The Retroactivity Provisions of Louisiana's Equal Management Law: Interpretation and Constitutionality

Cynthia Samuel
THE RETROACTIVITY PROVISIONS OF LOUISIANA'S EQUAL MANAGEMENT LAW: INTERPRETATION AND CONSTITUTIONALITY

Cynthia Samuel*

If "what's past is prologue," the prologue to Louisiana's equal management law took place ominously in France in 1793 when the Committee on Civil and Criminal Legislation, to which the government of the French revolution had assigned the task of preparing a civil code, presented its proposed articles on matrimonial regimes to the National Convention.¹ The Committee recommended that all spouses be subject to a regime of community similar to the customary regime that then existed in part of France, but with an important difference: in the community regime of the new civil code the husband was not to be the exclusive head; instead, the spouses would exercise a common right to the administration of their common fund.² The philosophers at the Convention, Danton, Desmoulins, and others, praised the proposal for restoring to the wife her natural rights to the administration of common property.³ The Convention's jurists, however, argued that man's natural superiority over woman rendered the wife incapable of administration, that common administration would engender disorder and discord, and that so revolutionary a system as the Committee proposed would cause foreigners to regard the French with distrust.⁴ In the end the Convention rejected the Committee's proposal, a triumph of juristic tradition over philosophical principles.⁵

If philosophical principles of equality in conjugal relations could not prevail during the heyday of "liberty, equality, fraternity," it was scarcely to be hoped that such principles would fare better in the summer of 1978 before the Louisiana Legisla-

* Assistant Professor of Law, Tulane University; Member of Advisory Committee to Joint Legislative Subcommittee Revising Louisiana's Community Property Laws.
1. P. Sagnac, La Legislation Civile de la Revolution Francaise 294-301 (1899).
2. Id. at 297.
3. Id. at 300.
4. Id.
5. Id. at 301.
ture which, by rejecting the Equal Rights Amendment, had already shown little fervor for statements of constitutional principle concerning the rights of women. Although the subject of comprehensive matrimonial regime reform to improve the wife's position in the management of the community property had been under intensive study since 1974, the legislature had seemed content to retain the husband as "head and master" while aiding the wife with piecemeal legislation giving her the authority to obligate her earnings, if she had any, and placing further restrictions on the husband's powers over community immovables. When presented in 1977 with two entirely different proposals for comprehensive reform the legislature had enacted neither and only resolved to study one of them for possible enactment in 1978. However, the unlikely happened; the 1978 legislature enacted as a comprehensive substitute for "head and master" a system of "equal management" wherein as a general rule either spouse acting alone may manage the community property and obligate it for debts. By coincidence France, too, in 1978 moved toward recognizing the principle of spousal equality by cabinet adoption of a proposal very similar to Louisiana's equal management scheme.

---


7. "Head and master," the term used in Louisiana Civil Code article 2404, will be used by this author to denote the system of husband-management of community property.


10. The 1977 legislature was offered a choice between a "two funds" system of management proposed by the Louisiana Law Institute in House Bill 783, and an "equal management" system proposed in House Bill 1278 and Senate Bill 581. The legislature enacted neither; instead, it passed Senate Concurrent Resolution 54 establishing a joint legislative subcommittee and an advisory committee to draft an "equal management" system. See Riley, supra note 6, at 558-62.


12. The Cabinet Meeting, Le Monde, March 9, 1978, at 34, reports that on March 8, 1978 the cabinet adopted a proposal allowing the wife, like the husband, to have the power to administer and dispose of community property on her own, though con-
Although the philosophical debate over the wife's place in the community regime may have been settled in Louisiana by Act 627 of 1978, the Equal Management Law, the legislature has invited further scrutiny of equal management prior to actual implementation. By the terms of Act 627 equal management will not take effect as the legal regime until January 1, 1980. In the interim equal management is to be restudied and additional legislation proposed to implement the concept in a proper, orderly manner. Among the decisions crucial to the effectiveness of equal management is that of determining to whom, to what property, and to which transactions the new law will apply. Shall it apply retroactively, that is, shall unforeseen consequences be attached to situations that arose prior to the effective date of the new rules? If so there is a risk that the expectations of those whose actions took place under the old law will be frustrated. Alternatively, shall the new law be applied prospectively, that is, only to situations arising after the effective date of the Act? If so the inequities of head and master will be perpetuated in numerous situations. As a compromise, should the new rules apply in some respects retroactively and in others prospectively?

The answer to these questions depends partly on the extent to which the United States and Louisiana Constitutions permit retroactive legislation, and partly on legislative policy determinations as to what, within constitutional bounds, ought to be the reach of the new law. The problem demands legislative attention, for if the legislature does not clearly demonstrate the intent to make a law retroactive, the courts are bound by the Civil Code and Revised Statutes to apply it prospectively only. Yet in other areas of Louisiana Civil Code

15. LA. CIV. CODE arts. 8, 1945(1); LA. R.S. 1:2 (1950). In Green v. Liberty Mut. Ins. Co., 352 So. 2d 366 (La. App. 4th Cir. 1977), cert denied, 354 So. 2d 210 (La. 1978), the court refused to apply a new law barring "executive officer" liability to a cause of
reform retroactivity has either not been dealt with legislatively or has been treated legislatively as an afterthought. In the community property reforms of other states and countries, some legislatures have addressed the problem of retroactivity in detail, while others have remained enigmatically silent on the subject. The Louisiana legislature's approach to the applicability of the equal management law falls in between these actions against an executive officer that arose prior to the new law. Finding no legislative intent to make the new law affect prior causes of action, the court considered itself bound to give the new law prospective application.

16. For example, 1976 La. Acts, No. 103, containing comprehensive amendments to the usufruct, use and habitation articles, did not have a retroactivity provision as originally passed. The following session, section seven of that act was amended by 1977 La. Acts, No. 137, to read: "The provisions of this Act shall apply to all personal servitudes, including those existing on the effective date of this act; but no provision may be applied to divest already vested rights or to impair the obligations of contracts." As a statement of legislative intent with respect to the application of the new law the last clause leaves much to be desired. If it means only that the new law is not intended to be unconstitutionally applied, it is superfluous since the law could not be applied unconstitutionally whether or not the legislature so intended. If it means that there are situations to which the new law is not intended to apply even though it could constitutionally be so applied, then it would have been better to describe those situations in terms more functional than "vested right" and "impairment of the obligations of contract." The Louisiana Trust Code of 1964 contains a more functional retroactivity provision: trusts created prior to the effective date of the Trust Code are governed by the law in effect at the time of creation except that, unless the trust provides otherwise, administrative and procedural matters are governed by the Trust Code. LA. R.S. 9:2252 (Supp. 1964), as amended by 1968 La. Acts, No. 137.


18. See, e.g., the New Mexico equal management reform, N.M. STAT. ANN. §§ 57-4A-1 et seq. (1973), which, except for section 57-4A-6 concerning a presumption of separate property, contains no statement on the retroactivity of the new law. The 1969 Quebec matrimonial regime reform made changes in the community regime, which prior to the reform had been the legal regime but after the reform became a contractual one. The changes to the community regime, though not as far reaching as Louisiana's changes, affect both classification and control of assets. Nevertheless, Quebec Civil Code article 1268(3) declares that the changes in the community regime are applicable to spouses married under the old regime, apparently without any limitations such as Louisiana, France, and California have attempted to prescribe. For a general discussion of the Quebec reform, see Bartke, Community Property Law Reform in the United States and in Canada—a Comparison and Critique, 50 Tul. L. REV. 213 (1976).
two extremes. Section 9 of Act 627 of 1978 provides that the new legal regime will be applicable as of January 1, 1980 to:

the property and obligations of all spouses whether the spouses were married or whether property was acquired or an obligation was incurred prior to or after January 1, 1980, unless the spouses have adopted a matrimonial regime by express contract; provided, that Part II of Chapter 2 of Section 1 of this Act [the new legal regime] shall not be construed to change the characterization as community or separate of assets acquired or fruits and revenues accrued prior to January 1, 1980, nor to invalidate any act or transaction made prior to January 1, 1980 by a spouse according to the law in force at the time of the act or transaction.19

Thus the legislature intended the new legislation to cover all married persons and all marital property and obligations without distinction as to the date of the marriage or the time the property and obligations were acquired,20 and the intended exceptions to this general rule are described with particularity.

In spite of commendable legislative attention in Act 627 to the problem of retroactivity, lawyers and judges will still be faced with a variety of situations in which the applicability of the new equal management law may become problematic. To aid in resolving these problems this article will attempt first to delineate the general constitutional restrictions on retroactive laws. The article will then discuss a theory advanced academically and judicially from which it might follow that retroactive application of Act 627 in any respect would be unconstitutional as to spouses married under the old law. Specific problematic situations will then be identified and examined in relation to the legislative intent concerning retroactivity in those situations and to constitutional restrictions. Finally, recommendations for legislative amendment will be made where amend-

ment appears necessary to prevent troublesome decisions on the applicability of the new law.

POSSIBLE THEORIES OF CONSTITUTIONAL CHALLENGE

It is virtually impossible for legislation to improve the social and economic circumstances of some and still maintain the status quo for everyone else. The social and economic disadvantage of some almost always corresponds to the social and economic advantage of others. Thus when legislation removes or ameliorates the disadvantage suffered by one group, the corresponding advantageous position does not remain the same as it was before the legislation. When state legislatures try to shift advantages through taxation and spending, as when taxes are increased to provide for greater welfare benefits, the soundness of the shift may be hotly debated in the political arena. However, when a state attempts a more direct reallocation of social and economic advantages, as when it compels employers to pay minimum wages or observe maximum hours, debate has often spread from the legislature to the courts via the arguments of those happy with the status quo that the reallocation unconstitutionally deprives them of property without due process of law or impairs the obligations of their contracts.2 Constitutional history exhibits widely differing judicial response to these arguments.

During the era of the United States Supreme Court’s “substantive due process” doctrine, generally regarded as beginning in 1905 with *Lochner v. New York*, the Court’s willingness to scrutinize under the due process clause the ends and means chosen by legislatures to effect social and economic reforms resulted often in constitutional preservation of the status quo.24 The Court later repudiated the substantive due process

---

21. "[N]or shall any State deprive any person of life, liberty, or property without due process of law . . . ." [hereinafter referred to as due process clause] U.S. Const. amend. XIV, § 1. The Louisiana constitutional counterpart to the federal due process clause is article I, section 2, of the 1974 Louisiana Constitution.


23. 198 U.S. 45 (1905).

24. *Lochner* invalidated a New York law setting maximum hours for bakery
doctrine following heavy criticism that pursuant to that doctrine the Court was merely substituting its own judgment for that of elected legislatures in determining social and economic policy. Where it had once scrutinized social and economic reforms for unconstitutionality, the Court eventually deferred to legislative judgment on those matters with little or no inquiry into the reasonableness or necessity for the legislation.25

Retroactive civil laws are not prohibited solely on account of their retroactivity by any specific clause in the constitution.26 Thus they ought not to engender any stricter constitutional scrutiny under the due process clause than prospective legislation reallocating social and economic advantages. However because of general suspicion of retroactive legislation it might be expected that the Court, having abandoned the due process clause for invalidating prospective social and economic legislation, might yet resurrect it for scrutinizing retroactive legislation. As recently as 1975, however, the Court sustained a retroactive federal law upon a simple showing of its rationality and non-arbitrariness. In Usrey v. Turner Ellshorn Mining Company27 the Court upheld under a due process attack28 a federal statute imposing on mine operators liability to compensate miners and their survivors for disability or death due to "black lung disease" contracted during employment in the mines. The statute was retroactive in that it required mine operators to compensate for disabilities incurred during em-

---


26. The clause in article I of the United States Constitution forbidding ex post facto laws had been held to apply only to criminal laws. Calder v. Bull, 3 U.S. (3 Dall.) 386 (1798). The Louisiana Constitution likewise contains no ban on retroactive civil laws per se; the ex post facto clause of the Louisiana Constitution apparently does not apply to civil laws. See Cooper v. Lykes, 218 La. 251, 49 So. 2d 3 (1950). The clause is found in article IV, section 15, of the Louisiana Constitution of 1921, and in article I, section 23, of the Louisiana Constitution of 1974.

27. 428 U.S. 1 (1975).

28. Although the attack on the federal statute was made under the due process clause of the fifth amendment, there is no reason to believe the analysis would have been different if the law had been a state law attacked under the due process clause of the fourteenth amendment.
ployment that had terminated prior to the enactment of the statute imposing liability. The Court stated that "legislative Acts adjusting the burdens and benefits of economic life come to the Court with a presumption of constitutionality, and . . . the burden is on one complaining of a due process violation to establish that the legislature has acted in an arbitrary and irrational way." The rationality test appears none too stringent in light of the Court's indication that it is rational for a legislature to place the cost of injury or death from a dangerous condition of employment on the employers who had benefited from the employment, even though the employers might have been justifiably unaware of the danger of black lung disease when the employment took place. The Court could have used the balancing analysis suggested by some writers to determine the rationality of retroactive legislation. In this analysis a court weighs the importance of the new policy and the necessity for retroactive legislation against the justifiable reliance by the complaining party on the situation before the new policy and the severity of the injury caused by the retroactive application of the new policy. Instead, the Court refused to base its determination of rationality partly, as it might have done, on a finding that the mine operators could not be said to have consciously structured their conduct in reliance on non-liability to former employees for black lung disease. Although it acknowledged the fact that the retroactive law might have a grossly uneven effect on mine operators throughout the indus-

29. 428 U.S. at 15-16.
30. Id. at 15.
31. Id. at 18-19.
32. The right to compensation under the statute extended to miners employed prior to the 1950's when the disease was first recognized in the United States. Id. at 17. See also id. at 40 n.4 (Powell, J., concurring).
33. Reppy, supra note 17, at 1048-49. See also Hochman, The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692 (1960); Slawson, Constitutional and Legislative Considerations in Retroactive Lawmaking, 48 Cal. L. Rev. 216 (1960); Smith, Retroactive Laws and Vested Rights, 5 Tex. L. Rev. 231 (1927).
34. See Welch v. Henry, 305 U.S. 134 (1938). The Court in Welch upheld a state tax on dividend income received in a year in which previous law had exempted such income because the taxpayer's conduct in receiving income would have been the same no matter which law applied and thus his conduct could not be said to have been in reliance on the old law.
try,\textsuperscript{35} it apparently gave this factor no weight. Thus the Court's conclusory statement that "the Act approaches the problem of cost spreading rationally,"\textsuperscript{36} amounts to total deference to the "wisdom of Congress’ chosen scheme"\textsuperscript{37} where retroactive legislation is challenged under the due process clause.

