Property Transactions Between Spouses

Stanford O. Bardwell Jr.
because certain remedies are accorded to the surviving spouse which operate to prevent this inequitable result. If the surviving spouse is also the succession representative, he can eliminate the problem by paying the taxes and then claim compensation from the heirs when he delivers their virile share to them. Appointment of anyone else as succession representative practically insures payment of the taxes, since his discharge is conditional on payment. Finally, if no succession representative is appointed, and the heirs refuse the pay the tax, the tax collector has the authority to obtain a judgment and order sufficient succession property sold to satisfy this judgment.

Conclusion

Although the usufruct of the surviving spouse has decreased in importance due to the advent of various public and private programs, it seems that the institution still plays an important role in affording financial security to the surviving spouse.

Some improvements on the present law may be suggested. First, the requirement of issue of the marriage should be strictly construed; second, the court should look to the intention of the testator to determine what constitutes a disposition adverse to the surviving spouse; third, the jurisprudence allowing the usufruct to continue after the survivor’s remarriage should be disapproved; and fourth, the surviving spouse should be required to post security.

Charles G. Gladney

PROPERTY TRANSACTIONS BETWEEN SPOUSES

Among the numerous articles of the Louisiana Civil Code dealing with marriage are those governing donations and contracts between spouses. But the code provisions are sketchy and the jurisprudence slight, especially on the rules affecting interspousal donations. The purpose of this Comment is to clarify the law of interspousal transactions generally.

82. See LA. CODE OF CIVIL PROCEDURE art. 2951 (1960); LA. R.S. 47:2407(c) (1950).
83. LA. R.S. 47:2408(b) (1950); id. 47:2409(c).
DONATIONS

Article 1532\(^1\) excepts interspousal donations from a number of rules applicable to ordinary donations inter vivos.\(^2\) Donations between spouses are governed by a special set of rules. Chapters 8 and 9 of Title II, Book III, of the Louisiana Civil Code are devoted entirely to donations made by marriage contract and donations made during the marriage. Chapter 8 regulates donations made by third parties under the marriage contract to the future spouses, or one of them, and to the future children of the marriage; chapter 9 regulates donations between spouses either by marriage contract or during the marriage. Certain rules in chapter 8, however, for donations by third persons to the future spouses are made applicable also to interspousal donations.\(^3\) Donations made during marriage are the more common today since the marriage contract is rarely used. However, the rules applicable to gifts by marriage contract are operative and bear examination, since they apply to donations of future, and present and future property between spouses during the marriage.\(^4\)

By Marriage Contract

General

Since all marriage contracts must be by authentic act,\(^5\) the formal requirement that inter vivos donations be in authentic form\(^6\) is readily satisfied for donations by marriage contract. The donor may dispose by marriage contract of the same quantum of his property as the law allows him to give a stranger.\(^7\) All such donations fall, however, if the marriage does not take

\(^1\) LA. CIVIL CODE art. 1532 (1870).
\(^2\) See, e.g., id. art. 1528 (inter vivos donation only comprehends present property); id. art. 1529 (inter vivos donation made on purely potestative condition null); id. art. 1530 (inter vivos donation null if made on condition of paying charges that do not exist at time of donation or are not listed in act of donation); id. art. 1531 (if donor reserves right to dispose of donated object, at donor's death the object belongs to the donor's heirs).
\(^3\) Id. arts. 1744, 1745.
\(^4\) Ibid.
\(^5\) Id. art. 2.328.
\(^6\) Id. art. 1536. Of course, gifts of movables made by delivery are not subject to any formality. See id. art. 1539.
\(^7\) Id. art. 1746; see also id. art. 1734. The disposable portion varies from one-third to two-thirds of the donor's property if the donor leaves children at his death, the amount depending upon the number of children. Id. art. 1493. If the donor leaves no children at his death, but leaves one or both surviving parents, the disposable portion will vary from two-thirds to three-fourths of the donor's property. Id. art. 1494. Compare id. art. 1494 with id. art. 911.
Thus present property donated and delivered must be returned to the donor if he so demands; the other forms of donations simply lapse and would be unenforceable at the donor's death. Upon the death of the donor the donations are reducible to the disposable portion.

There is some ambiguity in the Code regarding the need for the donee to accept a gift made by marriage contract. Article 1540 provides that a donation must be accepted in precise terms to be effective. Article 1739 provides that "donations made by marriage contract can not be impeached or declared void on pretense of a want of acceptance." Probably the two articles can be reconciled by recognizing that since the donee is always a party to the marriage contract the donation is always accepted in precise terms.

There are three types of donations that can be made by a marriage contract: present property, future property, and present and future property. A discussion of the rules applicable to each type follows.

