based upon lesion beyond moiety, referred to the transaction in question as an aleatory contract.

Since the court nowhere mentioned Article 1526, the Thielman case apparently cannot be explained away on the ground that it involved an onerous donation not subject to the rules peculiar to donations. Thielman thus seems authority for the proposition that a transferor may make a contract not a donation (and thus not subject to the restrictions placed on donations) with another, the "consideration" furnished by the other being an obligation on his part to support the transferor, provided the latter has retained enough for his subsistence in the event the former fails to perform his obligation. In the event of such a breach, it is submitted that the aggrieved party should be allowed such damages as he actually sustains and proves. The case further intimates in dictum that even if the party to be supported does not retain property sufficient for his sub-

111. 119 La. at 355, 44 So. at 125.
112. Id. at 356, 44 So. at 125.
114. 119 La. at 353, 44 So. at 124.
115. Note also that the transferee had fully complied with the obligations of support and to bury the transferor when dead. However, the transferor only lived about 2 1/2 months after the transfer of the property. Since the property was valued at $3,300, it seems unlikely that the value of the services and expenses of the burial exceeded two-thirds of this figure in the year 1907. Thus it appears that a mere application of Article 1526 could not have saved the transaction being classified as a donation subject to the rules peculiar to donations.
sistence, nevertheless the transaction is not *ipso facto* a donation.\(^1\)

**Article 1526 and Its Effect on Onerous Donations**

The action to annul a donation *omnium bonorum* often is not brought until years after confection of the donation. Then, if the donee has satisfied the condition of supporting the donor, the expenditures of support are held to be the "charge imposed" mentioned in the onerous donation of Articles 1524 and 1526. Consequently, since Article 1497 is a rule peculiar to donations, should the facts show that the value of the thing given\(^1\) did not exceed by one-half the value of the charges imposed,\(^1\) it has no application.\(^2\) Similarly, on these facts neither Articles

\(^1\) See the quotations from *Thielman* in notes 108-09 *supra*, and in the text at note 112 *supra*.

The following cases, none of which (as best can be determined from the opinions) dealt with a transferor who left himself destitute by the conveyance, seem to lend support to the *holding* in *Thielman*: Balzrette v. Hughes, 232 La. 509, 94 So. 2d 649 (1957) ("obligation" of transferee to furnish home for transferor allowed as part consideration for conveyance); Citizens Bank & Trust Co. v. Willis, 188 La. 127, 162 So. 822 (1935) (agreement to care for transferor valid consideration for transfer; contract not contrary to law or public policy even though agreement not recited in act); Moore v. Wartelle, 39 La. Ann. 1067, 3 So. 384 (1887) ("obligation" assumed by transferee to support transferor counted as part of consideration); Ryals v. Ryals, 199 So. 481 (La. App. 2d Cir. 1940) ("obligation" of support good consideration for transfer of immovable property). See notes 135, 136 *infra*. See also the discussion of *Thielman* and *Garcia v. Dulcich*, 237 La. 359, 111 So. 2d 309 (1959) in *The Work of the Louisiana Supreme Court for the 1958-1959 Term—Conventional Obligations*, 20 LA. L. REV. 224, 225 (1960).

Another case of interest in this area is Quarles v. Quarles, 179 So. 512 (La. App. 2d Cir. 1938). It appears that the court there held the transferee obligated to the transferor when the consideration for the transfer was partly cash and partly an obligation of the transferee to support the transferor for life. In fact, after a determination that the services were worth $6 per month, the court ordered the transferee to pay to the estate of the transferor that amount for each month that the transferor had not lived with the transferee prior to her death.

118. The "value of the thing given" refers to its value at the time of donation, not the time of suit. *Steen v. Louisiana Central Lumber Co.*, 2 La. App. 39 (2d Cir. 1925).

119. No case was found which discussed the possibility of valuing the "charges imposed" as of the time of donation by actuarial standards.

120. *Whitman v. Whitman*, 206 La. 1, 18 So. 2d 633 (1944); *Potts v. Potts*, 142 La. 906, 77 So. 786 (1918); *Succession of Dolper v. Feigle*, 40 La. Ann. 848, 6 So. 106 (1888); *Landry v. Landry*, 40 La. Ann. 229, 3 So. 728 (1888); *Pugh v. Cantey*, 33 La. Ann. 786 (1881); *Lafield v. Balzrette*, 21 So. 2d 156 (La. App. 2d Cir. 1945). *Contra*, Lemoine v. Lemoine, 27 So. 2d 650 (La. App. 2d Cir. 1946). In the last case, the court, after referring to the *Landry* and *Lafield* cases, *supra*, said: "From our examination of all the authorities cited in the briefs in this case and others that we have found, we are of the opinion that Articles 1514 and 1526, R.C.C., have no reference to Article 1497, R.C.C., but on the contrary refer to excessive donations not reprobated by the provisions of Article 1497." *Id.* at 653. No reason is given to support this opinion. The case seems clearly wrong on this point. However, notwithstanding the court's choice to base its decision on this ground, it agreed with the district judge's finding that the
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1536 and 1538, requiring a donation inter vivos to be by authentic act,121 nor Article 1533, prohibiting the donor from reserving to himself the usufruct of the donated immovable property,122 apply. Again, the party alleging invalidity of the transaction has the burden of proving that the value of the object given exceeds by one-half that of the charges imposed.123 If he bears his burden, although the donation cannot be reduced below the expenses incurred by the donee in meeting the charge,124 the amount exceeding such expenses may be subject to reduction125 or collation.126

Although no definitive decision was found in point,127 it is donee had failed to meet the condition or charge imposed on him, and the result can be sustained on this basis.

Of course, if the value of the thing given does exceed the value of the charge by one-half, Article 1497 is applicable. Baker v. Baker, 125 La. 969, 52 So. 115 (1910); Lagrange v. Barre, 11 Rob. 302 (La. 1845).

121. Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944); Potts v. Potts, 142 La. 906, 77 So. 756 (1918). The opinion in Castleman v. Smith, 155 La. 367, 99 So. 298 (1924) may be contra by implication. Though not clear, it appears the court found the transaction was an onerous donation not subject to the rules peculiar to donations, then concluded the "defect" of its not being in notarial form had prescribed.

122. Succession of Dopler v. Feigle, 40 La. Ann. 848, 6 So. 106 (1888). It should be noted that the Feigle case also held that if the transferor has reserved the usufruct, the value of the usufruct is deducted from the total value of the property transferred in computing "the value of the object given" for purposes of Articles 1523 and 1526. But if the usufruct is given to a third person (Article 1533 does not prohibit this, so that the donation must be attacked on some other ground) apparently no such deduction is made; moreover, the donee cannot count the value of the usufruct as part of the burden or charge imposed on him by the donor. The usufruct of the property given in the act of donation to one other than the donor cannot be counted as "onerous in so far as the donee [is] concerned," for "the donee only [has] to recognize the usufruct." Latour v. Guillory, 130 La. 570, 578, 58 So. 341, 344 (1912).