The deference to legislative judgment shown by the Court under the due process clause is also apparent when the Court examines legislation alleged to violate the clause prohibiting the taking of property for public use without just compensation.\textsuperscript{38} In \textit{Penn Central Transportation Company v. City of New York}\textsuperscript{39} the Court upheld the New York City Landmark Law which prohibited the owners of Grand Central Terminal from constructing a 55-story tower above the terminal. Acknowledging the lack of a set formula for determining when "justice and fairness" require compensation, the Court held that there is no unconstitutional taking just because a new law denies a previously existing opportunity to exploit a property interest, or because the new law diminishes the value of a property interest, or because the new law has a more severe impact on some than on others.\textsuperscript{40} Only if the magnitude of the interference with property interests is unusually severe will compensation be required.\textsuperscript{41} Where, as in this case, the new law does not interfere with the present use of the property, permits a reasonable return on investment, and offers the injured party some new rights in return for the ones abrogated,\textsuperscript{42} the effect of the new law is not of sufficient magnitude to constitute a taking of

\textsuperscript{35} 428 U.S. at 18-19.
\textsuperscript{36} Id.
\textsuperscript{37} Id. at 19.
\textsuperscript{38} "[N]or shall private property be taken for public use, without just compensation.” [hereinafter referred to as takings clause] U.S. Const. amend. V, declared applicable to state legislation through the fourteenth amendment in Missouri Pac. Ry. v. Nebraska, 164 U.S. 403 (1896). The corresponding takings clause of the Louisiana Constitution is qualified in that ownership of private property is expressly made "subject to reasonable statutory restrictions and the reasonable exercise of the police power." La. Const. art. I, § 4.
\textsuperscript{39} 98 S. Ct. 2646 (1978).
\textsuperscript{40} Id. at 2659-65.
\textsuperscript{41} Id. at 2665.
\textsuperscript{42} The New York City Landmark Law provided that the owner of a designated landmark could transfer the air rights from the landmark to another site suitable for construction of an office building. Id. at 2666.
private property for which compensation is due. Analysis under the takings clause in *Penn Central* focuses on whether the injured party is left with any meaningful rights or property. That focus is perhaps preferable to the conclusory approach the Court took in *Turner* under the due process clause in determining that the law was rational, but both cases indicate that the injured party must make a showing of extraordinary injury before the legislative judgment will be upset. Neither the due process nor the takings analysis probes in any depth the purpose of the legislature in enacting the challenged laws nor evaluates the merits of the particular means chosen by the legislature to effectuate the purpose.

Until recently the contracts clause had not been considered as presenting any greater limitation on a state's power to enact social and economic legislation than the limitation presented by the due process or takings clauses.43 Although the Court had at times used the contracts clause to invalidate various state legislation having retroactive effect,44 the leading case construing the contracts clause, *Home Building and Loan Association v. Blaisdell*,45 upheld an emergency retroactive debt moratorium law on the theory that a contract must be read as having incorporated in advance reasonable legislative changes in the law.46 In light of the *Blaisdell* case, the Louisiana Supreme Court in its leading contracts clause decision construed the clause as requiring no more than that retroactive legislation pursuant to the state's police power be reasonable.47


45. 290 U.S. 398 (1934).

46. *Id.* at 435. See also El Paso v. Simmons, 379 U.S. 497 (1965) (upholding new five year limitation on previously unlimited right of land purchasers to reinstate claims to public land).

47. Hooter v. Wilson, 273 So. 2d 516, 521, 523 (La. 1973) (upholding statutory increase in amount of debtor's property exempt from garnishment, even though garnishment judgment was rendered prior to effective date of increased exemption). See also Ouachita Nat'l Bank v. Rowan, 345 So. 2d 1014, 1017 (La. App. 2d Cir.), cert.
However, two contracts clause decisions from the United States Supreme Court's most recent terms indicate that invocation of the contracts clause may result in a stricter evaluation of legislation than is necessary under the due process clause.

The first of the recent contracts clause decisions, *United States Trust Company of New York v. New Jersey*, invalidated an attempt by New Jersey to repeal retroactively a statutory bondholders' covenant that restricted the ability of the Port Authority of New York and New Jersey to use revenues and reserves pledged to secure the Port Authority's bonds to finance predictably unprofitable passenger rail transportation. The Court distinguished between legislative attempts to affect contracts to which the state itself is a party and attempts to affect contracts between private persons. It designated the former to receive stricter scrutiny than the latter. In the case of legislation affecting private contracts "courts properly defer to legislative judgment as to the necessity and reasonableness of a particular measure." Where stricter scrutiny is appropriate, necessity is determined by whether less drastic means were available to achieve the legislative purpose, and reasonableness is determined by whether the problem the new legislation seeks to remedy has come to light since the making of the contract and was thus unforeseen at the time of the making of the contract. These tests of necessity and reasonableness shift the burden of proof to the legislature to justify the retroactive legislation affecting contracts to which the state is a party, in contrast to the deference afforded to legislative wisdom under the due process clause illustrated by the *Turner* decision. Furthermore, the trial court's findings that the market value of the

denied, 349 So. 2d 332 (La. 1977) (upholding application of increased homestead exemption to pre-existing debt).


49. *Id.* at 22-23. For a criticism of the Court's different standard for reviewing legislation affecting state, as opposed to private, contracts, see *The Supreme Court, 1976 Term*, 91 Harv. L. Rev. 70, 83-84 (1977); for a defense, see L. Tribe, *supra* note 25, at 473.

50. 431 U.S. at 29-32. The Court found in this case that the repeal of the covenant was (1) not necessary because the state failed to demonstrate that no less drastic means were available for providing passenger rail service and (2) not reasonable because the covenant was made precisely to protect bondholders against the foreseeable chance that the Port Authority would become involved in unprofitable mass transit.
bonds was not impaired and that other significant statutory protections for the bondholders remained \(^5\) were only relevant to, not determinative of reasonableness.\(^6\) This conclusion distinguishes contracts clause analysis from analysis under the takings clause wherein the court simply satisfies itself that the complaining party is still left with meaningful rights or property.

At least in the case of legislation affecting private contracts, *United States Trust Company* left the rule of deference to legislative judgment intact, but in *Allied Structural Steel Company v. Spannaus*, \(^7\) decided in June of 1978, the Court rejected the rule of deference with respect to legislation affecting private contracts. Minnesota had enacted a law in 1974 requiring employers of over 100 persons that provided a pension plan for employees to pay a "pension funding charge" for either terminating a pension plan or closing a Minnesota plant. The pension funding charge obligated the employer to make its pension fund sufficient to cover all employees who had worked for the employer at least ten years. The charge was to be computed to include periods of employment antedating the new law and to be applied so as to supersede the terms of the specific pension plan under which the employees had worked. Allied Structural Steel closed its Minnesota plant shortly after the effective date of the Act and was assessed a charge of $185,000 for nine employees who had worked ten years but who would not have been eligible for pension rights under the terms of Allied's plan. The Court's first inquiry under its new contracts clause analysis was whether there had been a substantial impairment of a contractual relationship, for according to the Court a severe impairment would entail careful judicial scrutiny of the nature and purpose of the legislation.\(^8\) Had the impairment been less than severe the Court apparently would have deferred to legislative judgment as to the necessity and reasonableness of the law. The Court then measured the severity of the impairment by the extent of the reliance the parties

---

51. *Id.* at 41-44 (Brennan, J., dissenting).
52. *Id.* at 27.
54. *Id.* at 2723.
had placed in a specific state of affairs created through binding contractual obligations. The fact that Allied had relied heavily and reasonably on the express terms of its pension plan when making contributions, that the Minnesota law in effect nullified those express terms, and that Allied was forced by the retroactive legislative changes to its pension plan to pay the “potentially disabling” amount of $185,000, led to the conclusion that Allied’s contractual obligation had been severely impaired. The Court then questioned the purpose of legislation that did not address protection of broad societal interests but instead focused narrowly only on large employers with pension plans who attempted to close their plants or terminate their plans, and found the purpose insufficient justification for severe impairment of a contractual obligation. The Court’s overriding skepticism of the purpose of the legislation, in contrast to its concession in United States Trust Company of the legitimacy of the purpose of providing mass transportation, energy conservation, and environmental protection, obviated the need in Allied to assess the necessity and reasonableness of the means chosen by the legislature to achieve the purpose. Had an inquiry into the necessity for and reasonableness of the means been appropriate in Allied the Court might have applied the tests from United States Trust Company, questioning the availability of less drastic means to effectuate the purpose and asking whether conditions unforeseen at the time of the contract created the problem the new legislation sought to remedy.

The Allied and United States Trust Company cases have thus rearmed the contracts clause as a vehicle for attacking new legislation. The idea expressed in Blaisdell that contracts are understood as having been made subject to future laws is no longer tenable. Instead, when a contractual arrangement of affairs justifiably relied upon has been nullified by legislation causing a potentially disabling effect, the Court will find severe

55. Id.
56. Id. at 2723-24.
57. Id. at 2724-25. The Court even intimated that the Act might have been passed in retaliation for the closure of a plant by White Motor Corporation, which employed over 1,000 Minnesotans. Id. at 2724 n.20.
59. Id. at 29-32.
impairment of the contract and will invalidate the legislation unless in the Court's opinion the legislation serves a sufficiently broad and important societal purpose, there are no less drastic means to effectuate the purpose, and the problem remedied by the legislation was unforeseen at the time the contract was confected. Furthermore, a comparison of the results in the two recent cases contesting legislation involving the welfare of employees—Allied, in which the Court invalidated under the contracts clause a statute compelling certain employers to bring their pension funds up to a certain standard, and Turner, in which the Court upheld under the due process clause a statute compelling certain employers to compensate employees for job-related disabilities—indicates that if the contracts clause is applicable the legislation is perhaps more likely to be invalidated than if only the due process clause is applicable.

The recent Supreme Court contracts clause decisions establish the focus of any inquiry into the constitutionality of the equal management law as applied to various situations. Whereas previously it made little difference whether new legislation affected a contractual or a non-contractual right, now any situation affected by the equal management law must first be analyzed to see whether it involves a contract. If not, the burden is on the complaining party to show that the law is arbitrary or irrational. Where a contract is involved, however, then if that contract is severely impaired according to the test in Allied, the purpose of the legislation and the means chosen by the legislature to effect it are no longer entitled to deferential support, but instead must be scrutinized on their merits.

Changes in Management of Community Property: Effect of Act 627 on Husband Married Under Prior Law

Present law makes the husband the "head and master" of the community; he alone as a general rule may manage the community property, obligate it for debts, and dispose of it by onerous title.60 The wife has limited veto power over the lease, mortgage, or sale of community immovables.61 She can obligate

60. La. CIV. CODE art. 2404.
61. La. CIV. CODE art. 2334.
her earnings for her debts and obligate the community property for "necessaries" the husband has failed to provide or for debts contracted by her as a "public merchant," but she, unlike the husband, has no general power to obligate the community property for the debts that she creates. It is to these principles that the new law makes its greatest changes. First, under the new legal regime the wife as a general rule may without the husband’s consent manage the community property and obligate it for both her antenuptial debts and her debts during marriage. Second, the new law, by requiring the spouses to concur for alienation, lease, or encumbrance of major family assets, increases beyond present law the number of instances in which the wife’s consent is required. Third, by reserving transactions involving certain community property for the exclusive management of a particular spouse, the new

63. LA. Civ. Code art. 1786 has been cited judicially as authority for this proposition. See General Tire Serv. v. Nash, 273 So. 2d 539 (La. App. 1st Cir. 1973). However, as Professor Riley noted, the proper authority is either Civil Code articles 119 and 120, concerning the husband’s obligation of support, or Civil Code articles 2985-3034, outlining the principles of mandate. See J. RILEY, Contracts and Responsibilities of Husband and Wife in Louisiana Law; ESSAYS ON THE CIVIL LAw OF OBLIGATIONS (J. Dainow ed. 1969).
64. LA. Civ. Code art. 131. It may be argued, however, that the wife may not obligate the husband personally under this article unless he has consented to her being a public merchant. See discussion in J. RILEY, supra note 63, at 36-37.
65. 1978 La. Acts, No. 627, §§ 1-2841-42. The husband’s management powers are, of course, equal to those of the wife under the new law. Id.
66. 1978 La. Acts, No. 627, § 1-2843 requires concurrence for the alienation, lease, or encumbrance of (a) all community immovables (consent of wife not required by present law for sale, lease, or mortgage of community immovables registered in the husband’s name alone), (b) the furniture or furnishings in use in the family home (concurrence of wife not required under present law), (c) a community business or all or substantially all of the assets of the business (concurrence of wife not required under present law), (d) movables issued or registered as provided by law in the names of the spouses jointly (as a practical matter concurrence of wife is probably necessary under present law). Concurrence is also required for donations of community assets except ordinary and customary donations commensurate with the economic status of the spouses (under present law wife’s consent not necessary for donations under particular title of community movables). For present law, see LA. Civ. Code arts. 2334, 2404.
67. 1978 La. Acts, No. 627, § 1-2844 reserves to the spouse who is managing a community business without the participation in management of the other spouse the exclusive right to manage the ordinary affairs of the business. 1978 La. Acts, No. 627, § 1-2845 reserves to the spouse in whose name movables are issued or registered as provided by law the sole right to manage, encumber, lease, or alienate them.
law enables a wife to achieve sole control over such property to the exclusion of the husband's management. In sum the new law has elevated the managerial authority of the wife acting alone to equal the husband's authority under present law and has added additional instances requiring concurrence of the spouses.