**Present**

A gift of present property is an ordinary donation inter vivos by which the donor immediately divests himself of the thing given in favor of the donee. Thus the donee immediately acquires ownership of the thing and unless otherwise stipulated, this donation is not conditioned on the survivorship of the donor.8

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8. Id. art. 1740.
10. It is doubtful that the donor would need to sue to enforce this implied resolutory condition in a donation of future property. There is no jurisprudence but it appears that the invalidity generally would be urged only as a matter of defense if the donee later should try to enforce the donation.
11. LA. CIVIL CODE art. 1742 (1870).
12. Id. art. 1540.
13. Id. art. 1739.
14. See 5 PLANIOLE RUPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 738 (2d ed. 1957). But see 11 AUBRY ET RAY, DROIT CIVIL FRANÇAIS no 735 (6th ed. 1956), indicating the donation does not have to be accepted in precise terms if made by marriage contract.
15. LA. CIVIL CODE art. 1734 (1870): "Every donation inter vivos, though made by marriage contract to the husband and wife or to either of them, is subject to the general rules prescribed for the donations made under that title . . . ."
16. Id. art. 1468: "A donation inter vivos, (between living persons) is an act by which the donor divests himself, at present and irrevocably, of the thing given, in favor of the donee who accepts it."
donee. Should the donee predecease the donor, the property will merely be transmitted in the donee's succession. At the time of the donation, however, the children to be born of the marriage acquire no present interest in the property donated.\footnote{17 Id. art. 1744: “Every donation \textit{inter vivos}, of present property, made between married persons by marriage contract, shall not be deemed to be done on the condition of the survivorship of the donee, if that condition be not formally expressed, and it is subject to all the rules above prescribed for those kinds of donations.” This rule is to be distinguished from the rules governing donations of future property which, if made between the spouses, are conditioned on the survivorship of the donee. See id. art. 1534.}

\textit{Future}

A donation of future property is a gift of all or part of the property the donor may leave at his death.\footnote{18 Id. art. 1734: “... It can not take effect for the benefit of children not yet born.”} Such a donation is a hybrid, for it has characteristics of a donation \textit{inter vivos}, as well as a donation \textit{mortis causa}.\footnote{19 Id. art. 1735: “Fathers and mothers, the other ascendants, the collateral relations of either of the parties to the marriage, and even strangers, may give the whole or a part of the property they shall leave on the day of their decease, both for the benefit of the parties, and for that of the children to be born of their marriage, in case the donor survive the donee. Such a donation, though made for the benefit of the parties to the marriage, or for one of them, is always, in case of the survivorship of the donor, presumed to be made for the benefit of the children, or descendants to proceed from that marriage.”} In form, it resembles a donation \textit{inter vivos}, since it is made during the life of the donor. In result, however, it is similar to a testamentary gratuity, analogous to a bequest. In effect, this donation makes the donee an heir of the donor. It amounts to a contractual institution of heir and as a matter of fact, that is precisely the name given to it by the French.\footnote{20 3 \textsc{Planiol}, \textsc{Civil Law Treatise} (an \textsc{English Translation} by the \textsc{Louisiana State Law Institute}) no. 3158 (1959) [hereinafter cited as \textsc{Planiol}].} Since a donation of future property is a donation of all or part of a succession not yet opened, no immediate transfer of ownership occurs. The donor retains control and use of his property but may only dispose of it by onerous title.\footnote{21 3 \textsc{Planiol}, \textit{in institutions contractuelle”.} The Code appears to contemplate only remunerative donations which resemble onerous transfers rather than pure gratuitous ones.} The donor cannot make any further gratuitous dispositions of objects comprised in the donation unless they be of moderate sums.\footnote{22 \textsc{La. Civil Code} art. 1736 (1870).} Is the restriction applicable only to those specific objects “comprised” in the donation at the time of the
donation, or does it restrict the disposition of property acquired subsequently as well? Or does the restriction apply at all if there are no specific objects named in the donation? According to the French commentators and the slim Louisiana jurisprudence, the restriction does apply to property acquired subsequently, and no specific enumeration of items is required to cause the restriction on gratuitous dispositions to be operative.24

An illustration may prove helpful at this point. Assume that a week prior to marriage, the parties enter into a marriage contract whereby the future husband donates to his future wife half of all the property he may leave at his death. Although the precise language of the donation and of article 173525 suggest that what the wife should get is only half of the estate owned at his death, the French commentators and the Louisiana jurisprudence are apparently unanimous that the wife is entitled to half of all the property he owns on the day of the donation, and half of all the property he may acquire from that moment on.26

The husband retains the use and enjoyment of the property so accumulated during his life, but at his death the wife, as contractual heir, is entitled to her half interest as a creditor of his estate.27 Had the husband made any donations exceeding a moderate sum since the date of the contract, the wife would have a cause of action to have them reduced by half, or to receive half of their value if the husband’s estate at his death was insufficient to satisfy the donation.28 Had the wife predeceased the husband, the donation would have lapsed,29 making the husband’s estate subject instead to normal succession claims.

24. Riddell v. Riddell, 146 La. 37, 83 So. 369 (1919); 15 LAURENT, PRINCIPES DE DROIT CIVIL FRANÇAIS nos 212-222 (2d ed. 1876); 4 TROPLONG, DROIT CIVIL EXPLiqué nos 2343-2352 (2d ed. 1872).

25. LA. CIVIL CODE art. 1735 (1870): “Fathers and mothers . . . may give the whole or a part of the property they shall leave on the day of their death. . . .”

26. Actually the quantum due the wife at the husband’s death would be computed as follows: half the property in the husband’s estate at his death plus all property donated by the husband since he instituted his wife as a contractual heir. Thus if at his death the husband’s estate was valued at $50,000 and he had made $30,000 worth of donations since the date of the contract, the wife is entitled to half of $80,000 or $40,000. Since the patrimony at his death is $50,000 the donation can be satisfied without reducing the other donations of present property which the husband had made during his life. See 5 PLANIOL ET RIPERT, TRAITÉ PRATIQUE DE DROIT CIVIL FRANÇAIS no 777 (2d ed. 1857); see also Riddell v. Riddell, 146 La. 37, 83 So. 369 (1919).