123. Castleman v. Smith, 148 La. 233, 86 So. 778 (1920); Potts v. Potts, 142 La. 906, 77 So. 786 (1918); Hearsey v. Craig, 126 La. 824, 53 So. 17 (1910); Lafield v. Balzrette, 21 So. 2d 156 (La. App. 2d Cir. 1945).

124. LA. CIVIL CODE art. 1514 (1870) ("Donations, by which charges are imposed on the donee, can never be reduced below the expenses which the donee has incurred to perform them"); Landry v. Landry, 40 La. Ann. 229, 3 So. 728 (1888).

125. No case was found that held this, but the result is clearly dictated by the language of Article 1514. See the cases discussed in note 126 infra, where this rule was stated in collation cases, apparently by analogy to Article 1514, which deals with reduction. Also, the cases applying Article 1514's companion article concerning remunerative donations, Article 1515, could well be used as authority by analogy. See the cases cited in notes 162, 163 infra.

126. In re Andrus, 221 La. 906, 60 So. 2d 890 (1952); Steen v. Louisiana Central Lumber Co., 2 La. App. 39 (2d Cir. 1925). As to the possibility of this rule's having been stated as dictum in these cases, see note 127 infra. Article 1514 of the Civil Code treats of the reduction of excessive donations. Although the court in these cases did not mention this article, apparently it was resorted to by analogy for the proposition stated in the text. Furthermore, the court in Andrus relied for support of the proposition advanced on cases which dealt with reduction. A similar problem is encountered in remunerative donations. See note 168 infra.

127. In re Andrus, 221 La. 996, 60 So. 2d 890 (1952) may be taken to sup-
submitted that if application of Article 1526\textsuperscript{128} reveals the transfer is an onerous donation, but not subject to the rules peculiar to donations, then the transfer should be upheld for the whole, not just the value of the charge, even if the whole exceeds both the value of the charge and the disposable portion. This is so because the articles relating to "collation"\textsuperscript{129} and reduction\textsuperscript{130} are rules peculiar to donations, and should not be applied where the transaction is an onerous contract by virtue of Article 1526.\textsuperscript{131}

Sundry Exhortations on Onerous Donations

If the value of the object given does not exceed by one-half the value of the charge imposed, the ordinary rules of contract

\textsuperscript{128} Many early cases failed to determine the nature of the transaction by applying the test of Article 1526. \textit{E.g.}, Latour v. Guillory, 130 La. 570, 58 So. 341 (1912); Succession of Dopler v. Feigle, 40 La. Ann. 848, 6 So. 106 (1888); Landry v. Landry, 40 La. Ann. 229, 3 So. 728 (1888); Pugh v. Cantey, 33 La. Ann. 786 (1881); Lagrange v. Barre, 11 Rob. 302 (La. 1845). However, later cases have tended to apply it. \textit{E.g.}, \textit{In re Andrus}, 221 La. 996, 60 So. 2d 899 (1952); Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944); Lufield v. Balzrette, 21 So. 2d 156 (La. App. 2d Cir. 1945); Steen v. Louisiana Central Lumber Co., 2 La. App. 39 (2d Cir. 1925).

\textsuperscript{129} Whether the test has been met is a matter of proof to be decided by a trial on the merits. \textit{In re Andrus}, supra. Conceding that difficult evaluation problems will sometimes be encountered in making this computation, it nevertheless is clearly required in view of the explicit language of Article 1526, which merely makes specific the general rule of Article 1524.

\textsuperscript{130} LA. CIVIL CODE arts. 1227-1288 (1870).

\textsuperscript{131} The cases cited in note 132 \textit{infra} stand for the proposition that the
law apply to the conveyance. Consequently, the contract may, as may any other onerous contract, be dissolved for nonperformance of the charge or condition. A recent case intimated there is a presumption that the condition of support and care has not been complied with if the donor leaves the home of the donee, for "it would be unnatural for him to leave" without cause.

If the sole consideration for the transfer is the donee’s promise to care for the donor, the transfer cannot be upheld as a sale because it lacks a price in current money. However, the expenses incurred in fulfilling the promise to support the transferee can be counted in a sale as part of the consideration paid by the transferee. Further, if the obligation to support is

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The opinion in Garcia v. Dulich, supra, pointed out that it was immaterial whether the test of Article 1526 was met if the condition of support had been violated because the contract then could be dissolved whether it was a donation or an onerous contract. The court relied on Moore v. Sucher, supra, and La. CIVIL CODE arts. 2045, 2046, 2561, 2130 (1870).

Likewise, even an onerous donation subject to the rules of donations that does not run afoul of Articles 1497, 1533, and 1536, is subject to revocation, if the donee fails to maintain the condition of support. La. CIVIL CODE art. 1559 (1870); Hurley v. Hurley, 146 La. 337, 83 So. 643 (1920).

Although it may be an implied condition of the onerous donation that the donee will not dispose of the property transferred to him, this condition is not violated by a sale that is absolutely necessary for compliance with the condition of support. Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944).


135. Harris v. Wafer, 113 La. 822, 37 So. 768 (1904); Hearn v. Craig, 126 La. 824, 53 So. 17 (1910) (dictum). Contra, Citizens Bank & Trust Co. v. Willis, 183 La. 127, 162 So. 822 (1935) (mother not in need; son assumed obligation to support; act recited cash consideration of $3,000). The Citizens Bank case appears not to accord with La. CIVIL CODE arts. 2439 and 2464 (1870), insofar as it sustained the conveyance as a sale. However, the result seems justifiable under the decision in Thielman v. Gahlman, 119 La. 350, 44 So. 123 (1907), which recognized that although neither a sale nor a donation may be involved, yet a conveyance may be upheld as an innominate contract transitive of property. La. CIVIL CODE art. 1777 (1870) was relied on. See notes 100-17 supra, and accompanying text.

not expressed in the act of transfer, Article 1900\textsuperscript{137} can be invoked to show the true “consideration” was not that recited in the act.\textsuperscript{138} Even though the price recited was not paid, if the value of the services rendered in fulfilling the condition of support exceeds two-thirds the value of the thing transferred, the transaction may be upheld as an onerous donation not subject to the rules peculiar to donations.\textsuperscript{139}

The fairly recent Supreme Court case of \textit{Whitman v. Whitman}\textsuperscript{140} involved several interesting issues. It was the only case found in which the charge imposed upon the donee was to support not the donor, but a third party — the mother of the contracting parties. The donation was upheld since the total value of the services rendered in support of the mother before and after the conveyance exceeded two-thirds the value of the property conveyed. Thus, the court expressly recognized that a donation may at the same time be both an “onerous donation, and to some extent, a remunerative donation,”\textsuperscript{141} and that addition of the value of the services to be recompensed and those later rendered is proper in applying Article 1526.\textsuperscript{142}

\textit{Importance of Who Is the Plaintiff}

From the jurisprudence concerning suits to annul onerous

\textit{Included, inter alia, services rendered transferor; services held part consideration).}

\textsuperscript{137.} \textsc{La. Civil Code} art. 1900 (1870).