The management provisions of Act 627 as well as the provision enabling either spouse to obligate the community property are clearly intended under section nine of the Act to be applied to the property and obligations of all spouses who have not made an express matrimonial regime contract, whether or not the spouses were married or the property acquired or obligations incurred before the effective date of Act 627.\textsuperscript{68} The Act thus has no direct application to spouses who have made express matrimonial regime contracts but is intended to apply to spouses who are living under the legal regime because they married without having made a prenuptial contract. Conceivably a husband subject to the present legal regime that makes him head and master could complain that the new law if applied to him deprives him unconstitutionally of his paramount position as manager of the community property. If his constitutional argument is based solely on a deprivation of property without due process of law he will have a tough burden to prove that the legislature acted arbitrarily or unreasonably.\textsuperscript{69}

However, if his position in the legal regime as head and master is considered to have resulted from a contract between him and his wife, and he can show severe impairment of this contract as a result of the new legislation, he may under the contracts clause shift the burden to the proponents of the legislation to demonstrate its necessity and reasonableness.\textsuperscript{70} Thus the first inquiry is whether the husband's authority as head and master of the community can be said to have resulted from a contract when the spouses are living under the legal regime in the absence of an express matrimonial regime agreement.

\textsuperscript{68} 1978 La. Acts, No. 627, § 9 is quoted in the text at note 19, supra.
\textsuperscript{69} See text at notes 27-42, supra.
\textsuperscript{70} See text at notes 48-59, supra.
Husband's Contracts Clause Argument: The Tacit Contract Theory

It is no coincidence that when legislative reform of the husband's authority as head and master became imminent the theory of the contractual nature of the legal community regime began to be vigorously urged in an attempt to establish that spouses who marry without making an express matrimonial regime contract have tacitly contracted for the community regime. If accepted, the theory could have conveniently served a double purpose for the opponents of the reform. It could have provided the basis for defending the old regime from constitutional attack on the ground that the wife had contracted for her inferior managerial position and hence could not complain. It could also have provided an argument based on the contracts clause that any change in the managerial rules of the community regime could not be constitutionally applied to spouses married prior to the change. The theory of the contractual nature of the community regime has been expounded academically, has appeared in a Louisiana statute, and has been utilized in opinions of the Louisiana Supreme Court, the Louisiana First Circuit Court of Appeal, and the United States District Court for the Eastern District of Louisiana. Indeed the United States District Court used the tacit contract theory to uphold the constitutionality of the husband's authority as head and master of the community. Although the tacit contract theory is rejected in the new legislation, the credibility...
ity that the theory may have gained from judicial mention and academic advocacy and the seriousness of the implications sought to be drawn from it necessitate a thorough inquiry into whether the community regime that results when spouses have made no prenuptial contract can be considered contractual in nature.

Authority for the tacit contract theory in Louisiana law is claimed to be found in the evolution of the spouses' power prior to marriage to contract a regime different from the legal regime of community. It is asserted by Professor Pascal that under the Digest of 1808, prospective spouses were not permitted to alter the community regime by express prenuptial contract; the community regime was at that time imposed by law as a consequence of marriage on every marriage subject to Louisiana law. The Civil Code of 1825, the argument proceeds, in contrast to the Digest of 1808 permitted prospective spouses to contract expressly to reject or modify the community regime; if no express contract was made, the Civil Code of 1825 subjected the spouses to the legal regime of community of acquets or gains. The present Louisiana Civil Code continues to allow the prospective spouses the option of contractually avoiding or modifying the community regime and to subject them to the legal regime of community in default of any such contract. It is argued that the deliberate revision of legislative will in 1825 to allow the prospective spouses to alter the community regime by contract changed the nature of the community regime from a regime imposed by law to one that is contractual.

It is doubtful that support for the tacit contract theory can properly be drawn from the asserted change in 1825 of legislative will. Examination of the Digest of 1808 reveals that it, like the Code of 1825 and the present Code, also permitted the spouses contractually to modify or reject the community regime.

77. See Pascal, Updating Louisiana's Community of Gains, supra note 71, at 556.
78. Id. See also LA. DIGEST of 1808, 3.5.10 and 3.5.63.
79. LA. CIV. CODE arts. 2305, 2312, 2394, 2369, 2393 (1825).
80. LA. CIV. CODE art. 2312 (1825).
81. LA. CIV. CODE arts. 2325, 2332, 2399, 2424.
82. LA. CIV. CODE art. 2332 provides that a community regime exists "by operation of law, in all cases where there is no stipulation to the contrary."
83. Pascal, Updating Louisiana's Community of Gains, supra note 71, at 556.
gime, although admittedly the Digest of 1808 was less than clear on this point. One article in the Digest of 1808 provided that prospective husbands and wives might regulate their matrimonial agreements as they pleased, provided their stipulations were not against good morals and were made according to prescribed limitations and formalities. Another article provided that the prospective spouses might even stipulate that their matrimonial agreement would be governed by the laws of any state or territory in the Union, provided the spouses made their intention explicit and formally renounced the benefits of the laws of Louisiana. The Digest further stated that if there was neither a marriage agreement nor any special convention, the rights of the spouses would be governed by “the following chapters,” one of which, chapter 11 of title V, contained the articles describing the community regime. Thus far the Digest seemed clearly to apply the community regime only to spouses who had not contracted, as they were free to do, for a different regime.

However, two other articles appear to have made the community regime impervious to contractual modification. Article 10 said that the community of acquets or gains was a necessary consequence of marriage within Louisiana and needed not be stipulated in the marriage contract in order to take effect. This article can be easily reconciled with the others by attributing to it the meaning that spouses who intended their property to be regulated by the community regime did not need to make a contract to that effect; they could achieve the desired result simply by marrying without having made a contract or by devising a contract silent as to the existence or non-existence of the community regime. The article itself implied that the matrimonial regime could be the subject of a prenuptial contract. It merely made such contracts unnecessary when the spouses desired the community regime; it did not forbid contractual adoption of a different regime by spouses who did not desire the community regime.

84. LA. DIGEST of 1808, 3.5.1.
85. LA. DIGEST of 1808, 3.5.2.
86. LA. DIGEST of 1808, 3.5.8.
87. LA. DIGEST of 1808, 3.5.63-.85.
88. LA. DIGEST of 1808, 3.5.10.
The second article in the Digest clouding the issue of contractual modification or rejection of the community, article 63, stated:

Every marriage contracted within this territory, superinduces of right, partnership or the community of acquets and gains. This community or partnership of gains takes place whether there be a marriage contract between the parties or not and although, in case there be one, said contract be entirely silent on this partnership or community.\(^9\)

This article did not actually provide that the community regime would govern the spouses in spite of a marriage contract rejecting or modifying it, and it is unlikely that that was the intended meaning of the article. Such a meaning would have been inconsistent with the other articles previously mentioned. It would also have been inconsistent with contemporaneous Spanish law, which allowed the prospective spouses to make express contracts regulating the matrimonial property,\(^90\) and with the Code Napoleon\(^91\) and its Projet.\(^92\) It is more likely that the words “whether there be a marriage contract between the parties” were intended to refer only to marriage contracts that did not explicitly reject or modify the community regime.\(^93\)

89. LA. DIGEST of 1808, 3.5.63 (emphasis added).
91. Code Napoleon art. 1387 (1804). This article is the same as LA. CIV. CODE art. 2305 (1825).
92. PROJET DU GOUVERNEMENT, Book III, Title X, arts. 11 and 113 (1800). Article 11 provided, “A défaut de conventions entre les époux, il y a communauté de biens;” which translated reads, “In default of agreements between the spouses, there is a community of property.” (Writer’s transl.). Article 113 provided, “Les conjoints peuvent, par leur contrat du mariage, ou exclure totalement la communauté, ou la modifier, l’augmenter ou la restreindre;” which translated reads, “The spouses can, by their contract of marriage either exclude the community totally, or modify it, or augment or restrain it.” (Writer’s transl.).
93. The apparent ambiguity among the code articles could also be resolved by interpreting the articles to mean that so long as the marriage was subject to Louisiana law, the community of gains could not be modified or rejected, but that the parties could contractually submit their matrimonial regime to the laws of another jurisdiction and thus avoid the community of gains. See Pascal, Updating Louisiana’s Community of Gains, supra note 71, at 556. However, even if this interpretation is accepted it would be misleading to assert that under the Digest of 1808 the spouses could not contrac-
Significantly, article 63 appeared in the Code of 1825 and its projet in the following form: "Every marriage, contracted in this State, superinduces of right, partnership or community of acquets or gains, if there be no stipulation to the contrary." If the amendment effected a change in the law by allowing the spouses contractually to reject or modify the community regime where article 63 had prohibited such action and was not merely a clarification of the original meaning of the article, one would expect to find a comment in the projet to the Code of 1825 noting the change in the law. There is no such comment. Thus the Code of 1825, instead of changing the law to allow parties to modify or reject the community contractually, simply clarified the provisions in the Digest of 1808 that already allowed the prospective spouses that option.

Even if one accepts the argument that the Code of 1825 changed previous law under the Digest of 1808, that fact would not explain how legislative permission to the prospective spouses to modify or reject the community regime by contract leads to the conclusion that the community regime that adheres when the spouses have made no contract to the contrary, is contractual rather than imposed by law. How does the unexercised contractual power to modify or reject the community regime become the equivalent of a contractual adoption of the community regime? The Louisiana Civil Code contains no shortage of articles describing the elements of a contract or conventional obligation. These articles make it tually avoid or modify the community regime, when they could do so by contractually adopting the law of another jurisdiction.

95. 1 La. Legal Archives, Projet of the Civil Code of 1825 at 299 (1936). In the preface to the projet the reporters state: "Every proposed alteration, whether by repeal or amendment, of any article in the old Code, or by the insertion of any new title or article, will be fairly written in one column of the page and the reasons for proposing it in another." Id. at XCIV. Elsewhere in the projet the redactors were careful to note when they were recommending changes in the law. See, e.g., id. at 115 where the redactors of the projet explained their recommended change from the Roman-Spanish conception of transmission of a succession to a completely different conception. In fact the only comment in the projet concerning the spouses' contractual power to modify or reject the community regime is the comment accompanying the proposal to suppress part of article 3.5.1 of the Digest of 1808 that allowed spouses to agree that their matrimonial affairs be regulated according to the laws of any state in the union. The comment states that this provision only created difficulty and confusion. 1 La. Legal Archives, Projet of the Civil Code of 1825 at 294 (1936).
clear that in order for a conventional obligation to arise, the parties must have actually consented to be bound in such a way that the will of both parties unites on the same point. Although consent need not be express but may be implied from the circumstances, even from silence or inaction, there must still be an inquiry as to whether the circumstances establish a factual basis for the inference of actual consent. The only circumstance offered by the tacit contract theory as evidence of actual consent to the establishment of a community regime is the failure of the parties to make an express contract on the subject prior to their marriage. However, several inferences as to the parties' wills are possible from the fact that the parties failed to make an express contract governing the matrimonial regime: (1) the parties agreed that the community regime would best suit them; (2) the parties were unable to agree on a matrimonial regime; (3) the parties agreed on their dissatisfaction with the community regime but because of the expense and time involved in seeking legal advice were unable to effect an express contract prior to the marriage; and (4) the parties did not consider the matter at all. The tacit contract theory might be valid if the first inference were the only possible one to be drawn from the parties' failure to make an express contract. In the case of the first inference, it could be said that the parties' wills united on the same point, and thus there was actual consent. However, in no way can the second, third, and fourth inferences be said to lead to the conclusion that the parties' wills united even tacitly on the community regime. In reality the second and third inferences are as likely to reflect the true state of the parties' minds as is the first, and the fourth inference probably reflects the true state of mind in the vast majority of cases. Thus, since a contract must be based on actual consent, and actual consent to the community regime may only rarely be inferred from the failure to make an express contract, the parties' wills would not unite on the same point.

96. LA. CIV. CODE arts. 1761, 1766, 1780, 1797, 1798, 1819.
97. LA. CIV. CODE art. 1811.
98. LA. CIV. CODE arts. 1811, 1816, 1817. See 1 S. Litvinoff, Obligations § 133 in 6 LOUISIANA CIVIL LAW TREATISE 216-17 (1969). The Code also recognizes a category of obligations that arise by operation of law and not from express or implied consent. LA. CIV. CODE art. 2292. It is submitted that the community regime, since it is not based on consent, must belong to this category.
contract concerning the matrimonial regime, it would be incorrect to conclude that spouses who have made no prenuptial contract have tacitly contracted for the community regime. In most cases a tacit community regime contract is nothing more than a fiction. The more frank explanation for the applicability of the community regime to spouses who have not expressly contracted to modify or reject the community regime is that the legislature, realizing the necessity for some regulation of matrimonial property in those cases, simply imposed the community regime on spouses who had not expressly agreed on their own regulations.

