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LOUISIANA'S NEW MATRIMONIAL REGIME LAW: SOME ASPECTS OF THE EFFECT ON REAL ESTATE PRACTICE

William H. McClendon, III*

Louisiana's new Matrimonial Regime Law incorporates changes which will have a profound effect on real estate practice in Louisiana and which will require a re-examination of the law by the judiciary and the Bar to pinpoint those practices now prevailing that do not comply with its provisions. Major conceptual changes include the granting to spouses of a legal capacity to contract with each other; the redefinition of the nature of each spouse's interest in community property; and the establishment of new requirements for the manner in which that interest may be alienated or encumbered. The real estate

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This article, written in the Fall of 1978, does not reflect any changes in the law since that date.

1. LA. R.S. 9:2831-56 (Supp. 1978), referred to herein as the "Matrimonial Regime Law," was enacted by section 1 of Act 627 of the Louisiana legislature of 1978. The Act contains a total of 12 sections:
   - Section 1—adding LA. R.S. 9:2831-56—Matrimonial Regime Law;
   - Section 2—adding LA. R.S. 9:1517—marital portion;
   - Section 3—amending LA. Civ. CODE arts. 1790 and 1791—capacity of spouses to contract;
   - Section 4—amending LA. R.S. 9:291—suits between husband and wife;
   - Section 5—repealing LA. Civ. CODE arts. 1751 and 2446—capacity of spouses to contract;
   - Section 6—repealing LA. Civ. CODE arts. 2325-2437—former community property law;
   - Section 7—repealing LA. Civ. CODE art. 131—capacity of wife to contract as public merchant;
   - Section 8—repealing the former law dealing with marriage contracts and respective rights of the parties in relation to their property;
   - Section 9—providing for the scope of the Act and its effective dates;
   - Section 10—providing: "The source notes, comments, and special notes contained in this Chapter reflect the intent of the legislature."
   - Section 11—regarding the general provision as to invalidity of any provision;
   - Section 12—repealing all conflicting laws.

2. Until this new law is interpreted by our courts, attorneys practicing in the area of real estate will have to anticipate the changes in documentation that will be necessary under the new Act. Only time will permit an exhaustive review of the entire history of this new law and reveal the total effect on future real estate practice in Louisiana.
practitioner must now view the documentation of a real estate transaction through two sets of lenses—when drafting instruments he must consider what documentation will conform explicitly to the requirements of the law, and when examining prior documentation prepared by other attorneys he must consider, before approving a title as marketable, what will satisfy the minimum requirements of future title examiners acting under the then prevailing standards. These viewpoints are more important and the problems more complex at a time when entire civil law concepts and established jurisprudence are changing.

The new act uses the term "matrimonial regime" extensively and defines it in section 2831, as regulating "the ownership and management of the assets and liabilities of married persons, and in relation to their property, their rights and obligations with respect to each other and to third persons." This term apparently will not be the counterpart to the term "community of acquets or gains" utilized in the present law, but rather will be used generally to conceptualize the legal fact of a property relationship existing between married persons by

3. Distinction should be made between title which is merchantable (marketable) and title which is insurable. Merchantable (marketable) title is determined by an attorney's examination of the mortgage and conveyance indices, and other public records, and has been defined by the Louisiana Supreme Court as a title "not suggestive of serious litigation." Schaub v. O'Quin, 214 La. 424, 38 So. 2d 63 (1948). The Louisiana Supreme Court, in Kay v. Carter, 243 La. 1095, 150 So. 2d 27 (1963), stated:

[N]ot all seeming defects render a title unmerchantable, especially those based on objections which are obviously groundless; it is when there are outstanding rights in third persons (not parties to the action) who might thereafter make claims of a substantial nature against the property, and hence subject the vendee to serious litigation, that the title is deemed not merchantable.

Id. at 1101, 1102, 150 So. 2d at 29 (emphasis by the court).

For example, the courts have held title to be defective when property acquired by a married woman with a separate property declaration is conveyed without the signature of her husband. Johnson v. Johnson, 213 La. 1092, 36 So. 2d 396 (La. 1948); Bachino v. Coste, 35 La. Ann. 570 (1883).

An insurable title, on the other hand, is one which will be insured by an insurance company authorized to do business in this state. The words merchantable and insurable are not synonymous because a title insurance company might be willing to insure without exception a title which technically would be unmerchantable.

4. LA. R.S. 9:2831 (Supp. 1978). The comment to section 2831 states: "This provision is new. It defines a matrimonial regime, a term used throughout this Title. The definition is consistent with civil law usage."

virtue of their marriage—whether it be a "contractual regime" modified, limited, or excluded by contract between the spouses, or the "community of gains or legal matrimonial regime" established by law absent a contract adopting a community or matrimonial regime of their choice.