\textsuperscript{138.} Citizens Bank & Trust Co. v. Willis, 183 \textsc{La.} 127, 162 So. 822 (1935); Thielman v. Gahlman, 119 \textsc{La.} 350, 44 So. 123 (1907); Ryals v. Ryals, 199 So. 481 (\textsc{La. App. 2d Cir.} 1940). Parol evidence is admissible to show the true nature of the transaction. Ducote v. Stark, 87 So. 2d 770 (\textsc{La. App. 2d Cir.} 1956), and cases cited therein at 773.

\textsuperscript{139.} Landry v. Landry, 40 \textsc{La. Ann.} 229, 3 So. 728 (1888); Lafie\textsuperscript{140.} d v. Balarette, 21 So. 2d 156 (\textsc{La. App. 2d Cir.} 1945).

\textsuperscript{140.} 206 \textsc{La.} 1, 18 So. 2d 633 (1944).

\textsuperscript{141.} \textit{Id.} at 17, 18 So. 2d at 638.

\textsuperscript{142.} \textit{Accord, Hearsey v. Craig}, 126 \textsc{La.} 824, 53 So. 17 (1910). Since, in \textit{Whitman}, the donee was the child of the person to be cared for, and since the latter was in penurious circumstances, the donors objected that the donee was under an existing obligation to render support for her by operation of law. (This obligation is discussed in detail in the text following note 44 supra.) The court disposed of this by noting that not only was the donee under such a duty, but “it was imposed also upon all of the donors, as a solidary obligation.” 206 \textsc{La.} at 21, 18 So. 2d at 640. Thus, assumption of the full burden of the mother’s support was more than the donee was obligated by law to do because it denied the donee a right to demand contribution from the other solidary obligors, the donors, and could be counted as a charge imposed on him by his contract with them. See notes 50-53 supra, and accompanying text, for discussion of the contribution question. Since the contract between donors and donee could not affect the rights of the mother, the donors were of course still obligated to care for their mother under Article 229 if penurious circumstances were again to befall her.
donations it appears to be of prime importance whether suit to annul is brought by the donor or by another. In fourteen of seventeen cases found in which the donor was attacking the transfer, the donation was annulled. But of seventeen cases in which either heirs or creditors of the donor were the plaintiffs, the donation was upheld in fifteen, one was remanded for trial on the merits, and the donation was annulled outright in only one. It seems beyond cavil that this is not mere coincidence. More likely, it is an unexpressed recognition by the courts that if the donor failed to attack the donation during his life, he must have been satisfied with the care rendered him by the donee in fulfillment of his charge.

**RENUMERATIVE DONATIONS**

*IN RECOGNITION OF SERVICES RENDERED*

*The Relationship of Civil Obligations, Remunerative Donations, and Article 1526*

Presumably, when the lawmakers came to deal with remu-

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143. *Annulled*: Garcia v. Dulcich, 237 La. 359, 111 So. 2d 309 (1959); Weems v. Medak, 231 La. 923, 93 So. 2d 217 (1957); Welch v. Forest Lumber Co., 151 La. 960, 92 So. 400 (1922); Hurley v. Hurley, 146 La. 337, 83 So. 643 (1920); Cox v. Busch-Everett Oil Co., 131 La. 817, 60 So. 256 (1912); Jaco v. Jaco, 129 La. 621, 56 So. 615 (1911); Baker v. Baker, 125 La. 969, 52 So. 115 (1910); Roques v. Freeman, 125 La. 60, 51 So. 68 (1909); Harris v. Wafer, 118 La. 822, 37 So. 768 (1904); Beaullieu v. Monin, 50 La. Ann. 732, 23 So. 937 (1886); Lagrange v. Barre, 11 Rob. 302 (La. 1845); Ducote v. Stark, 87 So. 2d 770 (La. App. 2d Cir. 1956); Lemoine v. Lemoine, 27 So. 2d 650 (La. App. 2d Cir. 1946); Hearon v. Davis, 8 So. 2d 738 (La. App. 2d Cir. 1942).

*Not annulled*: Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944) (donors not person to be supported); Lafreet v. Balzrette, 21 So. 2d 156 (La. App. 2d Cir. 1945) (services rendered clearly exceeded not only two-thirds but entire value of thing given); Nunge v. Cegretto, 3 Orl. App. 39 (La. App. Orl. Cir. 1905).


145. *In re Andrus*, 221 La. 596, 50 So. 2d 899 (1952).


147. At least two cases expressly distinguished prior cases on the ground that they had concerned suits in which one other than the donor was attacking the donation. Cox v. Busch-Everett Oil Co., 131 La. 817, 60 So. 256 (1912); Harris v. Wafer, 113 La. 822, 37 So. 708 (1904).

148. One case recognized this expressly: Bernard v. Noel, 45 La. Ann. 1135, 1136, 13 So. 737 (1893) ("[A]s no complaint was ever made to the contrary, we must presume [the donee] complied with his obligations.").
nerative donations, they were not undertaking primarily to characterize transfers designed to satisfy an existing civil obligation, because such transfers would constitute merely a giving in payment (an onerous contract). Rather, their primary object apparently was to deal with transfers intended to compensate for services rendered in the past which, although appre-
ciable in money, would not give rise to a civil obligation to pay. And they provided that transfers of this kind would be treated as donations if — and as onerous contracts unless — the value of the thing given exceeded by one-half the value of the services rendered. However, a person owing a civil obligation might transfer to his obligee property considerably more valuable than the obligation he owes to express his appreciation for the benefit he has received. In this event, the transferor might be considered moved by a spirit of liberality to the extent that the value of the property transferred exceeds the amount of the indebtedness. That the lawmakers intended to deal with this situation in adopting the rules relating to re-
munerative donations is not clear. It seems clear, however, that these rules are susceptible of application to such a case; but if applied, the transfer should never be reduced below the amount of the debt.

149. LA. CIVIL CODE arts. 1513, 1523, 1525, 1526 (1870).
150. See 3 TOULLIER-DUVERGIER, LE DROIT CIVIL FRANCAIS n° 186 (6th ed. 1846-48): “The remunerative donation is that which is made to compensate services rendered to the donor or his family: . . . . If the services rendered have a monetary value for which the donee has a right of action to enforce payment, the contract has of a donation nothing but the name.” (Translation from the original French by Carlos E. Lazarus, Associate Professor of Law, Louisiana State University.)