The further one attempts to place the tacit matrimonial regime contract into the Code's framework for contracts the more imperfect does the fit appear. If the tacitly contracted community regime were truly a contract, the courts would be bound to give legal effect to it, as to all contracts, according to the true intent of the parties. What would a court do when confronted with spouses who rejected the community regime by contract but did not execute the contract before a notary and two witnesses as required by Civil Code article 2328? The court would probably apply the legal community regime as if the spouses had made no contract, for to do otherwise would be to ignore the Code's required formalities. According to the tacit contract theory the court would have recognized a tacit contract for the community regime containing terms that are contrary to the clear intent of the spouses. This inconsistency would disappear if the fiction of tacit contract were dropped and the community regime simply recognized as having been imposed by the legislature on these spouses by operation of law. Likewise, if the community regime that results when spouses marry without having made an express contract is a tacit contract, then it ought to be susceptible of invalidation like any other contract for error, fraud, violence, or threats. For example, since fraud can consist of a suppression of the truth with

100. French writers have noted with criticism this same conflict between the tacit contract theory and general contract theory. See 2 H. Batifol, Droit International Privé 278 (5th ed. 1970); 8 M. Planiol & G. Ripert, Droit Civil Français ¶ 2-8, at 31 (2d ed. 1957).
respect to a material part of the contract,102 may a woman who married a lawyer claim that her tacit contract was induced by her husband's fraud in not revealing to her prior to marriage the disadvantages in management that the community regime would produce for her, disadvantages of which a lawyer would certainly have had knowledge? May all women who married believing there was no way to avoid the community regime claim that their tacit contracts are voidable for error of law as a means of preventing loss due to such error?103 There is slim possibility of the courts recognizing such claims as would embroil them in baffling searches for the material part104 or principal cause105 of the tacit matrimonial regime contract. Yet to be consistent with general contract theory, the rules concerning the vices of consent should apply.

Indeed the alleged tacit community regime contract resembles a true contract only because the articles on the community regime are located in book III of the Louisiana Civil Code as are the articles on contracts. If the community regime were imposed on the spouses by law rather than by tacit contract, the articles on the community regime might be expected to be found in book I, which contains the articles on marriage and the respective rights and duties of husband and wife instead of book III. However, book III, entitled “Of the Different Modes of Acquiring Things,” includes modes of acquisition by operation of law as well as by contract since it contains the articles on intestate successions106 and offenses and quasi-offenses.107 Hence inclusion of the legal community regime articles in book III is not evidence of their contractual basis. The articles on the legal community regime are sensibly located among the contracts articles not because the community regime is contractual, but because matrimonial regimes in general may be the object of express contracts. Preceding the articles on the community regime are general articles concerning express matrimonial regime contracts and articles on several

102. LA. CIV. CODE art. 1847(5).
103. See LA. CIV. CODE arts. 1822 and 1846(3).
104. LA. CIV. CODE art. 1847(2).
105. LA. CIV. CODE art. 1846.
106. LA. CIV. CODE arts. 886-933.
matrimonial regime “clauses” which may be adopted in express matrimonial regime contracts. The articles dealing with express matrimonial regime contracts and clauses are appropriately located in the book of the Code dealing with contracts, and it is logical to follow them with the legal regime articles in order to include all articles dealing with matrimonial regimes in one place. Article 2332 confirms that the position of the community regime articles within book III of the Code does not render the regime contractual by declaring, “The partnership or community of aquets [acquets] or gains needs not to be stipulated; it exists by operation of law, in all cases where there is no stipulation to the contrary.”

Two articles in the Civil Code, neither of which is in the title concerning matrimonial regimes, could nevertheless be construed as lending support to the tacit contract theory. In the title “Of Partnership” article 2807 provides: “The community of property, created by marriage is not a partnership; it is the effect of a contract governed by rules prescribed for that purpose in this Code.” Although arguably article 2807 by referring to the community as the effect of a contract confirms that the community regime is contractual in nature, examination of the probable source of article 2807 makes this interpretation questionable. Professor Batiza has traced the article to a passage from Pothier’s treatise on partnership in which Pothier, distinguishing types of universal partnerships, refers to the conjugal community as contracted between those joined in marriage. It is doubtful, however, that Pothier was referring to the conjugal community that results when the spouses have made no prenuptial contract. In his Treatise on the Power of the Husband Pothier distinguished between a community regime adopted by the parties in a prenuptial contract and one which results from the inaction of the parties. He denoted the former as “conventional,” the latter as “legal,” for the former

108. LA. CIV. CODE arts. 2336-96.
109. LA. CIV. CODE art. 2332 (emphasis added). See also LA. CIV. CODE art. 2325 which provides: “In relation to property, the law only regulates the conjugal association, in default of particular agreements . . . .” (emphasis added).
111. R. Pothier, TRAITÉ DU CONTRAT DE SOCIÉTÉ n° 28 (Hutteau ed. 1807).
is governed by the convention of the parties, the latter by the law alone. When he referred in the passage on partnership to the community as "contracted" he may have had in mind a "conventional" community for which the verb "contracted" would be appropriate. Also he may have used the word "contracted" to mean simply "acquired," that is, that the community regime is acquired by those joined in marriage who have not made a prenuptial contract. Regardless, it is unlikely that he meant that the legal community regime was contractual. Furthermore, since article 2807 states that the community regime is "created by marriage," the redactors, in saying that the community regime is the "effect of a contract," may have intended the word "contract" to refer not to the matrimonial regime contract, but to marriage itself, which is a civil contract. The article would then be an accurate characterization of how spouses who have not made a prenuptial contract acquire the community regime: it is created by their act of marrying. Consequently, not only is the history of the article unsupportive of the tacit contract theory, but the article's own language is susceptible of an interpretation inconsistent with the theory. Article 2807 is but tenuous support at best for the tacit contract theory.

The second troublesome article is found in the title on "Conventional Obligations." Article 1967 mentions the community of matrimonial gains as illustrating the kind of legislative provisions that take effect and regulate a contract when the parties make no agreement to the contrary. The Code thus seemingly implies that the community regime is a contract. As in the case of article 2807 it is helpful to examine the source of the article. Article 1967 has been traced to a passage


Furthermore, in his treatise on marriage he refers to the community regime that results when the parties have married without making a matrimonial regime contract as a civil effect of marriage. Hence he did not consider the legal regime a contract. I R. POTHIER, TRAITÉ DU CONTRAT DE MARIAGE n° 397 (1813).

113. LA. CIV. CODE art. 90 states that the law considers marriage a civil contract.

114. LA. CIV. CODE art. 1967 provides in part: "The laws directing a community of matrimonial gains and a warranty on sales are examples of this kind of legislative provision [provisions], which take effect and regulate the contract when the parties make no agreement that contravene them."
from Toullier. The passage does not say that the community regime is a contract in the sense of a conventional obligation resulting from the parties' consent; rather, it says that the community regime is one of a group of legislative dispositions in the Code Civil that serves as a contract to regulate the affairs of the parties when they have made no specific contract on the subject. To say that dispositions of law serve as a contract is not to say that the dispositions are the result of a contract. The Toullier passage clearly shows that the source of the dispositions is the law, not the agreement of the parties. Furthermore, it can be argued that article 1967 does not refer to all instances in which parties have married without having made a matrimonial regime contract. The article is addressed to situations where there is agreement by the parties at least on the basic object of the contract. The article gives as its other example of suppletive law a warranty on sales. It thus contemplates that the parties have at least agreed to give a thing for a price, or else the transaction could not be characterized as a sale. In the case of the community of matrimonial gains the article, by analogy to warranty on sales, contemplates that the parties have at least agreed that they will regulate the ownership and control of their marital property but have not specified how. Hence the word "contract" in article 1967 referring

115. Batiza, supra note 110, at 81.
116. VI C. TOULLIER, LE DROIT CIVIL FRANÇAIS n° 340 (4th ed. 1824). Toullier commented:
Enfin, la loi est le supplément des contrats, lorsque les parties n’y ont pas dérogé. Il existe même une foule de dispositions qui n’ont pas d’autre objet que de servir de contract aux parties. Telles sont, entre autres, celles qui concernent les droits respectifs des époux. La loi ne régit l’association conjugale, quant aux biens, qu’a défaut des conventions spéciales que les époux peuvent faire comme ils le jugent à propos pourvu qu’elles ne soient pas contraires aux bonnes moeurs ni à l’ordre public (1387). Ces dispositions sont le contract de mariage de ceux qui n’en on pas fait. (Emphasis added.)
Translated, the passage provided:
Finally, the law is the supplement of contracts, when the parties have not derogated from it. There exists even a group of dispositions which have no other object than to serve the parties as a contract. Such are, among others, those which concern the respective rights of spouses. The law regulates the conjugal association with respect to property, only in default of particular agreements which the spouses can make as they judge appropriate provided they are not contrary to good morals or the public order. These dispositions are the marriage contract of those who have not made one. (Writer’s transl.)
117. See LA. CIV. CODE art. 2439.
to the community of matrimonial gains can not be taken to include the situation where the parties marry without having given any thought to their matrimonial regime. In that situation article 2292, rather than article 1967, explains how the parties acquire the community regime. Article 2292 states that there are situations when without any agreement on the part of the persons bound the law will impose obligations, as in instances of "common property . . . and other like cases." 118 When the community regime is applied to spouses who have married with no agreement as to matrimonial regime, their situation fits easily into article 2292's description of obligations imposed by law and need not be characterized under article 1967 as a contract the terms of which are supplied by law.

The tacit contract theory's strongest support is to be found in French cases that have adopted it as the basis for a conflict of laws rule pertaining to matrimonial regimes. 119 The French tacit contract theory is derived originally not from a scholarly exegesis of the Code Civil or pre-code customary law; rather, it comes from an argument made in the early sixteenth century by the French commentator Dumoulin in a famous consultation on an issue of conflict of laws in the case of the spouses Ganey. 120 The spouses Ganey, who had been married in Paris without making a prenuptial contract, owned property both there and in another French province. The conflict of laws rule prevailing at the time would have resulted in the matrimonial regime of each province being applied to the property located in that province. Dumoulin, however, propounded the theory that when the spouses had made no prenuptial contract, they had tacitly contracted that the law of their first matrimonial domicile, in this case the Custom of Paris, would govern their patrimonies wherever situated. 121 Dumoulin's tacit contract argument was accepted by the French courts and was perpetuated during the nineteenth century period of "liberal individualism" when it was popular in France to view the civil law as effectuating the individual will rather than imposing the gen-

118. 'LA. Civ. Code art. 2292.
119. See H. BATIFFOL, supra note 100, at 277-78.
120. 'Id.
121. 'Id.
eral will. Several nineteenth century French decisions also used the tacit contract theory to resolve issues of "conflict of laws in time," that is, issues of the applicability of a new law to a particular situation. The decline of liberal individualism brought a more critical look at the tacit contract theory, and today in France it lies exposed as a fiction rejected by many modern civilians. While the tacit contract theory still serves today in French law to explain historically the French conflict of laws rule concerning spouses who own property in several jurisdictions, in light of the criticism the theory has received there, it should not be adopted in Louisiana to determine whether a new matrimonial regimes law can be applied to spouses married under the old regime.

Prior to 1973, the Louisiana Supreme Court three times explored the tacit contract theory. In Saul v. His Creditors the spouses were married in Virginia without an express matrimonial regime contract and moved to Louisiana without an express matrimonial regime contract and moved to Louisiana ten years later.


123. P. Roubier, whose treatise is the most extensive French work on the subject of the applicability of new laws, reports that some nineteenth century French cases equated the legal matrimonial regime with contractual matrimonial regimes and applied to the legal regime the contracts rule that the old law is to be applied. See P. Roubier, Le Droit Transitoire 393-96 (2d ed. 1960). Thus the cases held that a new law concerning matrimonial regimes was inapplicable to spouses who had entered into marriage under an anterior regime. Id. at 393-96. Planiol and Ripert, however, criticized the theory of these cases for if the theory were carried to its logical extent it would immunize all aspects of the legal regime from future changes in the law, a result that according to Planiol and Ripert was far too simple and inexact. M. Planiol & G. Ripert, supra note 100, at 39. They argued that the matrimonial regime is a complex body of rights and duties which might have taken effect when the parties could scarcely anticipate the problems that might occur during the long period of the regime's existence. They believed that some aspects of the matrimonial regime could properly be subjected to a new law and were of the opinion, for example, that the powers of the spouses to manage their property could be redistributed by a new law since neither spouse could be viewed as having acquired any right to any particular power. Id.


125. 5 Mart. (N.S.) 569 (La. 1827).
At the time of the wife's death the couple had acquired a large amount of property in Louisiana. Since the husband was insolvent, his creditors claimed that the marital property should be governed by the law of Virginia where no community of acquets or gains existed; the heirs of the wife claimed one-half of the marital property as the wife's share of the community under Louisiana law. After reviewing the historical origins of the tacit contract theory and the French conflict of laws rule derived from it, which would have produced a decision in favor of the creditors, the court labelled the theory "quite unsatisfactory," and decided that Louisiana matrimonial regimes law would apply to the property acquired after the spouses moved to Louisiana.\[126]\n
Five years after Saul, Dixon v. Dixon's Executors\[127\] addressed the question whether the repeal of the rule that property acquired during the husband's domicile in Louisiana was subject to Louisiana's community property laws and the substitution of a different rule that both husband and wife must be domiciled in Louisiana in order for property acquired to be subject to Louisiana's community property laws could affect property acquired when the prior rule was in force. Husband and wife had married in Pennsylvania. The husband moved to Louisiana shortly after the marriage and continued to reside there until his death, but the wife remained in Pennsylvania. The first rule was in force when he arrived, the second when he died. The central question decided and the point for which the case is most often cited was that a wife to whom the community regime applies acquires a vested right to the community property during the marriage, not a mere expectancy like an heir.\[128\] The court followed Saul, which rejected the tacit contract theory, in determining that the community regime applied to this marriage once the husband moved to Loui-

\[126\] Id. at 600. The conflict of laws rule announced in Saul v. His Creditors is the accepted American rule. R. LEFLAR, AMERICAN CONFLICTS OF LAW § 236 (3d ed. 1977); Leflar, Community Property and Conflict of Laws, 21 CAL. L. REV. 221, 223 (1933). The highest court of New York also expressly rejected the tacit contract theory in the context of conflict of laws in In re Majot's Estate, 199 N.Y. 29, 92 N.E. 402 (1910).

\[127\] 4 La. Ann. 188 (1832).

\[128\] Id. at 191-94.
siana. The Dixon court, however, held that once the community regime was established, the rights of husband and wife to the property acquired during marriage would be regulated by the law in force at the time the community regime was established. The court stated:

If, therefore, by the law of the country where the marriage took place, a community of acquests [sic] and gains was declared to be created by the marriage, or, in the language of our code, superinduced of right by the contract, we should think that a subsequent law, declaring there should be no further community between the persons who had entered in a violation of rights vested under the contract, as a statute would be, which would alter the obligations imposed, or impair the rights acquired, under a contract of sale or of lease.

