C Regimes applicable to particular types of donations

1 Donations inter vivos

a Special requirements: form

As an introduction to the topic of “donative formalities,” read, first, CC arts. 1536, 1539, 1554, and, then, the following doctrinal and jurisprudential materials. These materials review the history of those formalities and explain (and in some instances critique) the justifications that have been offered in support of them.¹

¹ Calixte Accarias, Précis de Droit Romain n° 304, at 794-97 (4th ed. 1886)

Before Justinian, the classic theory of donations inter vivos underwent three modifications that served as the point of departure for the legislation of that monarch. First, Emperor Antony the Pius, in a decree the text of which has not survived . . ., decided that a simple contract of donation, provided it had been made in writing and that the writing had been turned over to the donee, would be obligatory [when made] between ascendants and descendants. Second, in the first years of the 4th Century, we find in force a new theory that would rapidly lead to the desuetude of the lex Cincia [the earlier legislation on donations inter vivos]: I allude to the theory of “insinuation.” This word designates the copy or maybe the simple analysis of the act of donation [made] on the register of the superior magistrate or local judge.² This formality, which was already in use, though not yet required, at the time of the jurisconsults, was imposed, for all donations and under pain of nullity, by Emperor Constance Chlore, who did it, I think, less to the end of provoking the donor to reflection than to the ends of assuring publicity for the donation and of preserving proof for it. Later, this requirement was limited to donations in excess of 200 solidi. Third, as a consequence of the innovation of Constance Chlore, his son, Constantine, ordered that every donation be consecrated by a writing. But that decision was abrogated by Theodosius the Young and Valentinian III.

. . .

What did this monarch [Justinian] do? Two things. First, he decided that a simple contract of donation, whether written or not and

¹ In many of these materials, you will find numerous references to the Ordinance of 1731. That legislation of the French ancien régime was the immediate source of CN art. 931, which, in turn, was the ultimate source of our CC art. 1536.

² Savigny described “insinuation” this way: “a judicial procedure initiated upon the declaration of the parties” wherein the judge gave the donation his “attestation of authenticity.” 4 Frederick Carl von Savigny, Traité de Droit Romain § 165, at 223 (Charles Guenoux tr. [German to French] 1845).
It would seem, then, that the authors of *las Siete Partidas* did little more than to restate the legislation of Justinian.

Second, Justinian required insinuation only for donations in excess of 500 *solidi*. The omission of this formality carried with it absolute nullity, but only for the surplus. From this followed several consequences: (i) a donor who had not yet made delivery had no need of an exception [special procedural device of defense] in order to reject a demand by the donee as long as the donation did not surpass 500 *solidi*; (ii) upon delivering the thing, the donor put himself into a state of co-ownership by indivision with the donee, the latter of whom necessarily became a co-owner for the part that was equivalent to this sum; (iii) the donation did not constitute a just cause [just title] for usucaption [acquisitive prescription]; (iv) the death of the donor did not confirm the donation in any case. . . . [T]he nullity resulting from the absence of insinuation could be asserted not only by the donor, but by all interested persons.

By exception, Justinian exempted from insinuation (i) donations *dotis causa* [dowries] or *propter nuptias* [on account of marriage]; (ii) donations made or received by the Emperor; (iii) those intended to ransom captives; (iv) those whose cause was the reconstruction of a collapsed or burned house.

5 Jose Maria Manresa y Navarro, *Comentarios al Código Civil Español* arts. 632 & 633, at 135 (Pascual Marin Perez rev., 6th ed. 1951)

According to Law 9, Title 4, Partida 5 [of *las Siete Partidas*], one was entirely free to make any and every donation, regardless of value, with or without a writing, [of the following kinds:] . . . donations by or in favor of the State, dowries and donations *propter nuncias* [on account of marriage], those made to a church or [other] pious establishment, those whose object was the ransom of captives or the repair of some collapsed temple or house. Outside of these, any donation that exceeded 500 *maravedis* of gold . . . had to be made “[i] with a writing and [ii] with the knowledge of the major judge of the place at which the donation is made.” This [latter requirement] was the “insinuation,” which consisted . . . of “the presentation to the judge of the instrument . . . that evidenced the donation so that it could be approved by the intervention of his authority or a judicial decree.” That the *Partidas* required a “writing” for these donations [the former requirement] cannot be doubted. But it is not so clear whether this word alluded only to written form [in which case, any writing, even an act under private signature, would do] or specifically to a public document [authentic act].

4-2 Henri & Léon Mazeaud et al., *Leçons de Droit Civil: Successions - Libéralités* n° 1451, at 642

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According to our own Professor McAuley, himself a former notaire, the phrase “authentic act en minute” is a short-hand reference to a specific kind of notarial procedure, the salient features of which are as follows: (i) the notary prepares but a single original of the act (multiple originals are not allowed); (ii) once the act has been signed, the notary himself retains and archives this original in a vault for safekeeping; and (iii) the notary makes a “minute entry” of the act (in the case of donation inter vivos, a bare-bones summary stating only the names of the parties and the nature of the act) on the répertoire (register or directory) that he keeps of all acts passed before him.