28. 3 PLANIOL no. 3186; see also note 26 supra.

29. LA. CIVIL CODE art. 1745 (1870): “A donation of property in future, or of property present and in future, made between married persons by marriage contract, whether simple or reciprocal, shall . . . not be transmissible to the
Another problem raised by a donation of future property concerns its revocability. Article 1736 provides that a donation of future property is irrevocable only in the sense that the donor can no longer make gratuitous dispositions of the objects comprised in the donation, except for moderate sums.\textsuperscript{30} This provision that the donations of future property is irrevocable only in that one sense raises the question whether such a donation is directly revocable. The more reasonable answer seems to be in the negative for three reasons. First, such a donation is a donation by marriage contract and the Civil Code provides that a marriage contract cannot be altered after the marriage.\textsuperscript{31} Since a revocation of the donation after marriage would amount to an alteration of the marriage contract, it follows that there can be no revocation. Second, the donor alone cannot revoke because no contract is susceptible of unilateral alteration.\textsuperscript{32} Third, it would completely defeat the purpose of the article to allow a direct revocation and a new donation to a third party, while forbidding a tacit revocation by simply making other donations. It appears, therefore, that a donation of future property by marriage contract is irrevocable in the ordinary sense.

Since a donation of future property is not a legacy, it does not have to be in testamentary form.\textsuperscript{33} Further, the donee becomes a creditor of the donor’s estate and is preferred over any legatees.\textsuperscript{34} However, like a legacy, it is reducible to the donor’s disposable portion at his death.\textsuperscript{35}

\textit{children, the issue of the marriage, in case of the death of the donee before the donor.”} (Emphasis added.)

See Stratton v. Rogers, 11 La. Ann. 380, 383 (1856) : “If the donor has made a donation to his wife simply of future property, and he survives her, the donation will fail, although there was issue of the marriage.” But note that where the donation is made by a third party to one of the future spouses, it is presumed to be made in favor of the children to be born of the marriage, and consequently if the donee predeceased the donor, the issue of the marriage will take, not as successors of their parent, but in their own right as alternate donees. \textit{La. Civil Code art. 1735} (1870). See \textit{id. art. 1741; Doucet v. Broussard, 6 Mart.(N.S.) 196 (La. 1827).}

\textsuperscript{30} \textit{Id. art. 1736}: “A donation, in the form specified in the preceding article, is irrevocable only in this sense, that the donor can no longer dispose of the objects comprised in the donation on a gratuitous title unless it be for moderate sums, by way of recom pense or otherwise.

“The donor retains till death the full liberty of selling and mortgaging, unless he has formally barred himself of it in the whole or in part.”

See also note 23 \textit{supra}.

\textsuperscript{31} \textit{Id. art. 2329}.

\textsuperscript{32} \textit{Id. art. 1798}.

\textsuperscript{33} Succession of DeBellisle, 10 La. Ann. 468 (1855).

\textsuperscript{34} Succession of McCloskey, 29 La. Ann. 237 (1877).

\textsuperscript{35} \textit{La. Civil Code art. 1742} (1870). It may also be argued that since the donee is an heir by contract, he should be entitled to the same advantages regard-
Present and Future

The third type of donation by marriage contract is one made cumulatively of property present and future. The Code does not contemplate a single donation of both present and future property, but rather a single donation of either present or future property. The donee has a choice, exercisable at the donor's death, of accepting his share of the donor's property as it existed either on the day of the donation or on the day of the donor's death. The choice is available, however, only if there was attached to the contract a statement of debts and charges outstanding on the date of the gift. If this requirement has been complied with and the donee elects to take the present property, he must satisfy the mentioned debts and reject any property that may have accumulated since the date of the donation. If the statement of charges is not attached the donee can claim only the future property. If he elects to take the future property he must satisfy his pro rata share of the succession debts. When the election is made, assuming the choice has been preserved, the applicable rules are those pertaining to the type of donation chosen.

Since the election is not made until the donor's death, the donor's entire patrimony must be kept intact or its value in some way represented in the succession. Thus, no gratuitous disposition may be made of the present property or the property acquired subsequent to the donation, for the ultimate distribution is potentially out of both. Onerous dispositions may or may not be valid, depending on which choice the donee elects. If the future property is chosen, the applicable rules are those pertaining to the donation of future property, which allow onerous dispositions. If the donee elects the "present" property, acceptance of the donation as an ordinary heir has for accepting a succession. Thus he should be able to accept purely and unconditionally (and pay the proper portion of the donor's debts) or accept with benefit of inventory, or renounce the entire donation. See id. arts. 1055-1060.

36. Id. art. 1737: "A donation in favor of marriage may be made cumulatively of the property present and future, provided, that to the act be annexed a statement of the debts and charges of the donor, existing on the day of the donation, in which case the donee, on the decease of the donor, may accept merely the present property, renouncing the surplus of the property of the donor."

37. 3 Planiol no. 3190.
39. Ibid.
40. Id. art. 1738.
41. Ibid. See id. arts. 1611, 1614.
42. Id. art. 1736, quoted at note 30 supra.
he is considered as having been the owner since the date of the donation and may demand the return of "his" property, if it has been sold. This rule, while obviously advantageous to the donee, is also obviously detrimental to a vendee of the donor. The donation of present and future property, when made by marriage contract, is irrevocable for the same reasons, discussed previously, applicable to donations of future property.