In upholding the wife's claim to one-half the property acquired by the husband during his residence in Louisiana, the court in Dixon took an ambiguous position toward the tacit contract theory: it rejected the theory in so far as conflict of laws between states was concerned, but appears to have adopted it concerning the effect of a new law upon the existing community regime.

Any uncertainty as to the extent to which the Louisiana Supreme Court adopted the tacit contract theory in Dixon was dispelled nineteen years later in Deshautels v. Fontenot. Like Dixon, Deshautels involved the applicability of a change in the community regime laws to a marriage in existence under the old laws. In Deshautels the wife owned a slave as her paraphernal property. Under the Spanish law in force in 1806 at the time the spouses married, children of a slave owned by a spouse as paraphernal property became community property. Under the

129. Id. at 193.
130. Id. at 192.
131. Id. at 191.
132. Id. The court seems to have applied the old law even to property acquired by the husband after the new law went into effect, though the grounds for doing so appear to have been estoppel due to the husband's continuing after the new law went into effect to administer the property as if it were community. Id. at 194.
133. 6 La. Ann. 689 (1861).
Digest of 1808, in force when a child was born to the wife’s slave, children of paraphernal slaves became the separate property of the owner of their mother. The husband and wife had made no marriage contract but had simply celebrated their marriage, probably, the court supposed, without any thought as to their matrimonial regime. The court stated:

In absence of an agreement of the parties, the correct view to take of their contract is, that they submitted the regulation of their marital rights to the existing laws, subject to such changes in the general laws, as might be adopted by the legislative power of the government, for the interest of the country. ¹³⁴

Consequently, the court applied the Digest of 1808 and decided that the slave-child was the wife’s separate property. Although in the quoted passage the court confusingly implied that spouses who have made no agreement have contracted, the result in the case is a clear rejection of the tacit contract theory. That theory would have led the court to apply the law in effect at the time of the marriage thus making the slave-child community property. Furthermore, in support of its conclusion that the new law applied, the court mentioned two things: an analogy to the conflict of laws rules subjecting married persons moving to Louisiana to Louisiana’s matrimonial regime laws (enunciated in Saul, which rejected the tacit contract theory), and previous decisions holding that the usufruct of the surviving spouse enacted in 1844 took effect as to marriages celebrated and property acquired before its passage.¹³⁵ Both of these authorities are inconsistent with the tacit contract theory. Deshauteils thus stands for the proposition that the matrimonial regime existing between spouses who have not made an express matrimonial regime contract is subject to future legislative changes, the very proposition rejected by pro-

¹³⁴ Id. at 690.
¹³⁵ Id. The court cited no cases for either of these propositions, though clearly in the case of the conflict of laws rule the court was referring to Saul v. His Creditors, 5 Mart. (N.S.) 569 (La. 1827). As to the usufruct of the surviving spouse, the court may have been referring to Day v. Collins, 5 La. Ann. 588 (1850), which applied the usufruct to a marriage apparently existing before the law instituting the usufruct went into effect. The opinions in Day and Deshauteils were both written by Justice Preston.
ponents of the tacit contract theory. Dixon may be reconciled with Des haute ls by reading Dixon to mean only that future legislative changes may neither destroy a spouse's one-half ownership interest in community property acquired prior to the change nor totally abrogate the community regime.

In 1973, without mentioning Saul, Dixon, or Deshaute ls on the subject of the tacit contract, without examining the theory in the light of the Code's provisions on contract, and without noting the criticism of the tacit contract theory by modern French commentators, the Louisiana Supreme Court announced in Creech v. Capitol Mack, Inc.138 that "[i]t is thus very clear that the community regime is contractual." The question to be answered in Creech, a case involving spouses who had married without making an express matrimonial regime contract, was whether the husband's antenuptial debt could be satisfied from the community property during the marriage. The court stated that the community of gains is a contract between the spouses and concluded that creditors must look not to the community for satisfaction of debts but to the patrimony of the debtor-spouse.137 As the rest of the Creech opinion showed, that conclusion followed not because the community regime is a contract but because the community regime is not a juridical person or entity with a patrimony to which creditors can look for satisfaction.138 Presumably, the court thought that the supposed contractual nature of the community was evidence that the community was not a juridical person. However, it is inconclusive evidence on this point since at least one common juridical person, the partnership, is contractual in nature.139 To determine whether the community regime is a juridical person, the court needed to look beyond the manner of the community's creation to the purpose of its existence140 and to whether it is imbued with the

137. Id. at 504.
138. Id.
139. See LA. CIV. CODE art. 2801 (to the effect that a partnership is a contract); A. YIANNOPOULOS, LOUISIANA CIVIL LAW SYSTEM § 53 (1971) (to the effect that a partnership is a juridicial person or entity).
140. See A. YIANNOPOULOS, supra note 139, at 214, where it is stated: "According to traditional civilian conceptions, juristic personality is accorded to associations of human beings and to foundations established for the realization of a general interest."
incidents of juristic personality: name, domicile, nationality, and patrimony.\textsuperscript{141} The Creech opinion does not reflect the analysis used to conclude that the community is not a juridical person, but its reference to the contractual nature of the community added nothing and certainly was not crucial to its conclusion. That, plus the fact that the opinion shows no awareness of contrary authority on the contractual nature of the community regime, would justify treating the language in Creech concerning the contractual nature of the community as if it were dictum.\textsuperscript{142}

Prior to the enactment of Act 627 the legislature too had referred to the community as a tacit contract. Act 693 of 1975 directed all issuers of marriage licenses to provide to all applicants for marriage licenses a summary of current matrimonial regime laws prepared by the Louisiana Attorney General. The Act specified three matters to be emphasized in the summary: the possibility of contracting a regime other than the community regime, the impossibility of altering the regime after marriage, and the conclusive presumption of law that the spouses who have not entered into a marriage contract before marriage did contract tacitly the community of gains.\textsuperscript{143} It is doubtful that this Act can be claimed to have enacted the tacit contract theory for Louisiana. The purpose of the Act was to provide prospective spouses with a summary of current law; the Act was not intended to change the law or to give a legislative interpretation of existing law. Since the summary was designed for the public rather than for lawyers or judges, it was intended to emphasize to prospective spouses the practical consequences for their property of marriage in Louisiana. It was surely unnecessary for that purpose to teach the public any particular legal

\begin{footnotes}
\footnotetext[141]{\textit{Id.} at 216-17.}
\footnotetext[142]{The court in \textit{Kirchberg v. Feenstra}, 430 F. Supp. 642 (E.D. La. 1977), also referred to the community regime as contractual. As the only authority for this proposition, the court cited Civil Code articles 2325, 2332, and 2424, which allow prospective spouses to modify or reject the community regime by contract and quoted Pascal, \textit{Updating Louisiana’s Community of Gains}, supra note 76, at 555-56. As in Creech, there was no mention of the substantial contrary authority, and no explanation of how the power to make an agreement regarding the matrimonial regime means that the community regime resulting from failure to make such an agreement is contractual.}
\end{footnotes}
theory such as the tacit contract theory.\textsuperscript{144} If the legislative reference to the tacit contract theory was thus unnecessary to the purpose of Act 693 of 1975, which was only to inform the public of current law, not to change or interpret law, the Act should not be regarded as legislative adoption of the tacit contract theory.

Perhaps the most important point concerning the tacit contract theory is that even if the theory be accepted as explaining how spouses who marry without making a matrimonial regime contract are subjected to the community regime, this fiction ought not to be used as the basis for resolving constitutional problems concerning the matrimonial regime. The United States Supreme Court has recently criticized the attempted use of a similar fiction to support the constitutionality of inheritance laws. In \textit{Trimble v. Gordon},\textsuperscript{145} the Court rejected the argument that intestate inheritance laws merely represent the presumed intent of the decedent as to the distribution of his property. It was argued that since the decedent could have made a will establishing a different distribution had he so desired, any discrimination against illegitimate children in the intestate order of descent is the decedent’s discrimination, not the law’s. The Court stated:

With respect to any individual, the argument of knowledge and approval of the state law is sheer fiction. The issue therefore becomes where the burden of inertia in writing a will is to fall. At least when the disadvantaged group has been a frequent target of discrimination, as illegitimates have, we doubt that a State constitutionally may place the burden on that group by invoking the theory of “presumed intent.”\textsuperscript{146}

One need only read “making a matrimonial regime contract” for “writing a will” and “wives” for “illegitimates” in the quoted passage to see that the tacit contract theory will not

\textsuperscript{144} The Attorney General apparently disregarded the legislative directive to emphasize the tacit contract theory since his summary contains no mention of it. \textit{See Louisiana Department of Justice, Louisiana Community Property Law and How Its Effects Can Be Changed by Contract} (1977).

\textsuperscript{145} 430 U.S. 762 (1977).

\textsuperscript{146} Id. at 775 n.16.
carry its proponents as far as they would wish. For although a fiction may be sufficient basis, for example, for a conflict of laws rule, it is insufficient to determine constitutional rights.

**Husband's Due Process Argument**

If the tacit contract theory is not accepted for the purpose of determining the constitutionality of applying the new matrimonial regime laws to a husband married under the old laws, the constitutional determination must be made under the standard of reasonableness and non-arbitrariness demanded by the due process clause. The United States Supreme Court has considered the constitutionality of changes in matrimonial regime laws diminishing the husband's power over community property during the marriage. At issue in *Arnett v. Reade*[^147] was whether a new law requiring the wife's joinder in any conveyance of community real property could constitutionally be applied to community real property acquired when the law would have permitted the husband alone to convey it.[^148] The Court held that there was no violation of any constitutional provision in applying the new law to community property acquired under the old system. It reasoned that since the wife's interest in the community property was more than a mere expectancy, the legislature could properly protect her interest in the community property by requiring her joinder.[^149] It appears from this decision that so long as the wife's interest in the community is more than a mere expectancy, it is reasonable and hence constitutional for the legislature to increase her powers over the community; but by negative implication, if her inter-

[^147]: 220 U.S. 311 (1911).

[^148]: *Arnett* involved New Mexico law. The New Mexico Supreme Court had held that the wife's interest in the community was a “mere expectancy.” The United States Supreme Court reexamined this holding in light of Spanish law and the wife's remedies against the husband and concluded contrary to the holding of the New Mexico Supreme Court that under New Mexico law the wife had an interest greater than a mere expectancy. In an earlier case, *Warburton v. White*, 176 U.S. 484 (1900), the Supreme Court had held under Washington law that the wife's equal proprietary interest at death in community property permitted a new law giving each spouse testamentary capacity over one-half the community property to be constitutionally applied to community property acquired at a time when the old law gave the surviving spouse all of the community property.

[^149]: 220 U.S. at 320.
est in the community property is a mere expectancy, legislative diminution of the husband’s powers may not be reasonable.\textsuperscript{150} Since 1926 it has been clear that Louisiana considers the wife’s interest in the community to be more than a mere expectancy.\textsuperscript{151} Consequently, an increase in the Louisiana wife’s management powers and a corresponding diminution in the husband’s would be reasonable legislation under \textit{Arnett v. Reade}.

Legislative diminutions of the husband’s power to manage the community property are nothing new to Louisiana. The Code of 1825 limited the husband’s power to make inter vivos gifts of community immovables; his power to make gifts of immovables under the Digest of 1808 had been unrestricted.\textsuperscript{152} Beginning in 1912, a series of acts\textsuperscript{153} led to the present requirement of the wife’s consent to the mortgage, lease, or sale of community property when her name appears in the title.\textsuperscript{154} Since 1921, legislation has enabled the wife, by filing an appropriate declaration to require her consent to the mortgage or sale of the family home.\textsuperscript{155} In 1970 an amendment to article 686 of the Code of Civil Procedure gave the wife the exclusive right to sue for her earnings,\textsuperscript{156} and in 1975 she was given the power to obligate her earnings for debts incurred by her either before

\textsuperscript{150} The negative implication might explain \textit{Spreckles v. Spreckles}, 116 Cal. 339, 48 P. 228 (1867), in which the California Supreme Court held that an amendment decreasing the power of the husband over the community property would not be given retroactive application to affect community property acquired prior to the enactment of the amendment. At the time the \textit{Spreckles} decision was rendered, the California wife had no ownership interest in community property during the marriage, only a mere expectancy. For a thorough discussion of the problems generated by \textit{Spreckles} for California’s community property reform, see Reppy, supra note 17.

\textsuperscript{151} The Louisiana wife’s interest in the community property has been characterized as follows: 1976 La. Acts, No. 444, amending La. Civ. Code art. 2398 (present undivided one-half share); Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973) (imperfect ownership without use); Phillips v. Phillips, 160 La. 813, 107 So. 584 (1926) (vested one-half interest). \textit{See also} Dixon v. Dixon’s Executors, 4 La. Ann. 188, 191 (1832) which as early as 1832 rejected the French view that the wife had only a mere expectancy. The Louisiana Supreme Court did for a time espouse the “mere expectancy” theory, \textit{see} Guice v. Lawrence, 2 La. Ann. 226 (1847), but \textit{Phillips v. Phillips} overruled \textit{Guice} and reinstated \textit{Dixon} on this point.

\textsuperscript{152} \textit{Compare} La. Civ. Code art. 2373 (1825) \textit{with} La. Digest of 1808, 3.5.66.