The perceptive reader will note that this account of the history of “form requirements” in French law includes no reference to the Roman law institution of “insinuation.” That is not because the French never had it; to the contrary, they certainly had it at one time, albeit it in modified form, and arguably still do, albeit in a barely recognizable form (in both ancient and modern French law, “insinuation” meant and still means simply “recording of an instrument in the public records,” so that no judge even takes a look at the donation, much less passes on its authenticity). The reason for the omission, rather, is that the authors of the text, like most other French legal scholars during the last 250 years, do not think of “insinuation” as a “form requirement.” And why not? By “form requirements,” they mean those requirements pertaining to documentation of donations that must be satisfied if the donation is to be valid as between the parties themselves (and their successors). Now, the “authentic act” requirement is a “form requirement” in this sense, for, without such an act, the donation is invalid (provided the donatum is immovable or incorporeal) as between the parties themselves (and their successors). But the “insinuation” requirement is not a “form requirement” in this sense, for a donation that is otherwise valid as between the parties (and their successors) is still so even if there’s no insinuation. For what, then, is insinuation necessary? To make the donation effective as against third persons (if, that is, the donatum is immovable: since 1804, donations of movables, be they corporeal or incorporeal, haven’t had to be insinuated at all). That kind of requirement the French (rightly) think of as a “publicity requirement” or, to use Louisiana’s terminology, a “public records doctrine” requirement. And, to the French way of thinking, this requirement, unlike the form requirements properly so called (e.g., the authentic act requirement), has nothing to do with protecting the donor or his family from ill-considered gratuities, but rather is designed solely to protect third persons who, but for this publicity requirement, might find themselves “surprised” by secret donations.

For a detailed account of the evolution of the institution of insinuation from its Roman origins into its modern French form, see 3 Charles Demolombe, Traité des Donations Entre-Vifs et des Testaments n° 230-243, at 198-213, in 20 Cours de Code Napoléon (1876). See also Robert Pothier, Traité des Donations Entre-Vifs sec. 2, art. 3, in 7 Œuvres de Pothier 459-74 (Dupin éd., nouv. éd. 1825) (explaining in detail the law of insinuation under the French ancien régime).
In Pothier’s view, clearly enough, the rationale behind the form requirements for donations *inter vivos* is linked to the principle that such donations must be truly “irrevocable,” to be precise, these requirements, in his judgment, serve as a guaranty that that principle will be respected. But this justification for the requirements, far from providing a completely satisfactory explanation for their existence, merely invites another question, namely, “Why is irrevocability so important?” Though Pothier doesn’t answer that question here, he does answer it elsewhere:

The reason why our law requires . . . the necessity of . . . irrevocability for the validity of donations is readily understandable. The spirit of our French law is inclined toward this: that goods remain within families and pass to the heirs. The dispositions of this law regarding separate property, as well as those regarding the customary reserve [forced portion], make this inclination well known.

In this view, . . . our laws have judged it appropriate, while preserving for individuals the right [to dispose of their property as they wish], nevertheless to impose a restraint that makes the exercise of this right more difficult for them. It is for that reason that these laws have ordered that one cannot validly donate [a thing] unless he relinquish control of the thing given as of the very moment of the donation and unless he forever deprive himself of the power of disposing of it. The objective [of this restraint] is that the natural attachment that one has for that which one possesses and the aversion that one has for depriving oneself of things will deter individuals from giving.

Thus, the rationale for the form requirements, as Pothier understands it, seems to be this. The form requirements are needed to insure that donations *inter vivos* are in fact irrevocable. Irrevocability, in turn, is needed to protect the legitimate expectation of the donor’s family to share in his wealth upon his death. Irrevocability does that by deterring the donor from giving away his wealth in the first place. How so? By making the donor himself, right now and up front, “feel the same pain” that his giving away his wealth will inflict on his family at the time of his death, namely, the pain of losing that wealth and not being able to get it back.
169. According to natural law, donations are subjected to no particular form: one would resort to a writing only so as to prove the existence of the contract more easily. Justinian retained this reasonable simplicity of principles, as much in the form of donations *inter vivos* as in that of other contracts. Donations could be made . . . verbally and *a fortiori* by private writings.

170. Neither the ancient ordinances nor the *coutumes* of France governed the form of donations by means of any particular dispositions. Nevertheless, inasmuch as private acts could serve to elude the dispositions of those *coutumes* under which the power of giving by testament was less extended than was the power to donate inter vivos, the validity of donations made under private signature came to be questioned. The opinions of the [French] jurisconsults were divided on this question.

The Ordinance of 1731 caused these doubts to cease by providing . . . that all acts purporting to be donations *inter vivos* will be passed before a notary and that the act will be kept [by him] *en minute*, under pain of nullity."

171. The Code [Civil] suppressed the difference established by the *coutumes* between the power to give by testament and the power to give *inter vivos*. As a result, the rationale that had led to the introduction, for donations, of the requirement of a notarial act *en minute* existed. Even so, the Ordinance of 1731 was copied verbatim into article 931, which provides: "Every act purporting to be a donation *inter vivos* will be passed before a notary in the ordinary form for contracts; and the act will be kept [by him] *en minute*, under pain of nullity."

The form of donations *inter vivos* is, then, the same as that of all notarial contracts . . . . But the other contracts can be made under private signature, whereas donations must be passed before the notary.

187. Two different things must be considered here: the acceptance in itself and the solemnity [form] for the acceptance. One pertains to the substance of the contract; the other is only a formality of the civil law.

The acceptance is nothing other than the consent given by the donee to the offer of the donor. It is of the essence of a contract, which requires the consent of the two parties – the concourse of two wills. It is only at the moment of acceptance that the two wills are united; thus, it is the acceptance that renders the agreement complete.

The solemnity for the acceptance is the express mention that must be made of it [the acceptance] in positive terms and under penalty of nullity either in the act of donation itself or in a separate act that is both authentic and passed before a notary [and two witnesses]. Contracts other than donations are valid even though the acceptance is not referred to in express terms – even though it is manifested [i] only by the presence of the parties and is [therefore] only tacit or [ii] only by their signature.