**During Marriage**

**Historical Background**

In early Roman law, donations inter vivos between spouses were void. This prohibition was later relaxed to allow such donations, but only on the condition of revocability. In French customary law, on the other hand, the rules varied from province to province. In some areas only the husband could donate; in others, neither could. In still other provinces either spouse could make the donation, but it was subject to revocation. With the adoption of the French Civil Code in 1804 donations between spouses were authorized, but were revocable at the will of the donor. This principle was incorporated into the Louisiana Civil Code of 1808 and remained the law in this state until 1942. Article 1749 permitted revocation even after dissolution of the marriage by death or divorce. Consequently, third persons desiring to acquire property from a donee-spouse found themselves in an extremely precarious position. The donor, by revoking the donation, could recover the donated property even after it had passed out of the donee's hands. Since interspousal donations amounted to something less than complete divestiture, the property was considered to remain in the donor's estate for tax purposes. To eliminate these conse-

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43. 3 Planiol no. 3104.
44. See text at notes 31 and 32 supra.
45. 3 Planiol no. 3204.
46. Ibid.
47. Id. no. 3025.
48. Ibid.
49. French Civil Code art. 1096(1),(2).
51. La. Civil Code art. 1749 (1870); "All donations made between married persons, during marriage, though termed inter vivos, shall always be revocable. The revocation may be made by the wife, without her being authorized to that effect by her husband, or by a court of justice."
52. Succession of Waldo, 156 La. 664, 101 So. 21 (1924).
53. Howard v. United States, 125 F.2d 888 (5th Cir. 1942).
quences, article 1749 was repealed and R.S. 9:2351 was enacted, making all interspousal donations irrevocable unless otherwise stipulated in the act of donation. If the right of revocation is reserved, it may later be renounced by notarial act. There is no jurisprudence under the new law for situations in which the right of revocation has been reserved but it is a logical assumption that the former rules permitting revocation at any time would apply.

General

Although not expressly provided in the Code, it seems that the spouses may give to each other during the marriage not only present property but also future property and present and future property. Doubt exists however, because the articles dealing with the latter types of donations made between spouses speak only in terms of their being made by marriage contract. There seems to be no good reason why these donations should not also be made during marriage. Although there is no direct authority in point, article 1532 exempts interspousal donations from the general rule in article 1528 that donations inter vivos can comprehend only the present property of the donor and no distinction is drawn in the exemption between donations made by marriage contract and those made during marriage. In addition, the title to chapter 9 indicates that the donations dealt with therein may be made either by marriage contract or during the marriage. Either type, of course, must be made in authentic form, and spouses may donate to one another no more than they may give to a stranger.

54. La. R.S. 9:2351 (1950): “Every donation made... by a married person to his or her spouse shall be as irrevocable as if made to a stranger. However, where the donation is made by notarial act the donor may reserve the right of revocation by express stipulation therein. Any right of revocation so reserved unless renounced as provided in R.S. 9:2352, may be exercised at any time during the life of the donor, whether or not the marriage is then in existence, and whether or not the donee is then alive.”

55. Id. 9:2352.

56. In fact, R.S. 9:2351, in the last sentence, provides essentially the same rule as existed under the former law. See note 54 supra.


58. La. Civil Code art. 1528 (1870): “A donation inter vivos can comprehend only the present property of the donor. If it comprehends property to come, it shall be null with regard to that.”

59. Id. art. 1532: “The four preceding articles are not applicable to donations of which mention is made in the eighth and ninth chapters of the present title.”

60. The title reads, “Of Donations Between Married Persons, Either by Marriage Contract or During the Marriage.” See 3 Planiol no. 3208.

61. Id. art. 1536. La. Civil Code art. 1586 (1870).
Reciprocal Donations

Article 1751 of the Civil Code provides that reciprocal interspousal donations inter vivos or mortis causa may not be made by one and the same act. French writers indicate that the purpose of this requirement is to preserve the power to revoke the donation. However, since all interspousal donations during marriage are now irrevocable unless the contrary is stipulated, the utility of applying article 1751 to donations inter vivos no longer seems to exist. The prohibition appears more apposite, however, to donations mortis causa, as wills are normally kept by the testator or his representative so that alterations may be made at any times. Such changes and revocations would be difficult if both wills were included in the same act.

Revocability

Although the rules pertaining to donations during marriage are essentially the same as those applicable to interspousal donations by marriage contract, the revocability of donations of future and of present and future property made during marriage needs additional consideration. Prior to 1942 all donations inter vivos made during marriage were revocable at the will of the parties. A donation of future property is a donation inter vivos. Therefore, a donation of future property made during marriage was revocable. However, a conflict appeared to exist, since the code articles applying to donations by third parties to spouses were deemed applicable to interspousal donations through article 1745. Article 1736, applied to interspousal donations during marriage, would render such donations irrevocable in the sense that the donor could not gratuitously dispose of the objects comprised in the donation. On the other hand, under article 1749 such donations were totally revocable. Conceivably, article 1749 was not designed to apply to donations of future or of present and future property but was intended as an exception to the usual irrevocability of donations applying to donations of present property only. If so, no conflict would exist. In France, however, the equivalent to article 1749 is interpreted as applying

62. Id. art. 1751.
63. See, e.g., 3 PLANIOL no. 3215.
64. LA. R.S. 9:2351 (1950).
65. LA. CIVIL CODE art. 1572 (1870).
66. Id. art. 1749.
67. Certainly this is true at least insofar as form is concerned. See 3 PLANIOL no. 3158.
to all types of donations between the spouses, which makes the conflict real. The French resolve it by simply letting the rule of article 1749 control, believing that the power of revocation of donations during marriage should be preserved, article 1736 notwithstanding.