\textsuperscript{154} La. Civ. Code art. 2334.


or during marriage. The opportunity to argue that the legislature could not constitutionally apply these changes to husbands married prior to the change or to community property acquired prior to the change could have arisen with any of these acts, yet so far as reported decisions show, the argument was never made. The absence of any constitutional challenge is by no means conclusive on the issue of the non-arbitrariness and reasonableness of applying the changes to pre-existing marriages and previously acquired property, but a pattern of heretofore unquestioned legislative activity diminishing the husband's power is at least some evidence that the changes wrought by the equal management law, which are not vastly different in kind or degree from previous legislative diminutions in the husband's power, ought not to be adjudged arbitrary or unreasonable.

Dictum in Cameron v. Rowland is the nearest statement in Louisiana jurisprudence to a pronouncement on the constitutionality of changes in the husband's management powers. The statutes involved in that case were not matrimonial regime laws per se but were statutes governing the purchase by married women of shares in building and loan associations. Indirectly these statutes did affect the management of community property. Under the general law of the community regime the wife could not, without the consent of her husband, use community funds to create through investment a separate estate for herself. However, Acts 120 of 1902 and 140 of 1932 in effect allowed the wife to do just that with respect to shares in building and loan associations. In Cameron a married woman purchased shares in a building and loan association in her own name but with community funds. The heirs of her husband

158. Compare this result with the situation in California where since 1897 constitutional arguments have been made repeatedly concerning the applicability of statutory diminutions in the husband’s powers to property acquired prior to the diminution. See Reppy, supra note 17, at 1052-70.
159. 215 La. 177, 40 So. 2d 1 (1948).
160. These Acts provided that a married woman might own shares in building and loan associations without the consent or authorization of her husband and that the shares would be “for her separate benefit as paraphernal property.” 1902 La. Acts, No. 120, § 13. 1932 La. Acts, No. 140, § 34 is almost identical in this respect.
asserted that these shares were community property. On re-hearing, the Louisiana Supreme Court held that the statute in effect at the time of the purchase governed the classification of the shares as community or separate property, and thus, the shares purchased during the period the 1902 and 1932 Acts were in effect were the wife's separate property. Although the unconstitutionality of the 1902 Act had not been pleaded, the court, nevertheless, stated that it knew of no constitutional prohibition against the enactment of a statute empowering the wife from the effective date of the statute to purchase building and loan association shares in her own name as her separate property, with the community being entitled to reimbursement under the general laws of the community regime if she used community funds. The Cameron court thus would have held constitutional a statute giving the wife power to invest community property for certain purposes, and in so doing, implicitly rejected the proposition that legislative changes in the powers of the spouses to manage community property can not affect existing marriages.

Although France has no constitutional provision limiting the legislature's power to pass retroactive laws, the retroactivity provisions of France's 1965 matrimonial regime reform evidence the modern French belief that parts of the reform may reasonably be applied to spouses married under the old law. The extensive "transitional provisions" governing the applicability of the 1965 reform, some of which ordained the survival of the old law for spouses married prior to the new law, significantly made the parts of the reform concerning administration

162. Id. at 227, 233, 40 So. 2d at 18, 20.
163. Id. at 231, 40 So. 2d at 19.
164. Id. at 234-35, 40 So. 2d at 20.
166. Although there are no French constitutional limits on retroactive laws, the legislature is morally obligated to use restraint where expectations and acquired rights may be disrupted by new laws. Id.
168. Art. 10 al. 1 de la loi du 13 juillet 1965 continued the old regime of community of movables and acquets for those married without contract prior to the effective date of the new law. The new law established the community of acquets as the legal regime. Thus in so far as the composition of the community is concerned, the old law survives for those spouses previously married.
of separate and community property effective immediately for all spouses living under the community regime regardless of the date of their marriage, even though the husband's power was thereby diminished. 169

Perhaps the reasonableness of applying the new equal management rules to a husband married under the old law can best be seen by asking whether the husband would be left with any meaningful rights of management. After the effective date of the new law he will still be empowered acting alone to obligate the community property for both prenuptial and postnup- tial debts, 170 and although he will need his wife's consent to more transactions than under the old law, the new law provides a summary procedure by which he can circumvent his wife's arbitrary refusal or inability to consent. 171 With respect to the ordinary affairs of a community business solely operated by him 172 and to certain movables registered in his name, 173 he will still be the exclusive manager. When it is remembered that the alternative to applying the new equal management rules to husbands married under the old law is to perpetuate the arguably unconstitutional head and master rules for women married prior to the new law, the husband married under the old law will not be able to carry his burden of proof under the due process clause of showing that the Louisiana legislature acted arbitrarily or unreasonably in applying the new management rules to him.

CHANGES IN MANAGEMENT OF COMMUNITY PROPERTY: EFFECT ON RELATIONS BETWEEN A SPOUSE AND A THIRD PARTY

The equal management law affects not only the spouses, but in two major ways it also affects third parties who deal with the spouses. First, the equal management law specifies which spouse has the authority to enter transactions with third parties concerning the community property. Problems will arise

169. Arts. 10 al. 2 and 11 al. 2 de la loi du 13 juillet 1965. See H., L., & J. Mazraud, supra note 124, at 117-19. The new provisions on administration applied even to spouses who had made express contracts adopting a community regime. Id.
when a third party has dealt with the proper spouse pursuant to the old law, but the new law if applied to that transaction would require the concurrence of both spouses. For example, suppose that prior to the effective date of the new law the husband has signed an agreement to sell a community immovable registered in his name alone that is not the family home or has leased it with the lessee having an option to purchase. Under the law in effect at the time the agreement to sell or the lease with option to purchase was made the wife's concurrence would not have been necessary to transfer title. The new law makes the wife's consent necessary for all sales of community immovables. If the act of sale has not taken place before the effective date of the new law and the wife refuses to consent, will the wife's concurrence as required by the new law be necessary to transfer good title?

Section nine of Act 627 must first be consulted to see whether the legislature intended the new law to be applied in this situation. The section includes all spouses regardless of when married (except those who have made express matrimonial regime contracts) and all community property regardless of when acquired within the reach of new law, but contains a proviso that the new law shall not be construed “to invalidate any act or transaction” validly made prior to the effective date of the Act. If under these facts the new requirement of the wife’s consent could be viewed as invalidating the husband’s act or transaction, then the proper solution according to section nine is that the wife’s concurrence is not required. It is not altogether clear, though, that application of the new law to this situation amounts to the invalidation of an act or transaction of which the proviso of section nine speaks. It may be argued that the evil the legislature sought to avoid by enacting the proviso was only the divesting of the title, or the voiding of security rights, and that it did not intend to perpetuate the head and master rules for all contracts concerning the alienation, lease, or encumbrance of community immovables entered into under the old law and merely continuing under the new.

174. LA. CiV. CODE arts. 2334 and 2404.
Otherwise, the wife's new right to concur could be effectively defeated if prior to the effective date of the new law the community immovables were made the object of contracts to sell, lease, or mortgage no matter when performance is expected.\textsuperscript{177}

Acceptance of this restrictive interpretation of section nine's invalidation proviso forces an examination of whether requiring the wife's consent after the effective date of the new law would be constitutional where the agreement to sell or option to purchase was made without the wife's consent prior to the new law. That leads to an inquiry as to whether the contract between the husband and the transferee has been severely impaired.\textsuperscript{178} The extent of reliance on the husband's authority, the extent to which the new law nullifies that authority, and the extent of potential monetary loss are the relevant factors in this inquiry.\textsuperscript{179} Reliance on the husband's authority may be deemed unjustified if the agreement to sell took place after recent constitutional challenges to the husband's authority as head and master\textsuperscript{180} which, even though unsuccessful so

\textsuperscript{177} French jurisprudence shows similar difficulty interpreting the legislative command to give immediate effect to the new law in matters concerning the spouses' administration of their common and separate property. In a situation resembling the one proposed in the text, one French trial court found a way to give immediate effect to the wife's new right to consent but nevertheless protect the husband and third party's expectations. In a case where the husband prior to the new law signed an agreement to sell real estate subject to a suspensive condition that did not occur until after the effective date of the new law, the tribunal held that at the time the agreement became perfect the wife's consent was necessary; however, in order to prevent application of the new law from prejudicing the third party, the tribunal permitted the sale to take place but escrowed the part of the purchase price that was paid after the effective date of the new law pending a further decision or until dissolution of the community. Judgment of April 3, 1968, Trib. gr. inst., Draguignan, [1968] 11. 15696, note J. Patarin, reported in G. Goubeaux et P. Bihr, L'APPLICATION JURISPRUDENTIELLE DE LA LOI DU 13 JUILLET 1965 at 241-45 (1974). Had the sale been completed prior to the new law's effective date the tribunal apparently would not have allowed the wife to sequester the funds. See also the decision by the Court of Appeal of Lyon, G. Goubeaux et P. Bihr, supra at 245-47, where prior to the new law the husband had leased a community immovable to his business but had not recorded the lease until after the new law went into effect. The court held that the wife's consent was not required, for as to her, the contract was effective at the time of the lease rather than when it was recorded.

\textsuperscript{178} See Allied Structural Steel v. Spannus, 98 S. Ct. 2716 (1978).

\textsuperscript{179} See id. at 2723-25.

\textsuperscript{180} See Corpus Christi Parish Credit Union v. Martin, 358 So. 2d 295 (La. 1978).
far, should have alerted both husband and transferee to the possibility that the constitution might require the wife’s consent. Furthermore, if the transaction took place after the enactment of Act 627 but before its long postponed effective date, the parties should have been aware that the wife’s consent might be legislatively required and hence reliance on prior law would not be justified.

With respect to the extent to which the new act nullifies the husband’s authority it must be noted that if the wife withholds her consent arbitrarily or is unable to consent, the husband can receive judicial authority to act without her consent and sue her for damages if her refusal to consent amounts to fraud or bad faith in the management of the community. Hence it may be argued that the new law will not nullify the husband’s authority, only limit it. However, if the wife is able to consent and is not acting arbitrarily by withholding consent, then application of the new law will nullify the husband’s authority.

If the impairment of the husband’s contract with the transferee were deemed severe, the husband and the transferee would still be forced to suffer the impairment if the consequences of impairment were outweighed by the purpose for which the new law was passed. The law is addressed to the broad societal interest of upgrading the wife’s status within the matrimonial regime, a matter of urgency considering the tenuous constitutionality of the head and master scheme. Arguably that purpose can not be fully accomplished without calling into question the validity of all contracts to sell, lease, or mortgage community immovables entered into but not completely performed under the old law. However, even those Louisiana Supreme Court justices who were willing to hold unconstitutional the husband’s power to mortgage without the wife’s consent a community immovable registered in the name of both husband and wife would have done so only prospectively. See also Kirchberg v. Feenstra, 430 F. Supp. 642 (E.D. La. 1977), which upheld the husband’s authority as head and master but which is being appealed.

tively. Thus there is already judicial indication that the societal interest in abolishing an unconstitutional arrangement for managing the community property would not outweigh the severe impairment of a contract made in reliance on prior law. To this indication may be added the argument that had the legislature intended for the invalidation proviso to exempt from the effects of the new law only completely performed transactions it could easily have said so. The conclusion produced is that section nine ought to be interpreted as not requiring the wife’s consent where the agreement concerning a community immovable was entered into by the husband validly under the old law.

The second way in which third parties who deal with a spouse are affected by the new law concerns the broadening by Act 627 of the rights of unsecured creditors of the wife to reach the community property. For example, under present law the entire community property is subject to seizure to satisfy the husband’s, but not the wife’s, debts. The new law makes the entire community property answerable for the wife’s as well as the husband’s debts, be they tort or contractual debts, premarital or postmarital debts. Suppose the wife married under present law incurs a debt prior to the effective date of the new law. If she defaults may her creditor after the effective date of the new law seize community property such as the husband’s salary to satisfy the debt? If so, the creditors of the husband’s debts incurred prior to the new law could complain that when they extended credit to the husband they relied upon his salary as being impervious to the wife’s debts other than those authorized by the husband or for necessaries. Those creditors would argue that to apply the new law to the wife’s debt would deprive them for seizure purposes of property on which they relied in extending credit to the husband. The husband’s pre-Act 627

184. Corpus Christi Parish Credit Union v. Martin, 358 So. 2d at 302-04 (La. 1978) (Tate, Dennis & Calogero, JJ., dissenting).
185. Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973). The Louisiana Equal Credit Opportunity Law, La. R.S. 9:3581-85 (Supp. 1977), makes the wife’s salary available to satisfy her debts, but no other part of the community property is liable for her debts unless she has acted as the husband’s mandatary or the debt is for necessaries the husband is obligated by law to provide.
creditors can make this argument even as to the wife's debts incurred after the effective date of Act 627. However, their argument is stronger with respect to her pre-Act 627 debts. As to those debts, if the new law is to be applied, the wife's creditor will have received a windfall: he will be allowed to seize the husband's salary even though at the time he extended credit to the wife the law did not allow him such an opportunity to satisfy her indebtedness; hence the wife's creditor could not have relied upon the husband's salary in originally extending credit to the wife.

Section nine states that the new law shall be applicable to the "property and obligations of all spouses" whether the property was acquired or an obligation incurred prior to or after the effective date of the new law, provided that the applicability of the new law does not invalidate an act or transaction made according to the law in force at the time of the transaction. The new law as applied in this situation does not invalidate the husband's pre-Act 627 debts, hence the proviso is inapplicable. It thus seems clear that the legislature intended to treat the unsecured creditors of the spouses equally under the new law in so far as their right to seize community assets is concerned, with no distinction as to when the obligations arose. This solution avoids the complications that might have arisen at dissolution had the legislature tried to preserve the old law for the husband's pre-Act 627 creditors. The administrator upon dissolution would have had to carve out certain community property to be impervious to the wife's creditors vis-a-vis the husband's pre-Act 627 creditors without preferring the husband's pre-Act 627 creditors to the husband's post-Act creditors or the husband's post-Act 627 creditors to the wife's creditors. The solution of applying the new law to all creditors is practical, but is it constitutional?