The Roman law, which on this point was conformed to the simplicity of the natural law, made no distinction in this regard between donations and other contracts. But in
At this point, Demolombe inserts a cross-reference to another part of his treatise on donations, namely, volume 1, n° 3-5. To understand what Demolombe means here, one must first read at least part of the cross-referenced material. Here it is:

3. First of all, it was necessary, we say, that the legislators intervene [i.e., adopt laws regulating donations] in the interest of the disposing party himself . . . .

5. . . .

Dispositions by gratuitous title, by virtue of the very fact that they deprive us of property without compensation and without equivalent, offer dangers of a special nature, against which it is important to protect, first of all, the disposing party himself.

These dangers, which exist in donations inter vivos, are still more to be feared in testaments, where the disposing party is neither warned nor protected by his own interest, since the act imposes on him no immediate sacrifice and which, in any event, can be made as he approaches death, when his faltering will can no longer resist the obsessions of all sorts with which it so often then besieged.

Here is the source of the entire order of rules that have been introduced in the interest of the disposing party, to the end of guaranteeing that the disposition is indeed the word of a healthy and free will . . . . Such are the rules on solemn formalities for donations inter vivos and testaments as well as the rules on capacity to dispose and to receive.

8. Every act purporting to be a donation inter vivos must be passed before a notary.

– Rationale. – Article 931 [CN] is thusly conceived: “Every act purporting to be a donation inter vivos will be passed before a notary in the ordinary form for contracts; and the act will be kept [by him] en minute, under pain of nullity.”

That the necessity of passing an act before a notary has been seen as an essential guaranty of the certitude and independence of the will of the donor is incontestable.7 It

3 Charles Demolombe, Traité des Donations Entre-Vifs et des Testaments n° 8, at 9-10, in 20 Cours de Code Napoléon (1876)

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DIV - 6
is necessary to recognize, however, that this was not the principal rationale that directed the legislators of 1804. What they wanted, above all, was to attain the end (inspired by the example of the old law) that formed the predominant object of their preoccupation [in the domain of donations inter vivos], namely, to promote effectively the principle of the irrevocability of donations inter vivos. “The principal motive for this legislation,” Damours says of the Ordinance of 1731, was the irrevocability of donations.” And Pothier wrote, in the same vein, that “the Ordinance has this precaution in it in order to prevent the donor from being able to conserve the power to annihilate his donation, be it by retaining the act of donation with him or by putting it into the hands of a third person who would return it to the donor were he to ask for it back; that would be contrary to the irrevocability required in donations inter vivos.”

5 Marcel Planiol & Georges Ripert, Traité Pratique de Droit Civil: Donations et Testaments n° 342, at 461-62 (André Trasbot & Yvon Loussouarn revs., 2d éd. 1957)

Value of the principle of solemnity. – . . .

The solemnity of the donation has been justified by three ideas, which can be traced to the law of the ancien régime:

(i) The solemnity assures the liberty of the donor. The donor is often won over more or less effectively by the beneficiary; he who deprives himself for the benefit of another acts under a foreign influence that dominates his will. The presence of the notary is of such a nature as to repel or to diminish these influence and, at the very least, gives time for reflection.

(ii) The solemnity is attached to the idea of the conservation of goods within the family, which was so important in the old law. By imposing a solemn form, the law wished to draw the attention of the donor to the interest of his family and, in addition, to provide indisputable proof of the existence and the amount of the donations for the calculation of the reserve [forced portion] and the disposable portion.

(iii) The principle of the irrevocability of donations was recognized as early as the 16th century; to prevent any recovery of the effectuated donation, the law required the en minute notarial form. As a matter of history, this is perhaps indeed the principal reason for the solemnity. With an act under private signature, the donor would have had the de facto means of annihilating the liberality – by suppressing the title. . . .

All these justifications are insufficient. Leaving aside the idea of irrevocability, which will be evaluated later, the solemnity is illogical and ineffective. [i] It is illogical in the sense that there are well other means of ruining oneself and of ruining one’s family, all of which are just as dangerous as the donation. Numerous people who would never consent to an unreflected donation allow themselves to be tricked into onerous contracts.
I find this criticism itself to be "illogical," at least if its point is supposed to be that the solemnity requirement should be eliminated. All that the criticism establishes is that there is an inconsistency in the law. Now, this normative inconsistency, like every other normative inconsistency, might, as a logical matter, be resolved in either of two ways, namely, by eliminating one of the norms or the other and then subjecting the cases that were formerly covered by the eliminated norm to the norm that has been retained. Here, the two possibilities are (i) eliminate the form requirement for donations or (ii) subject other “dangerous” contracts to the form requirement (or, perhaps, to some functionally equivalent alternative). As between these alternatives, however, the criticism itself does not and, as a logical matter, cannot help us choose.

By the way, it seems to me that, since Planiol’s treatise was last revised (1957), Louisiana (as well as France) has, to a great extent, opted for the latter alternative. To be sure, Louisiana has not gone whole hog and required that onerous contracts be made in authentic form. But it has subjected a host of onerous contracts, in particular, those that are considered to be the most dangerous, to a variety of rules the point of which is the same as that of the form requirement for donations, namely, to give the contracting parties time to reflect and, if they so choose, to back out of the contract. I have in mind (i) the legislation that permits consumers who purchase goods in response to in-home or over-the-telephone solicitations to cancel their contracts within three days of making them, see La. Rev. Stat. 9:2711, 2711.1, & 3538 & La. Rev. Stat. 45:831(E); and (ii) the legislation that permits borrowers who apply for “consumer” or “federally related mortgage” loans to cancel their applications within five days of submitting them, see La. Rev. Stat. 9:3572.10. Thanks to this legislation, the “inconsistency” that had Planiol so ginned up has been significantly reduced, if not eliminated entirely.