Any conflict that might have existed in Louisiana seems to be resolved by the repeal of article 1749 and enactment of R.S. 9:2351 making donations between spouses irrevocable as if made to a stranger. This usually means, of course, that the donation is absolutely irrevocable. This provision, however, does not affect the revocability of donations of future property by onerous disposition, since a donation of future property to a stranger cannot be made at all except in the stranger's marriage contract and hence would be governed by article 1736. R.S. 9:2351 simply makes article 1736 apply to such donations between spouses since it is the only provision of the Code governing revocability of donations of future property. Thus all donations during marriage now seem to be in harmony with article 1736.

Article 156 of the Civil Code provides that the party against whom a judgment of separation is pronounced will lose all donations made to him by marriage contract or since. Consequently, although the right to revoke is not reserved the donee may still lose the donation by operation of law.

Disposable Portion

As last amended in 1916, article 1752 provides that the quantum which a spouse may give to the other where the donor has children of a prior marriage, is "all of that portion of his ... estate ... that he ... could legally give to a stranger." The quantum is the same as the disposable portion in any other circumstances but the result of an excessive donation differs. Ordinarily excessive donations are simply reducible. Such is not the case for excessive donations governed by article 1752; neither is it quite so simple. Under the second paragraph of

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68. 5 Planiol et Ripert, Traité pratique de droit civil français no 777 (2d ed. 1957).
69. ibid.
70. La. Civil Code art. 1528 (1870).
71. Id. art. 1562: "Any disposal of property, whether inter vivos or mortis causa, exceeding the quantum of which a person may legally dispose to the prejudice of the forced heirs, is not null, but only reducible to that quantum." Succession of May, 108 La. 994, 34 So. 52 (1908).
article 1754 it is clear that donations between spouses made in disguise or through a person interposed are null and void. Presumably, if the donation is not disguised or made through an interposed person, it is valid, but reducible if it exceeds the disposable portion. The language of the first paragraph presents a problem, however, as it provides: "Husbands and wives can not give to each other, indirectly, beyond what is permitted by the foregoing dispositions." What is the exact status of the donation made "indirectly"? Is it possible to have an excessive donation made indirectly that is not also made in disguise or through a person interposed, and therefore not null, but only reducible? The meager French jurisprudence takes the position that their equivalent of article 1754 contains two rules: excessive donations made indirectly are merely reducible; those made in disguise or through a person interposed are null. On the other hand, Planiol is of the opinion that the article contains only one rule, stated generally in the first paragraph and specifically in the second. According to this view the article would read: "Indirect donations, i.e., those made in disguise or through a person interposed, are null and void." Accordingly, it would be impossible to have an indirect donation that would only be reducible. The type of "indirect" donation found reducible by the French courts can perhaps be more properly termed a quasi donation. It is an act by which one party relinquishes a right to another person, for example, forgiving a debt. Louisiana courts have never decided whether an "indirect" donation is something other than one in disguise or through a person interposed and thus merely reducible. The only cases which have arisen have concerned donations either open and direct but excessive, or either disguised or through a person interposed. The former was reducible; the latter, null. There is perhaps some justification from the construction of the article itself for treating it as divisible. The first paragraph seems to be con-

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72. LA. CIVIL CODE art. 1754: "Husbands and wives can not give to each other, indirectly, beyond what is permitted by the foregoing dispositions. All donations disguised, or made to persons interposed, shall be null and void."

73. See 12 BAUDRY-LACANTIENIE ET COLIN, TRAITÉ THEORIQUE ET PRATIQUE DE DROIT CIVIL n° 4104 (12th ed. 1905); 4 TROPLONG, DROIT CIVIL EXPLiqué n° 2742 (3d ed. 1872).

74. 3 PLANIOL no. 3252.

75. Id. nos. 2546, 2547.

76. Succession of May, 100 La. 994, 34 So. 52 (1903).

cerned only with the excessive portion while the second strikes with nullity the entire donation. Furthermore, absent fraud or disguise, why should the whole donation fall? Since the prohibition seems to extend only to what is “beyond” the disposable portion, it appears that purely indirect donations (whatever that is) should only be reduced. On the other hand, the French commentators explain that the article should be considered to contain only one rule, thus making either type donation therein mentioned null, to provide a sanction against such donations in order to preserve the power of revocation during marriage. Consequently, a disguised donation, that is, a simulated sale which would not otherwise be revocable, can be annulled and thus brought back into the donor’s estate as if he had revoked the donation. The French seem to want to preserve the donor-spouse’s power of revocation whether he wants it or not. Viewed in this light, the article seems clearly to contain only one rule: indirect donations, those made in disguise or through a person interposed, are null. Since Louisiana no longer allows revocation of donations during marriage as a general rule, it appears that article 1754, so interpreted, has outlived its usefulness. It should be amended to provide only for the reduction of excessive donations made indirectly. Since article 1752 is now in line with articles 1493 and 1494, so far as the quantum is concerned, such an amendment would bring article 1754 into harmony with article 1502, and a uniform treatment of excessive donations would result.