151. See note 200 infra for a discussion of the giving in payment.
152. LA. CIVIL CODE art. 1525 (1870).
153. This is apparently the manner in which the French treat such transactions. See Aubry et Rau et Esmein, Droit civil § 644 (6th ed. 1954): “[T]hese acts of disposition will be subjected to the rules of donations only to the extent that the amounts are considered exaggerated remunerations.” (Translation from the original French by Carlos E. Lazarus, Associate Professor of Law, Louisiana State University.)
154. The argument advanced in note 77 supra, dealing with the exclusiveness vel non of natural obligations listed in Article 1758, suggests that Article 1526 may be applicable to cases involving an existing civil obligation. However, the argument would seem to be supportable on a contrary conclusion, since the words used — “in which a duty to pay would never arise” — could refer to a natural
Applicability of Article 1526 to Donations Mortis Causa

Although Articles 1523 through 1526 appear in a chapter of the Civil Code that deals with donations inter vivos,\textsuperscript{3} \textit{Succession of Henry}\textsuperscript{158} held their provisions relative to remunerative donations\textsuperscript{157} were likewise intended to apply to donations mortis causa.\textsuperscript{158} By necessary implication, this holding extended Article 1526 to exempt remunerative donations, if they met the test of that article, from those rules that are peculiar to all donations, whether inter vivos or mortis causa.\textsuperscript{159} Since most at-obligation in the context employed; and the hypothetical situation excluded by hypothesis the existence of a civil obligation. Note 77 \textit{supra} dealt with the situation where the value of the thing given did not exceed by one-half the value of the services, and the services were rendered under circumstances such that some kind of duty to pay had arisen. The discussion in the text accompanying and preceding this note deals with a situation in which the value of the thing given greatly exceeds the value of the services rendered, and again a duty to pay, specifically, a civil obligation, had arisen. In the former situation it would appear inequitable to reduce the transfer to the value of the services. See note 77 \textit{supra} (2d \textsuperscript{1}). Yet, in the latter situation, there appears no good reason to allow the transfer to stand for the full value, regardless of how much this value may exceed that of the services, merely because there was an original civil obligation to pay for the services. This problem suggests again that perhaps the safest path to characterizing such a transaction lies in ascertaining the transferor's purpose, motive, or cause. See generally Smith, \textit{A Refresher Course in Cause}, 12 \textit{La. L. Rev.} 2 (1961).

\textsuperscript{155} \textit{La. Civil Code} ch. 5, "Of donations inter vivos (between living persons)" (1870). Articles 1523 and 1526 expressly refer to donations inter vivos.

\textsuperscript{156} 158 \textit{La.} 516, 104 So. 310 (1925).

\textsuperscript{157} Generally, donations mortis causa will be remunerative rather than onerous. However, it would seem possible that an onerous donation may be made mortis causa, \textit{i.e.}, where the charge is to support someone other than the donor. Cf. Whitman \textit{v.} Whitman, 206 \textit{La.} 1, 18 So. 2d 633 (1944) (donation inter vivos; charge on donee to support mother of donors). It is submitted that, should such a case ever arise, the rationale of the \textit{Henry} case is broad enough to include onerous donations mortis causa within its rule.

\textsuperscript{158} \textit{Henry} has universally been followed on this point. \textit{E.g.}, \textit{Succession of Formby}, 243 \textit{La.} 120, 142 So. 2d 157 (1962); \textit{Succession of Formby}, 127 So. 2d 852 (\textit{La. App. 2d Cir.} 1961); \textit{Succession of Forestier}, 11 So. 2d 253 (\textit{La. App. Orl. Cir.} 1942) (dictum). These articles had been previously applied without discussion to donations mortis causa. \textit{E.g.}, \textit{Graves v. Graves}, 10 \textit{La. Ann.} 212 (1855); \textit{Succession of Fox}, 2 Rob. 292 (\textit{La. 1842}). The propriety of this was questioned and left unanswered in an earlier case, \textit{Succession of Jackson}, 47 \textit{La. Ann.} 1089, 17 So. 598 (1895), but it was not until the \textit{Henry} case, a century after the adoption of the articles, that the question was discussed in detail by the Supreme Court.

The court in \textit{Henry} relied on the relationship of numerous articles of the Code, and especially Article 1520, in determining that a remunerative donation could be made by donation mortis causa. 158 \textit{La.} at 522-24, 104 So. at 312-13. Also, the court was particularly impressed that "the right to make a remunerative donation in a last will and testament had passed . . . unchallenged" for a hundred years prior to this case. \textit{Id.} at 524, 104 So. at 313. This result seems justified both as an interpretation of the Code, and as a practical matter. There appears to be no objection to remuneration by will rather than by donation inter vivos for past services rendered. See Comment, 19 \textit{Tul. L. Rev.} 265, 269-72 (1944).

\textsuperscript{159} That is, as donations mortis causa were brought within the compass of
tacks on remunerative donations involve opposition of the donor's heirs or legatees to the donor's will, the holding of the Henry case has been extremely important.

It is submitted that in view of Henry and later cases Article 1526 is to be interpreted as if it read "the rules peculiar to donations inter vivos, and the rules peculiar to donations whether inter vivos or mortis causa" are inapplicable except when the value of the object given exceeds by one-half the value of the services. However, it would seem the rules peculiar only to donations mortis causa, such as those relating to form, capacity, and caducity are generally applicable even if the test of Article 1526 is met.

Reduction of Remunerative Donations

It has uniformly been held that a remunerative donation cannot be reduced below the value of the services rendered, even Article 1526, the rules controlling them were made inapplicable if the value of the services exceeded two-thirds that of the object given. This follows by necessary implication of the holding despite the court's statement: "The rules relative to donations inter vivos are not applicable to the bequest in this case, as the value of the services rendered exceed the value of the property." 168 La. at 526, 104 So. at 314. The rules peculiar only to donations inter vivos would not be applicable in any event to a bequest for it is a donation mortis causa.

It should be noted, however, that it would not be entirely accurate to say that Article 1526 exempts remunerative donations mortis causa from those rules peculiar only to donations mortis causa, i.e., Title II, Chapter 6 of the Louisiana Civil Code. These articles prescribe the rules for form, revocation, interpretation, caducity, etc., of testaments and legacies. It would seem a remunerative donation made by testament would have to conform to these rules regardless of the respective values of the thing given and services rendered. E.g., Succession of Forestier, 11 So. 2d 253 (La. App. Orl. Cir. 1942) (caducity). See note 183 (1st ¶) infra. The remedy of the renderer/legatee, should the donation run afoul of these rules, apparently would be a claim against the estate of the recipient, as discussed in text at pages 416-28 supra. See, e.g., Succession of Joublanc, 199 La. 250, 5 So. 2d 762 (1941) (revocation of will containing remunerative donation; recovery allowed); Vercher v. Roy, 171 La. 524, 131 So. 2d 658 (1939) (last will abortive for lack of form; recovery allowed). Cf. Caraway v. Leblanc, 1 La. App. 102 (1st Cir. 1924) (donation inter vivos to remunerate for services void; recovery allowed). If there are rules contained within these articles with which certain remunerative donations should not have to comply, this should be ascertained by a case-by-case approach. It would, however, seem safe to say that the rules contained in Title II, Chapters 3-5, and most of those in Chapter 2, fall within the ambit of Article 1526. When it is said in this Comment that the "rules peculiar to donations" do not apply (a term used for brevity), these restrictions must be kept in mind.