Really? Why? As you will see below, Louisiana (unlike France) presently subjects gifts of some of the things Planiol mentions – the gratuitous issuance of negotiable instruments (e.g., promissory notes and checks) and the gratuitous issuance as well as the gratuitous transfer of non-negotiable instruments – to the form requirements for donations inter vivos. Not only that, but numerous Latin American jurisdictions (again, unlike France) do the same as that of the form requirement for donations, namely, to give the contracting parties time to reflect and, if they so choose, to back out of the contract. I have in mind (i) the legislation that permits consumers who purchase goods in response to in-home or over-the-telephone solicitations to cancel their contracts within three days of making them, see La. Rev. Stat. 9:2711, 2711.1, & 3538 & La. Rev. Stat. 45:831(E); and (ii) the legislation that permits borrowers who apply for “consumer” or “federally related mortgage” loans to cancel their applications within five days of submitting them, see La. Rev. Stat. 9:3572.10. Thanks to this legislation, the “inconsistency” that had Planiol so ginned up has been significantly reduced, if not eliminated entirely.

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liberalities, the solemnity is, in the end, a costly luxury that is used [only?] by vigilant and scrupulous persons for whom, by definition, such protection is particularly superfluous.

4-2 Henri & Léon Mazeaud et al.,
LEÇONS DE DROIT CIVIL: SUCCESSIONS - LIBÉRALITÉS n° 1451-1452, at 642-43
(Laurent Leveneur & Sabine Mazeaud-Leveneur revs., 5th ed. 1999)

1451. History. – . . .
Currently the principle of solemnity [in donations inter vivos] is criticized, for it is thought that the formalities do not fulfill the end for which they were instituted. In addition, insofar as it is impossible to stop donations without form, which are accomplished in large numbers by hand-to-hand transfers, it is thought that the rule has no effect but to incite the parties, for fear of the sanctions, to leave no trace of their liberalities.

These criticisms, however, have not convinced the Commission for the Reform of the Code Civil, which has proposed to maintain (while nonetheless relaxing) the principle of solemnity. The majority of foreign legal systems likewise make the donation a solemn contract, notably, Italian law (C.Civ. art. 782 (1942)), Spanish law (C.Civ. Español. 633), and Greek law (C.Civ. Hellinique). Swiss law makes the publicity of donations of immovable rights a condition for the validity of the contract (C. Suisse des Obligations art. 242, ¶ 2). German law submits the promise of donation, but not the donation itself, to the writing of a notarial act (B.G.B. art. 518). . . .

1452. The purpose of the formalities. – The formalities have been instituted for the protection of the family and of the disposing party. The counsel that the notary must give will lead the disposing party to reflect and will discourage or foil maneuvers of captation [undue influence]. Moreover, the sole fact that one must avow one’s intention before a notary is of such a nature as to cause a person who would consent to a liberality if it would remain secret to reverse himself.

In addition, a donation that would be valid without any form could remain unknown or form the object of great difficulties of proof, be it when revocation for ingratitude . . . is demanded or when the heirs require collation or reduction. The writing of an en minute act by a notary assures the excellent conservation of proof.

Finally, the writing of an authentic act guaranties the irrevocability of donations. In this the legislature has believed it sees a rule that is protective of the family.

NOTE

When Louisiana first codified its law of form requirements for donations inter vivos (back in 1808), it seems to have all but ignored the Romano-Spanish tradition and to have “radically impossible.”
followed, instead, the French tradition, though with some interesting deviations.

Louisiana required insinuation, but only in its aberrant and watered-down French form. Thus, the only requirement was that the act of donation be recorded in the public records (the parties did not have to appear before a judge), the requirement applied only to donations of immovables (movables, whether corporeal or incorporeal, were exempt), and the only “sanction” for failure to meet the requirement was that the donation was to have no effect against third persons (as between the parties and their successors, insinuation was not a prerequisite to validity).

As for the form of the donative instrument itself, Louisiana, like France, required that the instrument be passed before and signed by a notary (as well as signed by the parties themselves). Beyond that point, however, the Louisiana redactors broke with their French counterparts. Oversimplifying somewhat, one could say that the former required at once both more and less than the latter. The Louisianaans required less in this sense: the special “en minute” procedure used by French notaires was not required, that is, the notary who passed the act was not required to keep and archive the original or, for that matter, to keep any record of the act at all. The Louisianaans required more in this sense: the instrument had to be passed before and signed by not only a notary (which was all that French law required), but also two witnesses.

With only a few exceptions (all of which will be noted below), Louisiana’s law regarding the form of donations inter vivos remains today as it was in 1808.

Deborah F. Zehner, Comment, Louisiana’s Approach to Gratuitous Inter Vivos Dispositions, 22 LOY. L. REV. 743, 747-48 (1976)

10 See supra note 44, p. 186, for a description of “insinuation” French style.

11 Why the redactors of the Digest of 1808 chose not to impose this requirement probably had something to do with the (dismal) state of notarial practice here in the early 19th Century. Prior to 1882, Louisiana notaries, even those in the big cities, were not required to maintain archives of the acts that had been passed before them. In that year, the Louisiana legislature imposed such a requirement for the first time ever, but limited its scope to Orleans Parish. See 1882 La. Acts No. 50. Thus, even after that time, notaries outside that parish were under no “archiving” obligation. See Atty. Gen. A.V. Coco, Notaries Public in Country Parishes not Required to Keep Public Records of Acts Executed Before Them, 1916-1918 La. Atty. Gen. Ops. 709 (Oct. 6, 1917). And – here’s the kicker – that’s how things have remained to this day!