Capacity to Donate

It is well settled that the husband may make a valid donation of community movables or immovables to the wife, which become her separate property. The donation is valid because the wife alone has the right to complain of a violation of article 2404, forbidding the husband from making certain donations of com-

78. See 3 Planioi et Ripert, Traité pratique de droit civil français no 762 (2d ed. 1957).
79. See text at notes 54 through 56 supra.
80. Compare La Civil Code art. 1752 (1870) with id. arts. 1493 and 1494.
81. Id. art. 1502, quoted in note 71 supra.
82. Id. art. 2334: “. . . Separate property is that which either party brings into the marriage, or acquires during the marriage with separate funds, or by inheritance, or by donation made to him particularly . . . .”

For donations of community property to the wife, see Coney v. Coney, 220 La. 473, 56 So. 2d 841 (1952); Succession of Byrnes, 206 La. 1026, 20 So. 2d 301 (1944); Succession of Bendel, 116 So. 2d 84 (La. App. 2d Cir. 1959).
munity property,\textsuperscript{83} and when she consents the donation is valid.\textsuperscript{84} May the wife make similar donations to the husband? The wife normally has no active control of the community property,\textsuperscript{85} cannot make gifts out of community property to a stranger, and thus should not be able to give to her husband. However, if the husband designates his wife as agent for the community,\textsuperscript{86} or if he accepts the gift indicating a ratification of her actions, it seems the donation may be valid. Further, a donation by the wife to the husband of future property will ordinarily include some or all of her share in the community. To that extent she is donating community property without any special authorization. Although there are situations in which the wife might make a donation of community property to the husband, the courts may decide that article 2404 is controlling and deny the wife such a power.\textsuperscript{87}

\textit{Redonation}

It has been held on two occasions\textsuperscript{88} that where the husband has made a donation to his wife of community property, any redonation of the property, or the fruits thereof, to the husband by the wife will be treated as a \textit{revocation} of the donation by the husband, which returns the property to its community status rather than making it the husband’s separate property. Although it is conceded that an outright revocation by the husband would have this effect, it is doubtful that a donation by the wife of anything but the exact property donated to her should be so treated. In \textit{Cousin v. St. Tammany Bank & Trust Co.},\textsuperscript{89} the husband donated cash and a small business, both community property, to the wife. Profits from the business, which was operated solely by the wife, were used by her to buy a small piece of land in her own name. Sometime later, the husband wished to borrow money from the defendant bank and wanted to use the property

\begin{itemize}
\item \textsuperscript{83} \textit{La. Civil Code} art. 2404 (1870): “The husband ... can make no conveyance inter vivos, by a gratuitous title, of the immovables of the community, nor of the whole, or of a quota of the movables, unless it be for the establishment of the children of the marriage ...”
\item \textsuperscript{84} Succession of Williams, 171 \textit{La.} 151, 129 So. 801 (1930).
\item \textsuperscript{85} \textit{La. Civil Code} art. 2404 (1870): “The husband is the head and master of the partnership or community of gains ...” \textit{Reccaforte v. Barbin}, 212 \textit{La.} 69, 31 So. 2d 521 (1947); \textit{Preston v. Humphreys}, 5 \textit{Rob.} 299 (\textit{La.} 1843).
\item \textsuperscript{86} \textit{La. Code of Civil Procedure} art. 695 (1960).
\item \textsuperscript{87} \textit{But cf.} \textit{Bernard v. Noel}, 45 \textit{La. Ann.} 1135, 13 So. 737 (1893).
\item \textsuperscript{88} \textit{Cousin v. St. Tammany Bank & Trust Co.}, 146 \textit{La.} 393, 83 So. 685 (1919); Succession of Johnson, 8 \textit{So. 2d} 139 (\textit{La. App. Orl.} Cir. 1942).
\item \textsuperscript{89} 146 \textit{La.} 393, 83 \textit{So. 685} (1919).
\end{itemize}
purchased by the wife as security. Doubtful that the property was a community asset, the bank had the wife "donate" the lot to the husband and join with him in granting the mortgage before it would approve the loan. The husband defaulted and the bank attempted to have the property seized and sold to satisfy the debt. The wife then sued to enjoin the seizure and sale on the grounds it was her separate property and could not be sold to satisfy her husband's debt. The court denied her claim, holding that the wife's redonation at the request of the bank amounted to a revocation by the husband, returning the property to the community. The wife could not then revoke her donation, as seemed to be her object, for the husband as head and master of the community had complete control of its properties. Thus it could be used to satisfy the debt.

While the result may be proper on a theory of estoppel, the holding seems both confusing and unnecessary. In the first place, the revocation was entirely fictional. In the second place, the property "redonated" by the wife was not the property first donated by the husband or the fruits thereof. In fact, it was property bought by the wife with her separate funds which were derived from the operation of the business by her personally. It is difficult to understand how the donation by the wife could be treated as a revocation by the husband of his gift, since he did not give her the property in question. Had it been the same property, the decision may well have been correct; however, it is doubtful that it could be applied today to a similar situation. Since R.S. 9:2351 makes interspousal donations irre-

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90. LA. CIVIL CODE art. 2403 (1870): "In the same manner, the debts contracted during the marriage enter into the partnership or community of gains, and must be acquitted out of the common fund, whilst the debts of both husband and wife, anterior to the marriage, must be acquitted out of their own personal and individual effects." From this article it seems clear that a debt of the husband, whether it is his own personal debt or one of the community, must be satisfied out of community funds. In any event he cannot use the wife's separate property. See Comment, 25 LA. LAW REV. 201 (1965).