LEGAL CAPACITY OF SPOUSES TO CONTRACT WITH EACH OTHER IN ESTABLISHING, MODIFYING, OR TERMINATING A MATRIMONIAL REGIME

Under the new legislation a contract establishing, modifying or terminating the contractual matrimonial regime may be entered into at any time before or during the marriage. This leniency effects a conceptual change, for it has long been established under statutory law and jurisprudence that marriage contracts can be entered into only before the celebration of marriage, or, for parties married outside the state of Louisiana, within one year after settlement in Louisiana. Under present law, the celebration of marriage in effect freezes the rights of the parties under the prenuptial contract, none of the provisions of which can be changed while the marriage lasts, except when the community is terminated by suit for separation from bed and board or separation of property and not re-established.

9. LA. Civil Code art. 2329.
10. The rule that all stipulations which the law permits to be made in marriage contracts may be altered by husband and wife jointly before the celebration of marriage, but not afterwards, was very early established in Desoby v. Schlater, 25 La. Ann. 425 (1871). As the parties bind themselves at the time of marriage, so they remain bound as long as the marriage lasts.
11. Desoby v. Schlater, 25 La. Ann. 425 (1871). When property and income of the wife are excluded from the community by antenuptial contract, administration by the husband does not transform the property from separate to community; income therefrom is taxable in full to the wife as her separate income, even though the property is in fact administered by the husband. Clay v. United States, 161 F.2d 607 (5th Cir. 1947). See LA. Civil Code arts. 2325-27, 2329, 2332, 2386, 2402, and 2424.
12. LA. Civil Code art. 155.
Form of Marriage Contract

Under the new law, the only requirement for establishing by contract a matrimonial regime for those married persons domiciled in this state, or domiciled without this state but owning immovable property within this state, is that the contract be an act passed before a notary public and two witnesses, a stipulation which is not inconsistent with present law or jurisprudence. The present requirement recently has been applied rigidly to require execution by both parties at the same time before notary and two witnesses. This precludes the use of private acts executed by the parties before two witnesses and acknowledged by the parties or proved by oath of one of the subscribing witnesses or even acknowledged with the same two witnesses and parties later signing before a notary public. Presumably this requirement will be equally applicable under the new legislation, and until changed by the legislature, the private act duly acknowledged in any form should not be used, particularly in light of the courts' tendency to apply

15. La. R.S. 9:2836 (Supp. 1978). This provision applies regardless of whether the parties were domiciled in Louisiana at the time of marriage.
16. Id.
18. La. Civ. Code art. 2328 reads, "Every matrimonial agreement must be made by an act before a notary and two witnesses."
19. According to Fleitas v. Richardson, 147 U.S. 550 (1892), a decision interpreting Louisiana law, a prenuptial agreement is properly executed if done before a notary public and two witnesses.
20. La. Civ. Code art. 2328. In accordance with Civil Code article 2234, an authentic act is one executed before a notary public or other officer authorized to exercise such functions and two witnesses aged at least fourteen years, or three witnesses if a party to the act be blind. If a party does not know how or is unable to sign, the notary must have him affix his mark, and mention should be made in the act of the reason for using a mark in lieu of a signature.
21. See Rittner v. Sinclair, No. 9421 (La. App. 4th Cir. 1978), in which the Fourth Circuit held a premarital agreement invalid for want of form, because the parties went to the notary's office separately and signed at different times.
22. All acts may be executed under private signature except such as are expressly required by law to be passed in the presence of a notary public and two witnesses. La. Civ. Code art. 2240. An act under private signature duly acknowledged has the same legal effect and binds parties to the same extent as though passed in authentic form. La. Civ. Code art. 2242. Public registry protects the rights of third parties, and Civil Code article 2253 provides for the acknowledgment of the private act prior to recordation in order to be effective against creditors or bona fide purchasers of real property.
rigidly the requirement that the marriage contract be executed in a specified form.

Additionally, if either of the parties to the agreement be a minor,\(^{23}\) the new legislation requires that the contract contain the written concurrence of the minor’s mother \textit{and} father, or the parent having legal custody of the minor, or the tutor of the person of the minor.\(^{24}\) Under the present law it is rare indeed for a minor emancipated by marriage to move to Louisiana and enter into a marriage contract. Under the new law, however, this may not be so rare due to the probable proliferation of such contracts. What will be the legal capacity of a married person to enter into a marriage contract affecting immovable property when the person is (1) between the ages of sixteen and eighteen, and (2) below the age of sixteen? In the former situation it would appear that the person, by marrying before execution of the marriage contract, is fully emancipated and thereby avoids the necessity of obtaining written concurrence of parents or tutor; under the latter, it would appear that while no parental concurrence is required, court authority may still be necessary although the new law is silent on this point.