12 Why the redactors of the Digest of 1808 chose to impose this requirement is not entirely clear. It is not unreasonable to assume, however, that they viewed the requirement as a substitute of sorts for the notarial “en minute” procedure, that is, as a measure that would (i) encourage the donor to reflect up on his decision, (ii) assure that the donation would, in fact, be “irrevocable,” and (iii) provide proof of the existence of the donation.
The courts have demanded stringent compliance with the form prescribed in the Civil Code for donations inter vivos. Policy considerations form the basis for such a strict construction. Since by its very nature a donation effects a transfer of property to another without any consideration flowing to the donor, strict requirements of form serve to protect the donor from any coercive influence to which he might be subjected in disposing of his property. By requiring donations inter vivos to be by authentic act, transfers become a matter of public record, openly entered into, with the risk of undue influence minimized. Or perhaps of utmost importance, the solemnity of an authentic act helps to impress upon the donor the gravity of depleting his patrimony during his lifetime, just as requiring a witness to take a solemn oath at trial calls his attention to the seriousness of his testimony. All of these policies are present and operations under the articles dealing with the form of donations inter vivos in the Louisiana Civil Code.

Succession of Miller, 405 So.2d 812, 819, 821-22 (on rehearing) (La. 1981)

DIXON, C.J., dissenting.

In this state provisions for manual gifts were first codified in Article 1526 of the Civil Code of 1825. The Code Napoleon did not provide for manual gifts, and made no distinctions between corporeals and incorporeals or movables and immovables in regard to donations inter vivos. Instead, the Code provided that any instrument containing or importing ("portant") an inter vivos donation should be executed before a notary, in the form usual for contracts; the original instrument was to be kept on file by the notary. C.N. 931.

The primary purpose of requiring the notarial act was to insure the irrevocability of the donation; since the notary was required to retain the original copy of the act in his files, the donor was powerless to revoke the donation by destroying the instrument, as could be done in the case of an act under private signature. A secondary purpose of the requirement was thought to be to diminish any external influences that may have affected the donor. 3 M. Planiol, supra, s 2526, p. 233. Much the same purpose was achieved in the case of donations of movable things: a descriptive list of the effects was required to be annexed to the act of donation. C.N. 948. Compare C.C. 1538. This article contemplates the situation in which a donor makes a gift of a movable, yet nevertheless retains possession of it. Since the donor retains possession, it would be possible to transfer or destroy the objects of the gift. To prevent this, and to assure the irrevocability of the donation, the descriptive list served as a title to the movable effects. 3 M. Planiol, supra, ss 2556-61, pp. 253-55.

Article 1526 of the Code of 1825, the predecessor of Article 1539, had no counterpart in the Digest of 1808 or in the Code Napoleon. The Louisiana articles, appearing to allow manual donation only of corporeal movables, worked a refinement upon traditional French law, in which no notarial act was required for any donation that
was actually effected by the real delivery of the object donated. Corporeal movables, of course, were typically the object of such gifts, since the transfer of possession conferred ownership. Aubry & Rau, Droit Civil Francais s 659, pp. 109-111 (L.S.L.I. trans. 1969).

The Louisiana Civil Code made significant departures from the Code Napoleon, and it is not altogether clear why those changes were made. C.C. 1536, requiring a notarial act for donations inter vivos, applies to immovables and to incorporeal things such as rents, credits and rights or actions, none of which can be physically transferred from one person to another. The purpose of requiring a notarial act to effect donations of incorporeals and immovables would thus seem to be entirely evidentiary: the document manifests the delivery of things which cannot be seen or touched and things which, by definition, cannot easily be moved. The notarial act accomplishes a delivery of ownership. If, as has been suggested, the effort of preparing a notarial act is imposed to impress upon the donor the seriousness of the act of donation, it is impossible to explain why this same cautionary device is not imposed when donations of money are made, which could easily exceed the value of an incorporeal thing. Just as a tract of land cannot be physically transferred from one person to another, an incorporeal thing eludes delivery. Corporeal movables, however, are susceptible to physical transfer. Cf. C.C. 2247. It is for this reason alone that corporeal movable effects are exempted from the rule of C.C. 1536.

NOTE

In some modern codes there is no requirement that the donee’s acceptance of the donation, as opposed to the donor’s offer (or promise) of the donation, be in any particular form. Examples include the BURGERLICHES GESETZBUCH (German Civil Code) (see § 518, which requires that the promise of donation be in notarial form but says nothing about the acceptance of that promise or of the eventual donation) and the CODE CIVIL SUISSE (Swiss Civil Code) (see arts. 242 & 243, which require that the promise to donate an immovable be made by authentic act and be filed for public registry but say nothing about the acceptance of that promise or the eventual donation).