91. LA. CIVIL CODE art. 2404 (1870).

92. Inasmuch as the wife actually joined in signing the act of mortgage, she should not be now heard to complain of the encumbrance, particularly since the bank has relied on it and granted the loan.

93. Prior to the amendment of La. Civil Code article 2386 in 1944, the fruits of the wife's paraphernal property (the retail store in this case) fell into the partnership only if administered by the husband. Since the husband had nothing at all to do with the operation of his wife's business it follows that at the time this case arose all the profits from the store became the wife's separate property. Consequently she could easily have established that the lot in question was her separate property as it was bought with her own funds and was in her name. In short, it was a totally different piece of property than that which had been donated to her by her husband.
vocable, it hardly seems likely that a court will recognize a fictitious revocation when it can not recognize a real one. Thus such a donation by the wife today would seem to fall into the husband's separate estate.

**ONEROUS TRANSACTIONS**

**Historical Development**

Although onerous contracts between spouses were not prohibited under Spanish law, the Louisiana Civil Code of 1808 prohibited interspousal sales, properly so called, and the Civil Code of 1825 struck down all interspousal contracts. The prohibition extended also to any alterations of the marriage contract after the celebration of the marriage. The purpose of this doctrine was two-fold: to protect the wife from an abuse of marital power by the husband and to protect creditors from being defrauded by contracts between the spouses. The Code of 1870 continued the policy of general contractual incapacity, excepting certain transactions.

**Permitted Transfers**

Article 2446 forbids all sales between spouses but enumerates three situations in which property transfers are possible.

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94. See note 54 supra.
95. LA. CIVIL CODE art. 2334 (1870) : "Separate property is that which either party . . . acquires during the marriage . . . by donation made to him or her particularly . . . ."
96. LAS SIETE PARTIDAS pt. 5, tit. 11, L. 4; pt. 5, tit. 5, L. 2 (1263); see Labbe's Heirs v. Abot, 2 La. 553 (1831).
98. La. Civil Code art. 1784 (1825).
99. Id. art. 2309.
101. LA. CIVIL CODE art. 1790 (1870) : "Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as a husband and wife, tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases, by the administrator, of any part of the estate which is committed to his charge, and the incapacity of the wife, even with the assent of the husband, to alienate her dotal property, or to become security for his debts. These take place only in the cases specially provided by law, under different titles of this code." (Emphasis added.)
102. Id. art. 2446 : "A contract of sale, between husband and wife, can take place only in the three following cases:
   "1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.
   "2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.
   "3. When the wife makes a transfer of property to her husband, in payment
Though designated "sales," the permitted transactions are in reality examples of the *dation en paiement*, which article 2655 defines as "an act by which a debtor gives a thing to the creditor, who is willing to receive it, in payment of a sum which is due." Furthermore, the prohibition of article 2446 applies to conventional or private sales only, not to judicial or public sales.

The first permitted "sale" allows a spouse judicially separated to transfer property to the other in payment of his or her rights. This provision has been interpreted to allow only a settlement of the community. It does not permit the parties to set the amount of alimony the wife will receive after the divorce.

The second transfer permitted by article 2446 is one by husband to wife which has a "legitimate cause." This seemingly all-inclusive, if vague, grant has been construed to allow only a transfer of property to satisfy a debt owed the wife. If the husband can prove, however, by parol evidence or other means that he owed no debt to the wife at the time of the transfer, the entire transaction will be annulled as one in *fraudum legis*. To prove lack of indebtedness the husband must show that the wife either had no separate funds or, if she did, that he never borrowed any from her. Similarly, the transaction may be

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of a sum promised to him as a dowry.

"Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage."

103. *Id.* art. 2655 (1870). It should be noted that all the situations enumerated in article 2446, quoted in note 102 *supra*, fall within the description of article 2655.


105. Russo *v.* Russo, 205 La. 852, 18 So. 2d 318 (1944).


108. Smith *v.* Smith, 239 La. 688, 119 So. 2d 827 (1960). Since it would be a fraud on the law to let the transfer stand where there is no indebtedness, parol evidence is admissible even though a written instrument is involved. *Smith* also indicates that parol evidence may be used to invalidate other transfers not conforming to *La. Civil Code* art. 2446 (1870).

This decision is questioned in *Note, 21 La. L. Rev.* 680 (1961), wherein it is pointed out that donations between husband and wife are not prohibited and that the *in fraudem legis* exception to the parol evidence rule should be applied only where the purpose is to show that the transfer in question was intended as a forbidden one, e.g., a sale, a donation * omnium bonorum*, or donation to a concubine.

attacked by the husband's forced heirs or his creditors. In all cases the burden of proof is on the person seeking to show the lack of indebtedness. To the extent a debt exists, however, the husband may transfer property to the wife to the prejudice of his other creditors. Any property so transferred becomes the wife's separate property and not subject to seizure for the husband's debts unless burdened by a mortgage at the time of the transfer, in which case only such property may be sold to satisfy the debt. The wife will not be personally liable.

The third transfer is practically the reverse of the above; the wife may transfer property to the husband in payment of a sum promised him as dowry. There is no jurisprudence concerning this type of transaction.