160. E.g., Succession of Formby, 243 La. 120, 142 So. 2d 157 (1962); Succession of Gilbert, 222 La. 840, 64 So. 2d 192 (1953).
161. See note 159 (2d ¶) supra. See also note 183 (1st ¶) infra.
162. Succession of Gilbert, 222 La. 840, 64 So. 2d 192 (1953); Kiper v. Kiper, 214 La. 733, 38 So. 2d 507 (1949); Succession of Faust, 189 La. 417, 179 So. 583 (1938) (collation); Winbarg v. Winbarg, 177 La. 1071, 150 So. 21 (1933); Graves v. Graves, 10 La. Ann. 212 (1855); Succession of Fox, 2 Rob. 292 (La. 1842).
though it infringes upon the legitime of forced heirs. These rulings clearly accord with Article 1513, found in that section of the Code dealing with reduction of donations inter vivos and mortis causa. It is commonly stated that no reduction can be made if the value of the services is equal to or greater than the value of the thing given, the negative implication being that if the value of the services is at all less than the value of the thing given, reduction may be required. However, Succession of Henry stated the rule as follows: “[A] remunerative donation may be reduced to the value of the services rendered, when the value of the object given exceeds by one-half that of the services. R.C.C. art. 1526.” (Emphasis added.) If the


164. LA. CIVIL CODE art. 1513 (1870) in Section 2, “Of The Reduction of Dispositions Inter Vivos Or Mortis Causa; . . . “Remunerative donations can never be reduced below the estimated value of the services rendered.”

165. Kiper v. Kiper, 214 La. 733, 38 So. 2d 507 (1949) ; Winbarg v. Winbarg, 177 La. 1071, 150 So. 21 (1933) ; Graves v. Graves, 10 La. Ann. 212 (1855) (by implication) ; Succession of Fox, 2 Rob. 292 (La. 1842) ; Succession of Formby, 127 So. 2d 352, 356 (La. App. 2d Cir. 1961) (“If [a remunerative donation is] established to be equal to or greater than the bequest, no reduction can be made; otherwise it must be reduced to the estimated value of the services.”). (Emphasis added.)

166. 158 La. 516, 104 So. 310 (1925).

167. 158 La. at 524, 104 So. at 313. Actually, the court in Henry found that the value of the services rendered exceeded the value of the legacy, so there was no necessity to invoke the rule as stated.

Although it detracts from the rule of Henry as given in the text, the court also stated: “But a remunerative donation cannot be reduced below the estimated value of the services rendered, if the value of such services should be little inferior to that of the gift, not even if such remunerative donation should trench upon the legitime of forced heirs. R.C.C. arts. 1525, 1513.” (Emphasis added.) Id. at 525, 104 So. at 313. The statement seems incorrect, for Article 1513 clearly says that the remunerative donation can never be reduced below the value of the services. Thus the emphasized portion of the quotation adds nothing to the sentence. It appears that the court, after having already stated its test by using the language of Article 1526, simply decided, for stylistic reasons, to vary the form and use the language of Article 1525 to arrive at the same result. Unfortunately, this did not succeed. More unfortunately, Henry was cited as standing for this latter proposition in Succession of Gilbert, 222 La. 840, 64 So. 2d 192 (1953).

The very recent case of Succession of Formby, 243 La. 120, 142 So. 2d 157 (1962) might indicate a return to the rule as property established by Henry despite its approval of certain language of a lower appellate court. The court in Formby said “[a remunerative] donation can never be reduced, even when forced heirs are concerned, below the value of the services rendered.” (Emphasis added.) Id. at ....... 142 So. 2d at 163. This statement in itself does not necessarily imply a retreat from the proper rule of Henry, for it merely states a minimum standard, i.e., in no case can a remunerative donation be reduced below the value of
value of the thing given is so approximated to the value of the services that reduction would not result if the Henry test were followed, it seems the transferor's intention was to pay for the services rendered by transferring what he considered a fair price. Furthermore, since Article 1513 states a rule peculiar to donations, it should not govern a remunerative donation classed as an onerous contract by virtue of Article 1526. Consequently, it is submitted that the Henry test is sound, and reduction to the value of the services should not be required unless the value of the object given exceeds by one-half the value of the services rendered.

The services; it does not say that in all cases such a donation will be reduced to the value of the services. But the court subsequently noted that the court of appeal had "properly observed and held . . . : 'The trial court concluded that the value of the services rendered justified the bequest without reduction. Obviously, the trial judge found that the value of the services rendered equaled or exceeded the value of the property bequeathed.'" Id. at ...., 142 So. 2d at 156. Again, the negative pregnant of this is that if the trial judge had not found that the value of the services equaled the bequest reduction would have been in order. Notwithstanding the approval of this language by the Supreme Court, it is suggested that Formby may be said to stand for the proposition that a remunerative donation is not to be reduced to the value of the services if the thing given does not exceed one-half the value of such services, for this was the result reached. On original hearing the court determined that the value of the thing given was $10,000. Id. at ...., 142 So. 2d at 156. Although the judgment was different on rehearing, nowhere is this valuation refuted. The value of the services was filed on rehearing at $250 per year. These services extended over a period of 33 years, 7 months, and 8 days, as appears from the Supreme Court opinion, supra, and the court of appeal opinion, Succession of Formby, 127 So. 2d 352 (La. App. 2d Cir. 1961). Thus, the services rendered were worth approximately $8402. This is less than the value of the thing given; yet the court did not reduce the legacy to the value of the services but let it stand in toto. It should be noted that the thing given did not, however, exceed by one-half (approximately $12,003) the value of the services.

168. Since the rules providing for collation, LA. CIVIL CODE arts. 1227-1288 (1870), are also peculiar to donations, it is submitted that they are likewise inapplicable in this situation, i.e., collation should not take place where the value of the donation does not exceed by one-half the value of the services rendered. Comment, 26 Tul. L. Rev. 203, 204 (1952) appears to agree with this view. In fact, this argument is more easily made than the argument regarding reduction. It has been held that collation is restricted to donations inter vivos. Succession of Meyer, 198 La. 53, 3 So. 2d 273 (1941); Jordan v. Filmore, 167 La. 725, 120 So. 275 (1929). Hence, it could be argued that the rules relating to collation, unlike those relating to reduction, are rules peculiar to donations inter vivos (Comment, 26 Tul. L. Rev. 203, 214-15 (1952)) and the problem discussed in note 159 (2d ¶) supra is avoided.

169. Succession of Faust, 189 La. 417, 179 So. 583 (1938) illustrates that the distinction can be important. Faust dealt with collation; yet the court applied Article 1513, apparently by analogy. The court found that $9000 in bonds had been given inter vivos by the deceased to the two defendants as a remunerative donation in recompense for their services in caring and nursing for her. The court further determined that the services were worth $1620 when appreciated in money. It was held that the defendants had to collate the $1620 difference between the value of the things given and the value of the services. Had the court used the test of reduction (by analogy for this collation case) set forth in Henry, it would have discovered that the value of the donation ($9000) did not exceed by one-half ($2190 [one-half of value of services] plus $1620 [value of services])...
Lack of Necessity of an Intention To Charge for the Services and Inapplicability of the Presumption-of-Gratuity Rule

Although some earlier cases might be interpreted to the contrary, Succession of Formby expressly recognized that intentions of the renderer to charge and of the recipient to compensate at the time services were rendered is not required as the basis for a remunerative donation; likewise, the presumption-of-gratuity rule concerning services rendered by a child to a parent not in need, which is merely a method of arriving at an intention to charge, was held inapplicable to a remunerative donation. The court properly noted that both rules apply only when suit is against the succession of the recipient on a contract basis in the absence of a valid donation.

equal $6570 (the value of the services rendered ($4380), and therefore this remunerative donation was not properly subject to the rules peculiar to donations, including collation.