1) The requirements

a) Act of (offer of) donation

1] General rule: by authentic act (CC art. 1536)

a] Explication

b] Scope: all donations IV of all things no matter what
category

1} All donations IV

a} Donations that appear to be donations

b} Donations disguised as sales

* Illustration

DH 72. F wants to give his nephew, N, a tract of land, but doesn't want anyone else, especially not his son, S, to realize that it's a donation. And so F draws up a document, entitled "Act of Sale," in which he purports to "sell" N the tract of land for $50,000. N, too, signs the document. Of course, no such money ever changes hands. Sometime later, S discovers that the "sale" to N was really a sham. And then F dies. S now sues N to recover the tract of land on the theory that (i) the deal was really a donation and (ii) the donation was null for it was not in proper form. What result? Why? See CC art. 2027, sent. 2, & comments (b) & (d), and the jurisprudence that follows:

Lambert v. Penn Mutual Life Ins. Co.,
24 So. 16 (La. 1898)

Syllabus by the Court

3. A donation made in the form of an onerous contract (without consideration, and really intended as a donation in disguise), to have effect as such must be passed before a notary public and two witnesses.

... 

BLANCHARD, J.

... 

Nor can we assent to the proposition that the assignment of the [rights] . . . by Mrs. Lambert to her husband is valid as a donation, as contended for it on the authority of Rev. Civ. Code, art. 1746. It is quite true that under that article one of the spouses may during marriage give to the other whatever he or she might give to a stranger. But this must be done pursuant to the directions of the law relative to donations. Id. art. 1536. The donation of incorporeal things, such as credits, rights, or actions, must be by public authentic act. This assignment was not such act. It is sought to overcome this difficulty, however, by the contention that the assignment is made in the form of a sale by private act, and, though not a sale, because without consideration, it is yet good, in this form of an onerous contract, as a donation, although not clothed with the formalities requisite for the validity of a donation. Several old decisions (Holmes v. Patterson, 5 Mart. [La.] 693; Trahan v. McMannus, 2 La. 215) are cited as sustaining this view. These cases were
decided under Code 1808, page 220, whose article 53 provided that 'all acts containing donations must be passed before a notary and two witnesses,' etc. An essential difference, both in language and effect, will be noted between that article of the Code of 1808 and article 1523 of the Code of 1825, now article 1536 of the Revised Code, in respect to the form of donations. The donation in Trahan v. McMannus, 2 La. 215, was upheld because it did not profess on its face to be a donation, though it was in reality one in the guise of an onerous contract under private signature. As it was not an act by its terms containing a donation, it was held not to contravene the provisions of article 53 of the then Code. But this article was changed in the Code of 1825 so as to make the law declare that 'an act shall be passed before a notary and two witnesses of every donation,' etc. The 2 La. case, therefore, is not an authority under the altered conditions. This was pointed out in Brittain v. Richardson, 3 Reb. (La.) 81, where it was declared that all donations inter vivos must be passed before a notary and two witnesses. See, also, Rhodes v. Rhodes, 10 La. 90; Cole's Heirs v. Cole's Ex'r's, 7 Mrat. (N. S. 424; Miller v. Andrus, 1 La. Ann. 237; Soileau v. Rougeau, 2 La. Ann. 766; Atkinson v. Atkinson, 15 La. Ann. 491; Farrar v. Michoud, 22 La. Ann. 358. The conclusion we announce on this subject is that a donation made in the form of an onerous contract,—that is to say, an onerous contract which is not such because without consideration, and really intended as a donation in disguise,—to have effect as a donation, must be passed before a notary public and two witnesses. . . .

2} All things

a} Immovables (CC art. 1536)

b} Incorporeals (CC art. 1536)

c} Corporeal movables (?) (CC art. 1538)

c] Explication

What, exactly, is required? See CC art. 1536. Can defects in form later be “cured”? If so, how? See CC art. 1845.

2} Exceptions

a} Manual gift

1} Explication


a} By donor himself to donee himself

DIV - 14
b)_by donor through representative to donee himself

DH 73. P hands $100 to his mandatary, M, with instructions that M hand it over to X. M does so. Has there been a manual delivery? Why or why not?

DH 74. The same as before (DH 73), except that, this time, P, instead of handing M $100, tells M to withdraw $100 from P's checking account and then hand it to X. Different result now? Why or why not?

DH 75. The same as before (DH 74), except that, this time, P, appoints X, the donee, as his mandatary for purposes of delivery and directs X to withdraw $100 from his checking account and then keep it (in other words, give it to himself). Different result now? Why or why not? See the jurisprudence that follows:

Succession of Gorman, 26 So.2d 150 (La. 1946)

ROGERS, Justice.

Mrs. Georgina Jepson Gorman died at her domicile in the City of New Orleans on September 1, 1942... The items inventoried [by the executor of her testament] was... a claim against Mrs. Margaret Muller for $2,643.92. The claim against Mrs. Muller was for money which, acting under a power of attorney, she drew out of a savings account in the name of Mrs. Gorman prior to her death.

The record shows that the defendant, Mrs. Margaret Muller, and the decedent, Mrs. Georgina Gorman, were half sisters, the children of the same mother. On July 22, 1942, Mrs. Gorman was ill and confined to the Mercy Hospital in the City of New Orleans. At that time she had on deposit in a savings account in the Whitney National Bank the sum of $2,643.92... She executed a power of attorney on the form provided by the bank authorizing Mrs. Margaret Muller to withdraw her money from the bank.

On July 22, 1942, the day the power of attorney was executed, Mrs. Muller withdrew $200; on August 6, 1942, she withdrew $2,000, and on August 28, 1942, she exhausted the account by withdrawing the balance. The death of Mrs. Gorman occurred four days later.

The tradition or delivery of movable effects takes place if the party to whom it is intended they should be transferred or delivered has them already in his possession. Civ.Code, art. 2478.