In order for any of the above dations to be valid they must meet three tests: there must be a real indebtedness; the value of the property transferred must not exceed the amount owed; and the property must be delivered. In connection with this last requirement, it has been held that a transfer of property in which a right of redemption was reserved by the transferor for a specified period was not fully translatible of title and consequently did not constitute delivery. Without delivery the dation was null from the outset and did not gain validity by the expiration of the redemption period and the inaction of the transferor. The decision has been criticized but never repudiated.

111. See note 107 supra.
115. See note 90 supra.
116. Miller v. Miller, 234 La. 883, 102 So.2d 52 (1958); Colvin v. Johnson, 104 La. 655, 29 So. 274 (1901); Krauss Co. v. Godchaux, 13 La. App. 907, 128 So. 673 (Orl. Cir. 1890); see also La. Civil Code art. 2656 (1870).
118. Alternative positions were available to the court, and each has some appeal. Justice Simon, on the original hearing in the cause, felt that since the period for redemption had expired, it was as though it had never been written, so it could be said that title vested absolutely in the wife. Id. at 890, 102 So.2d at 54. In dissenting from the opinion on rehearing, the same Justice proposed that since the redemptive period makes the transfer invalid, only that portion of the agreement should fall, leaving the rest of the act valid. Id. at 895, 102 So.2d at 59. In advancing this latter argument, reliance was placed on La. Civil Code art. 1519 (1870), which strikes from donations inter vivos impossible conditions, or those which are contrary to the laws or to morals. However, it is suggested
Save in the above transactions, no onerous contracts between spouses are permitted, and what is not permitted directly cannot be accomplished indirectly. Thus a sale by a husband to a third party who then sells the property to the wife is null.

There are, however, a number of other interspousal contracts which, though not expressly classed as exceptions to the general incapacity, are actually exceptions. These are, in addition to donations, an agreement to re-establish the community after a separation from bed and board; a contract of mandate whereby the husband assumes the administration of the wife's paraphernal property, or one in which the wife becomes agent for the husband or for the community; a contract where in husband and wife join on one side of an agreement with a third party on the other side, as in certain mineral leases; and an agreement for the wife to act as surety for her husband. Although generally incapable of contracting with each other, the parties may after divorce ratify some agreements which they were not capable of making during marriage. In this sense incapacity is only relative, not absolute.

**Actions To Annul**

Actions to annul onerous transactions between husband and wife not falling within one of the exceptions of article 2446 that article 1519 has no application, since there is nothing inherently contrary to law or good morals about a redemptive period.

119. Little v. Barbe, 195 La. 1071, 190 So. 368 (1940); Hayden v. Nutt, 4 La. Ann. 65 (1849); Neal v. Locke, 61 So. 2d 232 (La. App. 2d Cir. 1952). Not only are the transfers invalid as sales, but also they cannot form the basis for a prescriptive title.

120. Succession of Lewis, 157 So. 2d 321 (La. App. 4th Cir. 1963); see also Douglass v. Douglass, 51 La. Ann. 1455, 26 So. 546 (1899), where the wife was the vendor to an interposed party who then sold to the husband.

121. LA. CIVIL CODE art. 1743 (1870).

122. Id. art. 155: "Separation from bed and board carries with it separation of goods and effects. Upon reconciliation of the spouses, the community may be re-established by husband and wife jointly, as of the date of the filing of the suit for separation from bed and board, by an act before a notary and two witnesses . . . ."

123. Id. art. 2387: "The wife who has left to her husband the administration of her paraphernal property, may afterwards withdraw it from him." Presumably the wife stipulates some conditions for the administration of her property to which the husband agrees; that she may terminate it at will does not make it any less a contract.

124. LA. CODE OF CIVIL PROCEDURE art. 695 (1960).

125. See, e.g., Shell Petroleum Corp. v. Calcasieu Real Estate & Oil Co., 185 La. 751, 170 So. 785 (1936). The case contains a good analysis why this type of contract between husband and wife should be permitted.


127. LA. CIVIL CODE art. 1790 (1870); Sonnier v. Fris, 220 La. 1085, 58 So. 2d 395 (1952); Sheard v. Green, 219 La. 199, 52 So. 2d 714 (1951); Succession of Tullier, 53 So. 2d 455 (La. App. 1st Cir. 1951).

may be brought by one of the spouses, the forced heirs, or creditors.129 This action is not subject to prescription since the transaction is null ab initio.130 A transfer which on its face seems to conform to article 2446, but which in reality does not, is also null.131 If it fails to conform because the recited debt does not exist or because there was no intent to transfer, the entire transaction falls.132 On the other hand, if the debt actually exists but the value of the property transferred exceeds the amount of the debt, the transfer will only be reduced.133 Creditors bringing this action do not have to allege the debtor's insolvency as the revocatory action requires.134 In fact, to the extent the debt owed the wife is legitimate, the transfer is excepted from the rules governing the revocatory action and the creditors have no action at all. Thus the husband may, even if insolvent, prefer the wife's claim to the prejudice of his other creditors.135

Policy considerations present at the initiation of the ban on interspousal contracts seem equally valid today. The prohibition of the law is founded on the consideration that otherwise it would be very easy for the spouses, by simulated sales, to make donations exceeding the disposable portion or to withdraw their property from the pursuit of their respective creditors.136 The prohibition is made, therefore, to prevent fraud on the children of the marriage and creditors of the respective spouses. The ban also serves to protect the husband or wife, as the case may be, in their property rights against undue influence and imposition.137

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129. See Kelly v. Kelly, 131 La. 1024, 60 So. 671 (1913).
137. Ibid.