170. E.g., Boggs v. Hays, 44 La. Ann. 859, 11 So. 222 (1892) (intention to charge); Placid Oil Co. v. Frazier, 126 So. 2d 800 (La. App. 2d Cir. 1961) (presumption of gratuity). Contra, Kiper v. Kiper, 214 La. 733, 38 So. 2d 507 (1949) (by implication, but only after the court had in dictum referred to the presumption of gratuity); Succession of Henry, 158 La. 516, 527, 104 So. 310, 314 (1925) (“The rights of [a] legatee . . . do not depend upon any contract of compensation with the decedent, or upon any intention on his part to have charged for his services, while his [donor] was alive. . . . The legatee is not suing . . . upon any contract, or upon a quantum meruit, for the recovery of the value of his services . . . ; but is claiming title to the property bequeathed to him.”).

171. 243 La. 120, 142 So. 2d 157 (1962).

172. “Succession of Henry and Kiper . . . amply support the proposition that services rendered gratuitously in the first instance may serve as a valid basis for a remunerative donation.” Id. at . . . , 142 So. 2d at 165. The Henry and Kiper cases each dealt with a remunerative donation to the donor's child; thus the presumption of gratuity resulting from the parent/child relationship can have no function in remunerative donation cases. Further, the court quoted the statement from Henry given in note 170 supra.

As to the requirement of an intention to charge, the court noted: “But those cases . . . involved demands against successions for services rendered, the claims being on contracts or quasi contracts. In none was a bequest made by the decedent, as here, to compensate for services performed.” (Emphasis added.) Ibid. Succession of Waechter, 131 La. 505, 59 So. 918 (1912), which had held that the services of a child do not support a remunerative donation, was distinguished on the ground that there the renderer was a minor living with his father at the latter's expense, and the services were compensated by the recipient's support of the renderer. 243 La. at . . . , 142 So. 2d at 165.

The majority opinion on original hearing had erroneously relied on the inapposite cases requiring an intention to charge and invoking the child/parent presumption of gratuity. “These were not only such services that would be presumed gratuitous because of the relationship of the parties (Succession of Daste, 125 La. 657, 61 So. 677 . . . [1910]; Succession of Templeman, 134 La. 798, 64 So. 718 [1914] and Muse v. Muse, 215 La. 238, 40 So. 2d 21 [1949]), but were such services that would be regarded as gratuitous in the absence of any family relationship.” Id. at . . . , 142 So. 2d at 161. Perhaps the court had in mind the requirement of Article 1525 that the services rendered be appreciable in money, and felt that these were not such services. See note 77, and notes 183-88 and accompanying text, supra.
It is suggested, however, that whether the donee is a child or other close relative of the donor is relevant in determining the parties’ intention as to compensation; and the existence of an intention to charge for the services would strongly support an inference that the services are appreciable in money, without which the services will not support a remunerative donation.

A Remunerative Donation Mortis Causa
As Remuneration for Services Rendered Subsequent to Its Confection

The court in Succession of Formby found that although the testatrix used the words “this being an onerous donation, he having provided for me during my lifetime,” she intended that the donation mortis causa be remunerative. Confection of the will had preceded the testatrix’ death by almost thirty-three years; but commencement of rendition of the services had preceded the will by less than nine months. Opponents contended that the value of services should be determined only up to the date of the will rather than up to the date of the testatrix’ death. On rehearing, a sharply divided court held “it was error to hold initially that a donation of that kind is invalid insofar as it purports to compensate for services which the testator anticipates are to be performed subsequent to the drafting of the testament.” It is submitted that the final decision in Formby is correct, for the language “provided for me during my

173. 243 La. 120, 142 So. 2d 157 (1962). The court of appeal decision is at 127 So. 2d 352 (La. App. 2d Cir. 1961).
174. This was expressly recognized in the court of appeal (127 So. 2d at 354) and in the Supreme Court on original hearing. 243 La. at ...., 142 So. 2d at 159. The opinion on rehearing referred to the transaction throughout as a remunerative donation.
175. 243 La. at ...., 142 So. 2d at 160. However, the opinion in the court of appeal indicated that only 3 months elapsed between commencement of rendition of the services and confection of the will. 127 So. 2d at 354. At any rate, only a brief period had elapsed.
176. On original hearing, the court agreed with this contention, saying “the disposition is in remuneration for a past act and must be limited to services rendered by the donee prior and up to the date of the confection of the donation and does not extend to services rendered thereafter.” 243 La. at ...., 142 So. 2d at 160.

The court on original hearing had previously said: “A remunerative donation is one having for its object the recompense of services rendered. It does not and cannot compensate for services to be rendered in futuro.” Id. at ...., 142 So. 2d at 159.

177. The court on rehearing, as on original hearing, was split four to three. Justice Sanders was the “swingman.”
178. 243 La. at ...., 142 So. 2d at 164. “[The testatrix] intended that the donation made by her was to compensate her son . . . for all services rendered up to the time of her death, which bequest is not prohibited by law.” Id. at ...., 142 So. 2d at 163. The court apparently felt that either two strong precedents would have to be overruled or the judgment on original hearing reversed: Kiper
lifetime” apparently evidences an intention of the testatrix to compensate for services rendered until her death. Since this is also the effective date of the donation mortis causa, the donation in fact remunerates for past services. And, as the court pointed out, the Civil Code does not expressly prohibit such a bequest.

v. Kiper, 214 La. 733, 38 So. 2d 507 (1949) and Succession of Henry, 158 La. 516, 104 So. 310 (1925). Both these cases had evaluated the total worth of the services by calculating together those rendered before and those rendered after the date the will was written. The Kiper case was mentioned in Formby on original hearing, but the court said that apparently this issue was not called to the court's attention in Kiper. However, on rehearing the court in Formby noted that brief of counsel in Kiper had raised the point; thus, although the court in Kiper did not dwell on the point, it must have considered it.