If the funds involved in this case had been in the actual possession of Mrs. Muller at the time her sister, Mrs. Gorman, expressed the desire to make the donation there would
have been no necessity in order to perfect the manual gift to go through the ceremony of having Mrs. Muller turn the money over to Mrs. Gorman in order that Mrs. Gorman might immediately return the money to Mrs. Muller. The parties adopted the most expedient way of making and accepting the donation. It was not ineffective on that account. It would have been an idle ceremony for Mrs. Muller after withdrawing the money from the bank to hand it to Mrs. Gorman, the donor, so that Mrs. Gorman in turn might give it to Mrs. Muller, the donee. The law takes no account of useless formalities. In order to complete the manual gift it suffices that the will of the donor to give and the actual possession of the movable property by the donee operate simultaneously. In this case, the desire of Mrs. Gorman to make the gift was in full operation at the moment Mrs. Muller actually received the money from the bank. Succession of Zacharie, 119 La. 150, 43 So. 988. Gibson v. Hearn, 164 La. 65, 113 So. 766.

The mere circumstance that a person authorizes another to withdraw his funds from a bank under a power of attorney does not of itself constitute a donation of the funds, but if the evidence satisfactorily shows that the power of attorney was executed as one of the means of establishing a donation of the funds and the volition of the donor to make the gift is still in operation at the moment the donee actually receives the money from the bank, there would seem to be no good reason for holding the donation to be invalid.

Considering the testimony offered to establish the manual gift by Mrs. Gorman to her sister, Mrs. Muller, and the close personal relations existing between them, the transaction whereby Mrs. Muller came into possession of the jewelry and the money from Mrs. Gorman can be considered in no other light than as a donation.

By donor himself to representative of donee

DH 76. D hands $100 to M, X's general purpose mandatary, with instructions that M turn it over to X. Has there been a manual delivery? Why or why not?

DH 77. D deposits $100 into a savings account that belongs to X and has been set up in the name of X. Has there been a manual delivery? Why or why not?

DH 78. D gives T, the tutor of X, $100, with instructions that the money is to be deposited in the account that T maintains for X's benefit. This account, though in T's name, indicates that T holds the accounts "as tutor for X." Has there been a manual delivery to X? Why or why not? See the jurisprudence that follows:

Allen v. Allen,
301 So. 2d 417 (La. App. 2d Cir. 1974)

HALL, J.
The issue presented by this appeal is whether two savings accounts in a savings and loan association in California are assets of the community of acquests and gains formerly existing between Jack H. Allen and Joyce Reynolds Allen, now divorced, or whether the accounts are owned by their children through donations to the children made over a period of years. . . .

In 1963, Mr. and Mrs. Allen had a savings account in First Federal Savings & Loan Association in Monroe with a balance of over $700. They were advised of the tax advantages of putting savings in the children's names and reporting the income therefrom separately. The account at First Federal was closed out and a check issued to Mr. and Mrs. Allen for the balance, which was deposited in their checking account in a Monroe bank. A few days thereafter, two accounts were opened in the State Mutual Savings & Loan Association in California in the names "Mr. or Mrs. Jack H. Allen as guardian of the estate of Jacqueline Melinda Allen" and "Mr. or Mrs. Jack H. Allen as guardian of the estate of Robin Leslie Allen" and funds were deposited therein by Mr. and Mrs. Allen. Either Mr. or Mrs. Allen had the authority to make withdrawals.

Through the years thereafter, additional funds were deposited in the accounts by Mr. and Mrs. Allen . . . .

In about 1968, the names of the accounts were changed to Mrs. Joyce R. Allen, custodian for Jacqueline Melinda Allen and Robin Leslie Allen under the Louisiana Uniform Gifts to Minors Act. Only Mrs. Allen had authority to make withdrawals from the accounts. Separate income tax returns were filed in the children's names for 1969, showing interest income from each account of over $700 . . . .

Although the accounts were carried in the names of both parents as guardians and then in the name of Mrs. Allen as custodian, the provisions of the Louisiana Gifts to Minors Act, LSA-R.S. 9:735-742, were never complied with in that no deed of gift was ever signed.

The district court held the accounts are owned by the children and are not assets of the former community, the funds having been donated to the children by manual gift pursuant to Civil Code Art. 1539. Appellant contends there was no effective donation because the funds were not irrevocably vested in the donees as required by Civil Code Art. 1468 since the parents retained control and the right to withdraw the funds. Appellant further contends the accounts are incorporeal rights which cannot be the subject of a manual gift but require authentic acts under Civil Code Arts. 1536 and 1538 . . . .

Pertinent to the issue presented are the following articles of the Civil Code:

. . .

"Art. 1546. A donation made to a minor, not emancipated, must be accepted by his tutor.

"Nevertheless, either parent of the minor, or any ascendant of the minor, whether the minor is emancipated or not, or the tutor of the minor, may accept the donation for the minor whether such parent or ascendant is the donor, or the tutor of the minor or both. And a donation to be held in trust for the minor may be accepted by the trustee alone."

In Gibson, the court held that a deposit by the donor into a bank account in the name
of an agent for a minor donee was a donation of money, accompanied by a real delivery, and constituted a donation by manual gift. Money is a corporeal movable, and may be donated by manual gift.

In the instant case, as in Gibson, the gifts were of money, accompanied by real delivery through deposit of the money in savings accounts in the name of a fiduciary for the minors.

The donors' intent to make irrevocable donations of the funds deposited into the accounts is manifest from the evidence. Appellant's own testimony was that this was done for tax purposes, which necessarily presupposes an irrevocable gift to lawfully receive the tax advantage of separate income. The accounts were continuously carried in the names of fiduciaries for the named minors. The permanent and irrevocable nature of the donations is further demonstrated by the fact that no funds were ever withdrawn in the more than ten years since the initial donations were made.