Again the analysis begins with whether the husband's pre-Act 627 obligations have been severely impaired. The new law does not in any way disturb the husband's obligation to repay nor the creditor's right to collect his debt from the husband's

189. 1978 La. Acts, No. 627, § 1-2851, provides that upon dissolution of the community regime either spouse may petition for the appointment of an administrator to liquidate the community according to the principles set forth in § 1-2852.
patrimony; it simply makes the community property portion of the husband's patrimony additionally subject to seizure by creditors of the wife. The ability of the husband's creditors to collect the debt may thus ultimately be lessened by the wife's activity, but as a practical matter ultimate inability to collect a debt is a risk that is familiar to the unsecured creditor. The unsecured creditor has no right to any particular piece of the debtor's property until the debtor has defaulted and judgment has been obtained against the debtor. He has no recourse if prior to the maturation of his debt his debtor becomes insolvent due to seizure of property by the debtor's other creditors. Hence unsecured creditors always run the risk that the debtor's patrimony will decrease. Arguably that risk has not included a decrease due to the law's suddenly allowing someone besides the debtor to dispose of or obligate the debtor's patrimony. However, even this occurrence is not so very different from the ordinary risk that circumstances beyond the debtor's control, such as an increase in taxes or a downturn in the economy, will decrease the debtor's patrimony. Furthermore, since 1975 when the legislature passed the Equal Credit Opportunity Law allowing wives to obligate their salaries, creditors contemplating the extension of unsecured credit to husbands should have been expecting further inroads by the wife's creditors to seizure of community property. The reliance by pre-Act 627 unsecured creditors of the husband on the old law thus is not extensive enough to conclude that the obligation has been severely impaired. There being no severe impairment, a court must give deference to the legislative wisdom of applying the new law to all debts no matter when they arose.

190. LA. Civ. Code art. 1968. Consequently unless a creditor has reduced his claim to judgment, he may not have standing to object to another creditor's seizure of the debtor's assets.
193. Decisions in other community property jurisdictions have avoided the constitutional issue by finding no legislative intent to apply retroactively a new law broadening a creditor's access to the community property. McKee v. Conkle, 23 Ariz. App. 249, 532 P. 2d 191 (1975); Nat'l Bank of Commerce of Seattle v. Green, 1 Wash. App. 713, 463 P. 2d 187 (1969) (court opined that retroactive application would be unconstitutional). California recently attempted to clarify its legislative intent concerning the broadening of the creditor's access to community property for collection of the contractual debts of a spouse. 1977 CAL. STATS. Ch. 692, § 2 amended an earlier retroactivity
Act 627 does not change the basic rules of classification of property: property acquired during marriage other than by gift to a spouse individually, by inheritance, or with separate funds is community property. Neither does it change the presumption that applies under article 2405 upon dissolution that property possessed by either spouse during the community regime is presumed to be community property. However, Act 627 does make changes in some particulars of classification. First, the new law gives the husband the option currently given only to the wife to declare by notarial act that the fruits and revenues of his separate property will be separate. Second, it provides that the recovery for pain and suffering sustained during...
ing the marriage by the husband will be his separate property,\(^\text{197}\) whereas present law makes it community property.\(^\text{198}\) It provides further that upon dissolution of the community regime the part of the recovery or award for injuries sustained during marriage attributable to loss of earnings shall be apportioned between earnings that would have occurred during the community and post-dissolution earnings,\(^\text{199}\) the latter becoming the separate property of the injured spouse. Act 627 thus codifies the apportionment approach of *West v. Ortego*,\(^\text{200}\) wherein the Louisiana Supreme Court designated as the husband’s separate property the portion of his workmen’s compensation recovery for an injury sustained during marriage that represented loss of earnings that would have accrued after dissolution of the community. Although *West* involved recovery received after dissolution of the marriage, the new law calls for apportionment upon dissolution even as to recovery received during the marriage.\(^\text{201}\) Third, the new law makes the wife’s


\(^{198}\) La. Civ. Code arts. 2402, 2334. The wife’s personal injury award has always been her separate property. *Id.* See *Chambers v. Chambers*, 259 La. 246, 249 So. 2d 896 (La. 1971).

\(^{199}\) 1978 La. Acts, No. 627, § 1-2840. This section does not change the jurisprudential rule that if the injury is suffered prior to marriage, the recovery, though received during marriage and perhaps representing loss of earnings that would have accrued during marriage, is the separate property of the injured spouse. *Broussard v. Broussard*, 340 So. 2d 1309 (La. 1976).

\(^{200}\) 325 So. 2d 242 (La. 1975).

\(^{201}\) Previously even those who favored the apportionment approach when the husband’s recovery was received after dissolution conceded that recovery collected during the marriage was community property under Louisiana Civil Code articles 2334 and 2402. *Chambers v. Chambers*, 259 La. 246, 249 So. 2d 896 (1971) (Tate, J., dissenting). In the case of recoveries received during the marriage apportionment raises several questions. (1) How is the recovery for loss of earnings to be characterized during the marriage? Apparently it must be characterized as community property under the “catch all” provision of § 1-2838 (8). (2) Does apportionment upon dissolution occur only as to any of the recovery that remains after dissolution or does it apply even to recovery that has been consumed? If recovery that has been consumed is apportioned to the injured spouse’s separate estate he may be able to claim reimbursement if it was spent for community purposes. *See* 1978 La. Acts, No. 627, § 1-2852 (F). (3) Does apportionment occur when the community is dissolved by death? When it is the injured spouse who dies apportionment is unnecessary to protect him, and the surviving spouse should receive a community interest in all of the recovery representing loss of earnings. When the non-injured spouse dies, there should be an apportionment to protect the injured spouse just as when the community is dissolved by separation or divorce.
earnings prior to judicial separation, but while she is living separate and apart from her husband with an intent to end the marriage, community property, where presently her earnings under such circumstances would be separate property.

Section nine of Act 627 clearly delineates the new law’s applicability in the area of classification of property: “This Act shall not be construed to change the characterization as community or separate of assets acquired or fruits and revenues accrued prior to January 1, 1980 . . . .” In making the changes in classification applicable only as to property acquired after the effective date of Act 627 the legislature may have believed that it could not constitutionally have done otherwise. Although Deshautels v. Fontenot approved the reclassification of assets accruing after the effective date of the new classification, Dixon v. Dixon’s Executors held that a wife could not by subsequent legislation be divested of her one-half interest in the community property already acquired. A more recent Louisiana appellate court decision likewise held that a statute making a judgment of separation effective to dissolve the community from the date of the petition could not be applied to a judgment rendered several years before the effective date.

203. LA. CIV. CODE art. 2334.
205. 6 La. Ann. 689 (1851).
206. Id. See discussion in text at note 133, supra. See also McElwee v. McElwee, 255 So. 2d 883 (La. App. 2d Cir. 1971), involving the application of a 1944 amendment to Louisiana Civil Code article 2386. The amendment required the wife to file an affidavit that she was administering her separate property in order to make its fruits become her separate property. Under prior law if she administered her separate property in fact, the fruits became her separate property even in the absence of an affidavit. The property involved was a savings account opened prior to 1944 containing oil and gas royalties from the wife’s separate property which the wife had in fact always administered herself. She argued that the requirements of filing the affidavit did not apply to her, but the court held that amounts accruing after 1944 became community property due to failure to file the affidavit. Said the court: “The amendment was intended to affect existing communities of acquets and gains as well as those established after its enactment.” 255 So. 2d at 888.
207. 4 La. 188, 194 (1832).
208. Id. Dicta in Deshautels v. Fontenot, 6 La. Ann. 689, 690 (1851), however, states that should the community be abolished by law, the repealed law would not remain in force to govern future or past acquisitions of spouses married prior to the repeal.
date of the statute since the effect of doing so would be to change the classification from community to separate of the property acquired between the dates of the petition and judgment.  

California jurisprudence at one time reached the same conclusion that a law could not reclassify previously acquired property. The California Supreme Court at first held unconstitutional under the due process and privileges and immunities clauses a 1917 California statute providing that the removal of chattels to California or a change in the spouses' domicile to California converted the spouses' property into community property. Responding to the suggestion of the dissenting judge that California could constitutionally regulate the transmission on death of the property of a California domiciliary even if the property had been acquired during a previous domicile outside California, the California legislature enacted a system of quasi-community property. Under this system marital property retains its initial characterization during the marriage and may be dealt with by the spouses accordingly. Hence if a spouse acquires property while domiciled in a non-community property state, upon moving to California the spouse would continue to treat the property as separate property, and thus can make gifts of it or otherwise dispose of it without the consent of the other spouse. However, upon termination of the marriage by death, divorce, or separation the property would be treated as community property if it was acquired in a manner that would have made it community property under the California rules of characterization. Thus if the property was acquired with earnings during marriage, it would be treated upon dissolution as quasi-community property. With its impact thus focused on the transfer of

209. LaFleur v. Guillory, 181 So. 2d 323 (La. App. 3d Cir. 1965).
210. In re Thorton's Estate, 1 Cal. 2d 1, 33 P. 2d 1 (1934). The statute was an attempt to achieve a fair division of marital property for couples who moved to California from common law states that did not utilize a community property system.
211. 1935 Cal. Stat. Ch. 831, § 1, the original quasi-community property statute, applied only to transmission of property on death, but it now applies also to distribution of property of California domiciliaries when the marriage is dissolved by divorce or separation. 1961 Cal. Stat. Ch. 636, § 2 et. seq.
212. CAL. CIV. CODE § 4800 (West); CAL. PROB. CODE § 201.5 (West).
213. See CAL. CIV. CODE § 5110 (West).
property of California domiciliaries at dissolution of the marriage and its effect postponed until the happening of that event, California’s quasi-community property concept has been sustained by the California Supreme Court. Indeed, the California Supreme Court has gone even further in upholding a reclassification of property on divorce. It has held that a new statute making the husband’s earnings while living separate and apart from his wife separate property, where formerly they would have been community property, could be applied to earnings accrued to a separated husband prior to the effective date of the new statute.

The Louisiana legislature’s “prospective only” approach is sensible with respect to the husband’s new power to declare that the fruits and revenues of his separate property will be separate property and also with respect to the new community classification of the earnings while living separate and apart. The present rules compensate the wife somewhat for the husband’s considerable power to administer the community, and it is fair that property acquired and classified while that power existed retain its original classification. However, the codal rules that have discriminated against husbands in the classification of personal injury recoveries have had little connection to his powers as head and master. Thus the legislature might have achieved greater fairness by applying the new personal injury recovery provision to recoveries already acquired instead of giving it “prospective only” application. For example, a husband’s personal injury award received prior to the effective date of Act 627 will be classified according to the old law under the terms of section nine.

It would have been fairer and, by analogy to the California quasi-community property jurisprudence, constitutional for section nine to have permitted the new law to apply if dissolution occurred after the effective date of the

---

216. If the “asset” acquired in a personal injury situation is the cause of action rather than the recovery, then under section nine of Act 627 the old law would apply to a personal injury received prior to the effective date of Act 627 even though the recovery was received after the effective date. Green v. Liberty Mutual, 352 So. 2d 366 (La. App. 4th Cir. 1977), cert. denied, 354 So. 2d. 210 (La. 1978) suggests that the “asset” is the cause of action.
new law thus giving the injured husband his pain and suffering recovery plus any part of the recovery representing post-dissolution earnings as his separate property. The solution to the problem of classification of personal injury damages provided by the new law is based on commendable humanitarian concern for the injured spouse. It seems unwise to deny the solution to those who need it but who unfortuitously receive their injuries or their recoveries at the wrong time, particularly if neither the United States nor the Louisiana Constitution compels this result.

**Elimination of the Husband's "Double Declaration" Requirement**

Act 627 provides that "property possessed by either spouse during the community regime is presumed to be community property, but neither spouse shall be precluded from proving its separate character." As the applicable comment indicates, the provision is intended to abolish the jurisprudential requirement that in order to prove a piece of immovable property is his separate property a husband must have included a "double declaration" in the act of acquisition that the property was bought with his separate funds and for his separate estate. If the double declaration requirement be viewed as a rule of classification, that is, if the absence of the double declaration in an act of acquisition be viewed as classifying the property as community property, then according to section nine, Act 627's elimination of the double declaration requirement can not be applied to property acquired by husbands prior to the effective date of Act 627. As to such property a husband's failure to make the double declaration would still bar him from proving its separate character. If on the other hand the double declaration requirement be viewed simply as an evidentiary presumption governing proof in certain cases of the separate character of the husband's property, then section nine would make the elimination of the evidentiary presumption applicable to the property of the husband even if it were

acquired prior to the effective date of the Act. There could be no constitutional objection to applying a civil rule of evidence retroactively. Civil rules of evidence exist to facilitate the determination of the truth. A wife can hardly claim she has a constitutional right to prevent her husband from using a newly permitted method of proving the true state of affairs with respect to a piece of marital property. 219

A true evidentiary presumption merely shifts the burden of producing evidence to the party against whom the presumption operates but does not preclude that party from producing evidence in rebuttal. 220 Sometimes a true presumption also forces the party to produce rebuttal evidence that is “clear and convincing,” not merely believable. 221 If the double declaration requirement operated as a true evidentiary presumption, the wife would need only introduce the act of acquisition which does not contain the double declaration as proof that the property was community, and if the husband failed to produce any evidence (or clear and convincing evidence) in rebuttal, the wife would win the issue of classification. The Louisiana jurisprudence, however, has not treated the double declaration requirement in the manner of a true evidentiary presumption. Peters v. Klein, 222 for example, held that if a married man acquires immovable property without making the double declaration, “the property will belong to the community and, at its dissolution the community will owe his separate estate for the price paid.” 223 The husband is not entitled to present rebuttal evidence of the separate character of the property but must instead content himself with a claim for reimbursement as the result of the property’s being classified as community. Thus,

219. See M. PLANIOL & G. RIPERT, supra note 100, at 43.
221. Id. at 822-23. If the double declaration requirement were a true presumption its function would probably be to impose the higher standard of proof for rebuttal since possession of the property during marriage already raises the presumption that the property is community. LA. CIV. CODE art. 2405.
222. 161 La. 664, 109 So. 349 (1926).
223. Id. at 665, 109 So. at 350. See also Boulet v. Fruge, 221 So. 2d 602 (La. App. 3d Cir. 1969) (immoveable purchased by husband without double declaration is “conclusively presumed to belong to the community”) (emphasis added); Watt v. Stann, 195 So. 2d 343 (La. App. 2d Cir. 1967) (failure to make the double declaration is “conclusive against” the husband on the issue of whether the property is community) (emphasis added).
as applied by the jurisprudence the double declaration requirement is not a true evidentiary presumption but instead is a rule of classification of property. As such, it is a rule that section nine leaves undisturbed for property acquired prior to the effective date of Act 627.