Another case relied on by the majority on original hearing was distinguished on the language of the will, which showed that it was the testator’s intention to compensate for past services only. Delaureal v. Roguet's Succession, 177 La. 815, 149 So. 464 (1933). The will there read: “I give and bequeath unto [plaintiff], as remuneration for years of medical services, personal, close and devoted attention . . . .” Id. at 816, 149 So. at 464. The testator died about seven months after confection of the will. The court held that the testator intended only to remunerate for past services. “It is written in the present tense. The language is not ambiguous. It relates to, and in our opinion it clearly expresses, the testator’s intention to remunerate the legatee for services rendered during the years preceding the date of the will.” Id. at 817, 149 So. at 464. The court on rehearing in Formby said the case was inapposite for “the will now before us . . . clearly expresses a desire to compensate for services rendered to the testatrix until her death.” 243 La. at ...., 142 So. 2d at 165. This distinction seems valid since there is no mention of an intention to compensate for services rendered during a “lifetime” in Delaureal as there is in Formby, but only of an intention to remunerate for years of services. However, the court on rehearing did not mention another case relied on in the original hearing which seems to support the court’s view on original hearing. Succession of Gilbert, 222 La. 840, 64 So. 2d 192 (1953). The same Justice wrote the opinion in Gilbert and the majority opinion on rehearing in Formby. In Gilbert a span of slightly more than three years separated the writing of the will and the death of the testator. In arriving at a proper evaluation of the services rendered, the court noted without discussion and parenthetically that “(the district judge limited the proof to this date [the date of the confection of the will] since the testator referred to services rendered in the past),” and then evaluated the services without regard to those rendered after confection of the will. Id. at 849, 64 So. 2d at 135. It is suggested, however, that Gilbert could have been distinguished on the same ground as was Delaureal v. Roguet's Succession, supra. The will in Gilbert read: “I will and bequeath to my daughter . . . in compensation for the services which she has rendered, day and night to my late wife, to our deceased daughter and to me.” Id. at 842, 64 So. 2d at 193. This language seems to indicate an intention of the testator to compensate only for services rendered before confection of the will; it refers to services rendered to persons already deceased and does not mention remuneration during the “lifetime” of the testator.

179. LA. CIVIL CODE art. 1469 (1870).

180. Succession of Formby, 243 La. 120, 142 So. 2d 157, 164 (1962) (“A donation mortis causa cannot and does not take effect, as a disposition of property, until the death of the testator (Revised Civil Code Article 1469). Consequently, when the remunerative donation in a testament becomes so effective, and title to the bequeathed property is passable, it then constitutes a payment (a dation en paiement) in keeping with an expressed desire of the testator to compensate for all services rendered prior to death.”).

181. Id. at ...., 142 So. 2d at 164.

182. Another ground on which the transaction could have been upheld in
A donation is not remunerative under Article 1525 unless the services rendered are appreciable in money. The jurisprudence has held the following services unappreciable in money: professional services of a priest; services of friendship and affection resulting from a close, intimate relationship; services rendered each other by husband and wife during marriage; and routine chores of a minor child that he renders while living with his parents. The donee must prove that he

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*Formby* is that the donation was both remunerative and onerous. The jurisprudence expressly recognizes such a possibility. *Whitman v. Whitman*, 206 La. 1, 18 So. 2d 633 (1944); *Hearsey v. Craig*, 126 La. 824, 53 So. 17 (1910). Since the will styled itself onerous, it could well have been held that the language “he having provided for me during my lifetime” constituted an implied charge upon the donee-legatee to continue to render the services as he had been doing in the past nine months. The renderer did so in fact. One of the dissents to the opinion on rehearing hints at this possibility. 243 La. at ......, 142 So. 2d at 167.

183. A remunerative donation mortis causa has been held not heritable; so, where the legatee-renderer died before the testator, his share of the legacy passed to the testator’s legal heirs. *Succession of Forestier*, 11 So. 2d 253 (La. App. Orl. Cir. 1942). The case is approved in Comment, 19 Tul. L. Rev. 265 (1944). It is not possible to tell from the opinion whether the donation was one subject to the rules peculiar to donations, for the court merely mentioned Article 1526 without going through the process prescribed by that article. However, in this instance it would not seem to matter whether the test of Article 1526 has been met. The donation lapsed not because it was remunerative — and regardless of whether it was subject to the rules peculiar to donations — but because it was by will. The caducity prescribed by *La. Civil Code* art. 1697 (1870) applies only to a “testamentary disposition” — a donation mortis causa. See the discussion in note 159 (2d ¶ supra. Nevertheless, it seems the right to compensation which the renderer had would be heritable. See *La. Civil Code* arts. 1997-2019 (1870). See generally Comment, 31 Tul. L. Rev. 324, 348 (1957). In this event, the rules considered at pages 416-28 supra would be pertinent.

It has been held that services rendered by the donee to one other than the donor will support a remunerative donation, at least if the donor was under obligation to the recipient. *White v. White*, 7 So. 2d 255 (La. App. 2d Cir. 1942) (husband failed to pay alimony to wife as ordered by court; services performed by children to support her, named as consideration in deed, will support transfer of immovable property from husband to children if value of property does not exceed by one-half value of services).

In *Succession of Viola*, 138 So. 2d 613 (La. App. 4th Cir. 1962), it was held that a transfer from the recipient to the renderer in the form of a sale could not be considered a remunerative donation when the stated consideration, in addition to the recognition of past services, consisted of cash previously advanced by the renderer to the recipient and the assumption of a mortgage on the property by the renderer. See notes 135-39 supra, and accompanying text, for similar holdings with respect to onerous donations.


185. Continental Oil Co. v. Tute, 211 La. 852, 30 So. 2d 858 (1947).


188. *Succession of Waechter*, 131 La. 505, 59 So. 918 (1912).
has in fact rendered the services, but the burden of proving that the test of Article 1526 has not been met is on the party attacking the donation. However, the rule has been announced that "where a remunerative donation exceeds the disposable portion, the donee or legatee carries the burden of [proving] the value of the services performed."  

If the renderer is indebted to the recipient in an amount exceeding the value of the services, compensation occurs by operation of law eliminating the possibility of a remunerative donation to the former in recognition of the services rendered. Likewise, recompense by the donor for his care and support by contributing to expenses of running the donee's household, and by performing services beneficial to the donee, may destroy care and support of the donor as the basis for a remunerative donation.

If the remunerative donation is determined not subject to the rules peculiar to donations, it must be recorded in the conveyance book rather than in the separate book provided for registering donations. Furthermore, such a donation is not revocable by reason of ingratitude of the donee. However, if the value of the thing given amounts to as much as one and one-

189. Succession of Formby, 243 La. 120, 142 So. 2d 157 (1962); Almond v. Adams, 221 La. 234, 59 So. 2d 132 (1952); Winbarg v. Winbarg, 177 La. 1071, 150 So. 21 (1933); Succession of Fox, 2 Rob. 292 (La. 1842); Heirs of Cole v. Cole's Executors, 7 Mart. (N.S.) 414 (La. 1829); Succession of Formby, 127 So. 2d 352 (La. App. 2d Cir. 1961).

190. Whitman v. Whitman, 206 La. 1, 18 So. 2d 633 (1944); Bowlus v. Whatley, 129 La. 509, 513, 56 So. 423, 424 (1911) (complaint that descendant in title of renderer failed to prove value of the services; no invasion of legitime: Held, "where a conveyance, purporting to be a remunerative donation, is attacked, on the ground that the value of the property donated exceeds by one-half that of the services intended to be compensated, the burden of making this proof is on the party making the allegation."); Hearsey v. Craig, 126 La. 824, 53 So. 17 (1910); Placid Oil Co. v. Frazier, 126 So. 2d 800, 802 (La. App. 2d Cir. 1961) ("Where the validity of a remunerative donation is questioned, the burden rests upon the opponents to prove that the value of the property donated exceeds by one-half the value of the services rendered.").