The only factor weighing against the irrevocability of the donations is that both parents at first and then one parent had the right to make withdrawals and to that extent retained control of the funds. However, the donees are minors and someone had to act for them -- logically, the parents. The cases cited by appellant deserve careful consideration. In Succession of Grubbs, a husband deposited $10,000 in a savings account in the name of his wife. Withdrawals could be made by either the husband or wife. This court held there was not an effective donation because the husband attempted to transfer a savings account, an incorporeal immovable, without complying with C.C.Art. 1468 and because he retained the power of withdrawal. Grubbs is distinguishable from the instant case for two reasons. First, under the authority of Gibson v. Hearne we hold the gifts here were of money, a corporeal movable, not gifts of the accounts into which the money was deposited. Secondly, here the donees were minors and necessarily the authority to withdraw needed to be vested in someone, which was not the situation in Grubbs.

In Basco, Louis Basco opened a savings account in the name of "Joseph Basco, by Louis Basco." Louis had the sole right to make withdrawals. The court held the account was an incorporeal movable and since there was no compliance with C.C. Art. 1536 there was no valid donation to Joseph Basco. This case is distinguished from the instant case for the same reasons as stated above in connection with the Grubbs case.

In Succession of Dykes, supra, the accounts were opened by W. H. Dykes in the name of "W. H. Dykes or W. E. Dykes." The court held that conceding a donative intent, there was never a real delivery of the funds on deposit since W. H. Dykes remained the owner thereof and retained power of control and withdrawal until his death. In the instant case, the accounts were in the names of the donors only in a fiduciary capacity and their control was in the same capacity.

The accounts in question represent money donated to the children through manual gifts and are not assets of the community formerly existing between the divorced parents.

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4) By donor through representative to representative of donee

DIV - 18
DH 79. D appoints B as his mandatary, directing him (i) to sell a certain asset of D's and (ii) to hold the proceeds as mandatary for X. At the time, X knows nothing about it. But after B sells the asset and collects the proceeds, X "ratifies" B's acts. Has there been a manual delivery to X? Why or why not? See the jurisprudence that follows:

________________________________________________________

Chachere v. Dumartrait,
2 La. 38 (1830)

This is an injunction suit, instituted by the wife, against the syndic of the creditors of her insolvent husband, B. Martil to restrain him [the syndic] from selling the immovable property . . . of the insolvent [her husband], until her claim for property and money brought into[the] marriage is first satisfied by a sale for cash. . . .

It appears from the evidence that some time after the marriage of the petitioner to B. Martel, on or about the year 1816, her father Louis Chachere, allowed her husband to sell two tracts of land, situated on the Carancro and in the Parish of St. Landry, to one William Johnson, for $1,600 and to receive the price. The title to Johnson was ratified and confirmed by L. Chachere the father of Madame Martel. The wife alleges this land was a donation from her father to her, though sold by her husband. Madame Boutte her sister testifies that Louis Chachere (père) purchased the land since sold by Martel to Johnson, for his daughter, Madame Martel to live on. And that Martel and his wife did live on it a year or more. Mr. Boutte, a brother-in-law of the plaintiff, states it was always understood in the family that the land on the Carancro, "sold to Johnson," belonged to "Madame Martel." . . .

The wife now claimed in her petition of injunction, the price of the land . . ., and to have so much of the property in the hands of Dumartrait the syndic, sold for cash as will satisfy this claim . . . .

MATHEWS J. delivered the opinion of the Court.

... The $1600 . . . seem[s] to have been considered [by the trial court] as a donation made to her [Madame Martel] by her father [Louis], which fell into the hands of her husband, the insolvent, and was by him appropriated to his own use.

The donation appears to have been made in the following manner: Chachere the father, was the owner of certain tracts of land of which he permitted the husband of his daughter to take possession and occupy for some time, who afterwards sold this property to one Johnson for $1600, which was paid (on Chachere's ratification and confirmation of sale) to his son-in-law. From the whole tenor of the evidence we do not doubt the intention of the father to give these tracts of land to his daughter as a marriage portion: but before any legal transfer was made to that effect, her husband was permitted to make the sale as above stated.

The price, although paid to him by the vendee must be considered as really due to the owner of the property, Chachere the father; and was left in the possession of the receiver
as a donation to his wife, he received it as her agent, delivered from her father through the agency of the vendee of the land, who was really a purchaser from Chachere, altho' nominally from Martel. The donation was thus fully and completely effected. It was as fully executed as if the money had been delivered from the father to his daughter and by the latter transferred to her husband. If it was of moveable or personal property and was executed, it is good according to law. See La. Code, Art. 1528.

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e} By donor himself to both himself & donee

DH 80α. D opens an account in the name of D or X and then deposits $100 into the account. Not long thereafter, X withdraws the $100. Has there been a manual gift of money to X? Why or why not?

DH 80β. The same as before (DH 80α), except that X has not yet withdrawn the $100. Has there been a manual gift of money to X? Why or why not?

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NOTE

The Louisiana Supreme Court once purported to sum up the requirements for the “manual gift” exception of CC art. 1539 this way:

[I]t is clear from this prior jurisprudence that there is no need for the donor to actually hand over the [donatum] to the donee. It is sufficient ‘that the will of the donor to give and actual possession of the movable property by the donee [or his representative] operate simultaneously.

Succession of Miller, 405 So. 2d 812, 819 (La. 1981) (on rehearing). Based on the hypotheticals set forth above, do you agree or disagree with this generalization?

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