California and New Mexico each recently abolished the presumptions under their prior laws that an interest in real property acquired by a married woman by written instrument in her name alone was her separate property. 224 Significantly, neither state made the abolition retroactive to affect property acquired prior to the effective date of the abolition. 225 Commentators in both states have suggested that the reason for the prospective application of the abolition of the presumptions was the desire by the legislatures to obviate constitutional challenges that might have been made to the retroactive abolition of the presumptions. 226 The decision of these states against retroactive abolition of their presumptions is thus consistent with the conclusion that section nine of Act 627 leaves the double declaration requirement applicable to property acquired prior to the effective date of the new law.

**Effect of Act 627 on Spouses Who Have Express Matrimonial Regime Contracts**

Section nine of Act 627 explicitly makes the new legal regime inapplicable to spouses who have made express matrimonial regime contracts. 227 The legislature clearly intended to protect the reliance of spouses who have consciously sought to tailor-make a matrimonial regime for themselves by making an express matrimonial regime contract prior to marriage as permitted under present law. 228 Furthermore, the provision of Act 627 allowing spouses to contract during marriage, including the

---

227. **1978 La. Acts**, No. 627, § 9. The word "express" makes it clear that even if the theory be accepted that spouses who have married without making a matrimonial regime contract have "tacitly" contracted for the community regime, the legislature intended the new legal regime to apply to such "tacit" contracts.
228. **La. Civ. Code arts. 2325 et seq.**
right to make matrimonial regime agreements during marriage\textsuperscript{229} will take effect as to all spouses several months in advance of the effective date of the new legal regime.\textsuperscript{230} Even spouses who have not availed themselves of the right to make a matrimonial regime contract under present law will therefore be allowed to adopt a matrimonial regime contract in time to prevent the new legal regime from ever having effect as to them. The Act thus recognizes fully the primacy of an express matrimonial regime contract over the new legal regime.

Although by the terms of section nine the legal regime of Act 627 will have no direct application to spouses who have made matrimonial regime contracts, it may have an indirect effect on such contracts made prior to the effective date of the Act which refer simply to the "community regime" or "the community of acquets and gains" in order to adopt the community with a specified modification. In interpreting these terms according to the parties' intent,\textsuperscript{231} will a court deem the spouses to have intended the legal community regime as it existed at the time of the contract, or the legal community regime as it may be amended from time to time? A court may of course arrive at its conclusion using any of the means provided by the Code for interpreting agreements.\textsuperscript{232} Particularly, a court may look to the way the parties have executed the contract to furnish the interpretation.\textsuperscript{233} Thus if the spouses have been consistently acting as if amendments to the legal regime apply to them, their conduct has evidenced their intent at the time of the contract to be bound by the legal regime as amended from time to time.

If the spouses' intent can not be determined through the usual methods of interpreting agreements, a court will have to supply a special rule of interpretation to cover this situation.\textsuperscript{234}

\textsuperscript{230} 1978 La. Acts, No. 627, § 9, para. 2 (effective date of right of spouses to contract: sixty days after adjournment of 1979 regular legislative session), para. 1 (effective date of new legal regime: January 1, 1980).
\textsuperscript{234} The court may determine, however, that there was no common consent on this matter and hence no contract. La. Civ. Code art. 1945(4). See the pronouncement to this effect in Stratton v. Lubins, 11 La. Ann. 380, 381 (1856).
According to the French doctrinal rule the effects of contracts are generally governed according to the law in force at the time they are made except as to matters of public order.\textsuperscript{235} This approach may have been adopted by the United States Fifth Circuit Court of Appeal in a case involving the tax consequences of a prenuptial matrimonial regime contract.\textsuperscript{234} The taxpayer's prenuptial contract outlined the legal regime except for a provision governing administration of the wife's separate property. The taxpayer argued that she had contracted for the legal regime including any legislative changes concerning administration of separate property. Not convinced, the court held that in the absence of a contractual provision that the general laws of Louisiana should regulate the community, the parties had made a contract that would remain unaffected by statutory change. However, because the clause in controversy was an express contractual provision modifying a particular part of the matrimonial regime, the case does not precisely address the problem of the interpretation of a clause that merely refers to or adopts the legal regime. The French approach also seems to have been followed by the Louisiana Supreme Court in the case of a trust in which the settlor stated that the term of the trust "shall extend for the maximum time permitted under the laws of the State of Louisiana."\textsuperscript{237} The Louisiana Supreme Court applied the maximum time permitted by law at the time the trust took effect rather than the maximum time as subsequently amended, though the court by acknowledging that there was no settled interpretation of the older maximum time ultimately interpreted the two time periods to be the same.

Several factors cast doubt on the wisdom of applying the traditional French doctrinal rule to matrimonial regime contracts. If a contract is intended to be performed immediately or a short time after its confection, the law in effect at the time of the making of the contract will be easily ascertainable. However, a matrimonial regime contract is not intended to be completely performed immediately and in fact may have a very

\textsuperscript{235} P. Roulier, \textit{supra} note 123, at 360.
\textsuperscript{236} Clay v. United States, 161 F.2d 607, 610 (5th Cir. 1947).
\textsuperscript{237} Succession of Stewart, 301 So. 2d 872, 880 (La. 1974).
long duration. During the time the matrimonial regime contract is in effect there may be so many legislative changes and judicial interpretations of the law that it will be difficult to pinpoint the precise state of the statutory law and jurisprudence concerning the community regime at the time the contract was made. This determination is particularly troublesome when, as in Creech v. Capitol Mack, Inc., the Louisiana Supreme Court overrules prior jurisprudence as having been an incorrect interpretation of the law.\textsuperscript{238} What is “the law” for matrimonial regime contracts referring to “the community” that were contracted during the reign of the incorrect jurisprudence?

Furthermore, although there may be good reason to freeze the substantive rights and duties of the parties according to the law in effect at the time of the contract, there may be no reason to freeze the procedural or administrative aspects if to do so would hinder the ultimate effectiveness of the substantive parts of the contract. Trusts provide an example of this point. In the case of the maximum term, distribution of income, termination of income interest, and other substantive provisions of a trust where the settlor has simply referred to what is permitted by Louisiana law, a trustee needs to be able to rely on a fixed set of substantive provisions in making his distribution decisions. Likewise a beneficiary ought to be able to rely on an entitlement to benefits according to unvarying terms. On the other hand, in the case of administrative or procedural provisions where the settlor has merely referred to what is permitted by Louisiana law, the settlor should perhaps be regarded as intending that the trustees be able to avail themselves of any subsequent law enabling them administratively or procedurally to carry out the substantive provisions of the trust. Hence the Trust Code itself provides that unless the trust stipulates otherwise, it shall be governed in administrative and procedural matters by subsequent amendments to the Trust Code.\textsuperscript{239}

With respect to community regimes adopted by express contract the French have legislatively declined to follow the doctrinal rule of applying the law in existence at the time of

\textsuperscript{238} 287 So. 2d 497 (La. 1973).
\textsuperscript{239} LA. R.S. 9:2252 (Supp. 1968). See Succession of Stewart, 301 So. 2d 872, 884 (La. 1974).
the contract and have chosen instead to apply the new law to such contracts in matters concerning administration of the community property. While a tempering of the all-or-nothing doctrinal rule is commendable, the distinction between substance and administration is replete with practical difficulties. Unlike a trust, the matrimonial regime can not be separated so clearly into substantive and administrative parts. For example, would the new rule allowing the husband to declare the fruits and revenues of his separate property to be separate be a substantive rule or a rule concerning administration of separate property? The rule is found in the new law in a section concerning characterization of assets rather than in a section on management or administration and would thus appear to be a substantive rule. The analogous rule under the present law provides that the wife, but not the husband, can reserve as separate property the fruits and revenues of separate property, which until such reservation are considered to be administered by her husband. So long as the wife's separate property is administered by the husband, the profits therefrom are community property. Thus it can be argued that the classification of fruits and revenues of separate property is presently dependent upon administration of the property. Similar difficulties arise in deciding whether a spouse's power to obligate the community property for debts will stem from a substantive rule or from a rule of administration or management. Again the new law locates the rule outside of the subpart concerning management implying that the rule is one of classification, not management. However, jurisprudence under the present law indicates that the community property is liable to third persons for the husband's debts because his extensive management powers over the community property place it within his patrimony. By analogy it can be argued that the section of the new law that will allow either spouse to obligate

242. LA. CIV. CODE art. 2386.
243. LA. CIV. CODE art. 2385.
244. LA. CIV. CODE art. 2042.
the community property stems from the new provision making the spouses equal managers of the community property. If it can not be clearly determined whether the important rule concerning the liability of the community property for debts of a spouse pertains to substance or administration, the substance-administration distinction does not furnish a practical method for deciding whether the new community regime will be applied to spouses who prior to the new law contractually adopt "the community regime."

The decision as to what the parties mean by "the community regime" must thus be made between: 1) application of the law existing at the time of the contract and 2) application of the new law without distinction between substance and administration. The second alternative is preferable in that it avoids a potentially difficult search for the statutory law and decisional interpretation as of a particular point in time, and it treats all spouses living under a community regime alike whether their regime is contractual or imposed by law to the extent that there are no express contractual modifications of the community. If the new community regime is deemed worthy to be applied to spouses on whom the law imposed the community regime prior to the effective date of Act 627, then it is likewise worthy to be applied to spouses who contractually adopted the community regime prior to that time, unless through the usual means of contract interpretation it be determined that the spouses intended to be regulated by the law as it existed at the time of the contract.

**Effect of Act 627 on Spouses Who Are Separate in Property as a Result of a Judgment**

Section nine of Act 627 will make the new legal regime inapplicable to spouses who are conventionally separate in property, for it specifies that the new legal regime is not to be applied to spouses who have made express matrimonial regime contracts. Section nine, however, does not specifically exempt from the effect of the new legal regime spouses who are separate in property as a result of a judgment dissolving the

---

community. Spouses who have obtained a judgment of separation from bed and board and have not proceeded to divorce or who have reconciled without reinstating the community regime by notarial act would, under the present law, be living under a regime of separation of property, as would spouses when the wife has obtained a judgment of separation of property. Did the legislature intend to subject these spouses to the new legal regime of community to the extent that to do so would not reclassify assets already acquired or invalidate transactions? In the case of a wife who has obtained a judgment of separation of property to protect herself from the disorder of her husband’s affairs the legislature certainly can not have intended to endanger her marital assets once again by reuniting the spouses’ property under a community regime. Unless the condition of the husband’s affairs had improved since the judgment of separation of property, the wife who found herself once again subject to a community regime would be entitled to seek another judgment of separation of property under the new law. It would certainly be unfair of the legislature to force her to seek the same remedy for the same cause twice. If conditions had in fact improved, the new law would permit the spouses once again to have the benefit of a community regime by adopting it through contract. There is thus no reason for the legislature to impose the new community regime automatically on this wife on the assumption that the husband’s affairs have improved. Similarly, where the spouses are separated from bed and board and are unreconciled, there would be no reason for the legislature to impose the new community regime on them since they are neither in fact nor in law sharing their lives or their property as spouses.

On the other hand, where the spouses were separated from bed and board by judgment and have since reconciled but have not reinstated the community regime by notarial act, something can be said in favor of applying the new community regime to them. Since they are at least in fact and in law sharing their lives as spouses once more, it may not be unrea-

249. LA. CIV. CODE art. 155 requires the filing of a notarial declaration to reestablish the community regime after it has been dissolved by legal separation.
250. LA. CIV. CODE art. 2425.
sonable to suppose that the legislature intended them to share their marital property as before. A spouse in this situation cannot honorably argue that applying the new community regime to him would nullify one of his purposes in obtaining a separation from bed and board. Although the dissolution of the community is an effect of separation from bed and board, a spouse cannot legally have obtained a separation for the purpose of ending the community regime. A desire to end the community regime does not constitute grounds for separation. Furthermore, many legally separated spouses may have assumed that upon reconciliation their community regime was automatically reestablished. To put these reconciled spouses under a new community regime would actually accord with their expectations. Thus, unless the legislature in the forthcoming session states its intent not to apply the new legal regime to reconciled spouses, a court may with some justification allow such application.

**CONCLUSION**

Pollock and Maitland once noted that “[i]f there is to be any law at all, contract must be taught to know its place.” Their observation marks the limit to which impairment of contract can be argued to invalidate new legislation. The observation applies with special vigor to a fictitious contract like the tacit matrimonial regime contract. The tacit contract’s place is somewhere other than among the factors that determine the constitutionality of new legislation as applied to particular persons. Thus, it is not an obstacle to the achievement of the desirable goal embodied in section nine of Act 627 of bringing as many persons as possible under a single legal regime.

The legislature in its next session could further its commendable reform effort by clarifying specific sections and by addressing those constitutional questions presented in this article but not fully considered during the 1978 session. Responsible legislative attention to these areas could determine the extent of the success of Louisiana’s new equal management approach.