191. Succession of Formby, 127 So. 2d 352, 356 (La. App. 2d Cir. 1961). Accord, Winbarg v. Winbarg, 177 La. 1071, 150 So. 21 (1933); Succession of Fox, 2 Rob. 292, 293 (La. 1842) ("If a remunerative donation exceed the disposable portion, the donee or legatee is bound to prove the value of his services." Case remanded to determine if legitime invaded.).


half times the value of the services, the remunerative donation must be in proper form;\textsuperscript{196} and reservation of the usufruct by the donor will vitiate the transfer if the thing donated is immovable property.\textsuperscript{197}

**Suggestions for Treatment of Remunerative Donations**

Although some exaggerated and unlikely situations are imaginable where injustice might be worked,\textsuperscript{198} the Civil Code provides a workable, practical, and fair solution to the workaday problems involving remunerative donations. It is submitted that in the future the courts should rely even more on the provisions of Article 1526 to determine whether remunerative transactions are subject to the rules peculiar to donations.\textsuperscript{199} When a remunerative donation is attacked for defects of either form or substance, the first determination should be whether the services can be appreciated in money; if so, then their value and the value of the object given should be found. The test of Article 1526 should then be utilized: If the value of the thing given does not exceed by one-half the value of the services rendered, the remunerative donation is not a real donation, but an onerous contract not subject to the rules peculiar to donations.\textsuperscript{200} Of

\textsuperscript{196} Pulford v. Dinnick, 107 La. 403, 31 So. 879 (1902) (not a services-about-the-home case); Bordelon v. Brown, 84 So. 2d 867 (La. App. 2d Cir. 1956).

\textsuperscript{197} Almond v. Adams, 221 La. 234, 59 So. 2d 332 (1952); Placid Oil Co. v. Frazier, 126 So. 2d 800 (La. App. 2d Cir. 1961).

In Caraway v. Leblanc, 1 La. App. 102 (1st Cir. 1924), a remunerative donation was annulled on the ground it was proscribed by Article 1497. However, in Tucker v. Angell, 1 La. App. 577 (2d Cir. 1925), a remunerative donation attacked on the ground that it violated Article 1497 was upheld, the court distinguishing certain onerous-donation cases on the ground that "the service and attention mentioned in the deed [in this case] did not purport to be such as had been rendered." Id. at 580.

\textsuperscript{198} For example, a hypothetical situation might be posed in which the remunerative donation was for $1,500,000, and the services were found to be worth $1,000,001. Strict adherence to Article 1526 would mean that the renderer was getting $499,999 more than his services were worth. But it is difficult to imagine a situation in which services would reach such a figure.

\textsuperscript{199} Cases, new and old, have failed to use Article 1526 in adjudicating the cause before them. E.g., Succession of Faust, 189 La. 417, 179 So. 583 (1938); Graves v. Graves, 10 La. Ann. 212 (1855).

\textsuperscript{200} Several cases have said that rendition of services creates an obligation and that extinguishment of this obligation is a legal basis for the transfer of property. Kiper v. Kiper, 214 La. 733, 38 So. 2d 507 (1949); Succession of Henry, 158 La. 516, 104 So. 310 (1925); Bowles v. Whatley, 129 La. 509, 56 So. 423 (1911); Robinson v. Guedry, 181 So. 882 (La. App. Orl. Cir. 1938).

The courts have not been careful in defining the nature of this obligation. "However, as I view this case, if the act of conveyance is a donation, it is a remunerative donation [not subject to the rules peculiar to donations] which in effect means that the donor says—'I owe you something for what you have done for me and I now want to pay you by giving you such property.' It is paying a debt,
course, difficult questions of fact will arise in determining whether the services can be evaluated in money and in determining their value. If the courts adhere to the formula given in Article 1526, much confusion could be eliminated from this area of the law.  

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*either moral or legal.* (Emphasis added.) White v. White, 7 So. 2d 255, 257 (La. App. 2d Cir. 1942). However, see the discussion concerning moral and natural obligations at text accompanying notes 55-63 supra. Thus, the remunerative donation has at times been referred to as a giving in payment. Cases cited supra. *Contra,* Greco v. Millano, 13 Orl. App. 134, 140 (La. App. Orl. Cir. 1916) ("But we are sure that a dation en paiement is not a donation.") If a recipient sees fit to recompense his benefactor, and the appreciable monetary value of the services is little inferior to that of the gift (i.e., more than two-thirds of the value of the gift), then the legislature has said, in Article 1526, that the transferor cannot be considered moved by a spirit of liberality, but by a sense of duty. Thus, he is paying, not giving. And "giving in payment" seems as appropriate a name as any by which to refer to the transaction, although possibly not so technically correct as a "remunerative donation not subject to the rules of donations." Cf. Hebert & Lazarus, *Some Problems Regarding Price in the Louisiana Law of Sales,* 4 LA. L. REV. 378, 381 (1942): "Article 1523 of the Louisiana Civil Code, distinguishing between gratuitous donations and the so-called remunerative and onerous donations, has no counterpart in the Code Napoleon. Whatever the nature of these contracts, it is clear that they are not real donations when the purpose of the transfer is to recompense the transferee for services which he has rendered. . . . Accordingly, it is not only misleading but erroneous to refer to such transfers as donations for such transactions are in effect commutative contracts of a different nature. But the term 'remunerative or onerous donations' is widely used both here and in France." It has been said that a giving in payment requires a fixed price—Bowls v. Whatley, supra; Pulford v. Dinnick, 107 La. 403, 31 So. 879 (1902); Kleinpeter v. Harrigan, 21 La. Ann. 196 (1889) —but that a remunerative donation does not—Bowls v. Whatley, supra; Hearsey v. Craig, 126 La. 824, 53 So. 17 (1910); Robinson v. Guedry, supra. This is objectionable. The article relied on for the requirement that a *dation en paiement* have a fixed price is Article 2464, which provides that the "price of the sale must be certain, that is to say, fixed and determined by the parties." The giving in payment is subject to the rules of sale unless otherwise provided. L.A. CIVIL CODE art. 2659 (1870). It is suggested that this article means not that a monetary figure must be arrived at and mentioned in the sale, but that the parties must agree either to a price or on some way to determine one. If this is correct, then it would be necessary that a *dation en paiement* have a certain price only in this sense, and not in the sense used in the above cases. Furthermore, although it is not (Succession of Henry, supra) and should not be necessary that the parties fix and state the value of the thing given or the services rendered in the act of donation, yet it will become necessary to determine the "price" of the remunerative donation if it is subsequently attacked, in order to go through the process prescribed by Article 1526. This last is recognized in Hearsey v. Craig, 126 La. 824, 833, 53 So. 17, 20 (1910).  