Under the new law the matrimonial regime contract is not effective against third parties until filed for registry in the

\(^{23}\) A “minor” is any person under the age of eighteen years. \textsc{La. Civ. Code} art. 37. The minor may be emancipated by notarial act at age fifteen, thus acquiring the power of administration over his estate, \textsc{La. Civ. Code} art. 366, with the limitation that until age eighteen there can be no alienation or encumbrance of his property without court authorization. \textsc{La. Civ. Code} art. 373. This emancipation for purposes of administration only is revocable. \textsc{La. Civ. Code} art. 377. The minor may also be emancipated by marriage, \textsc{La. Civ. Code} art. 379, which emancipation is irrevocable. \textsc{La. Civ. Code} art. 383. \textit{In Re Greer}, 184 So. 2d 104 (La. App. 4th Cir. 1966), held that a thirteen-year-old girl was emancipated by marriage and upon her husband’s death she did not resume her previous legal inability to contract, but retained her full legal capacity to prosecute a wrongful death action in the courts. A married person below the age of sixteen has only the power of administration of his estate and cannot alienate, affect, or mortgage any of his immovable property without court authorization. \textsc{La. Civ. Code} art. 382. A minor may be emancipated by judicial decree at the age of sixteen, \textsc{La. Civ. Code} art. 385, and the minor is then relieved of all disabilities which attach to minority.

\(^{24}\) \textsc{La. R.S.} 9:2835 (Supp. 1978). Under present law an unemancipated minor may enter into a marriage contract, but only with the consent of both parents, or the survivor if one is dead, or the tutor if both are dead. \textsc{La. Civ. Code} arts. 97, 1785, 2390. In \textit{Wilkinson v. Wilkinson}, 323 So. 2d 120 (La. 1975), the prenuptial contract was declared null by reason of the fact that the wife was an unemancipated minor at the time of its execution, and, although the mother signed the contract, the father did not.
mortgage records\(^{25}\) of the parish in which the spouses are domiciled and, in relation to immovables, of the parish where the immovable is situated.\(^{26}\) According to prior jurisprudence, it does not appear to be necessary that such an act, after being filed for registry, be indexed, photocopied and recorded as long as it can be shown that the act was filed for registry.\(^{27}\) The

\(^{25}\) LA. R.S. 9:2834 (Supp. 1978). In East Baton Rouge Parish the mortgage office presently maintains a mortgage index by name only (not by property description) for documents placed in the following books: Mortgage, Charter, Federal Tax Lien, Paving Lien, Registered Agent, Judgment, Weed Lien, Partnership, Sheriff's Bond, Federal Land Bank, Crop Pledge, Bond and Special Mortgage. Documents for all other books are indexed in the conveyance records. Under the present law it has been held that an act of sale must be recorded in the conveyance records to have effect against third parties, and recording the sale in the mortgage office is the same as not recording the deed. Bona fide titles and mortgages, if not recorded in the proper conveyance or mortgage office, have always been preempted by subsequent titles and mortgages duly recorded. See, e.g., Levench v. Toby, 6 La. Ann. 462 (1851); Tulane v. Levinson, 2 La. Ann. 787 (1847).

\(^{26}\) LA. R.S. 9:2834 (Supp. 1978). Under present law marriage contracts affecting immovable property are to be recorded in the conveyance records. LA. Civ. Code arts. 2264-66. Conveyance records are the only thing to which one dealing with the conveyance of realty needs to look, and innocent third parties are not bound by any knowledge except as is disclosed by those records. LA. R.S. 9:2721-22 (1950); LA. Civ. Code arts. 2254, 2264, 2266; Cole v. Richmond, 156 La. 262, 100 So. 419 (1924); Hasslocher v. Recknagel, 160 So. 2d 421 (La. App. 2d Cir.), cert. denied, 245 La. 964, 162 So. 2d 14 (1964). Acts affecting immovable property should be recorded in the parish where the immovable is situated, and where more than one piece of property is affected, LA. R.S. 44:138 (Supp. 1954) authorizes the recordation of certified copies of instruments of writing affecting immovables in more than one parish. Such recordation has the same effect as the recordation of the original instrument.

\(^{27}\) The recordation of a conveyance of immovable property under Civil Code article 2266 is effective from the time the act is deposited in the proper office and endorsed by the proper officer. Schneidau v. New Orleans Land Co., 132 La. 284, 61 So. 225 (1913). A mortgage is also effective from the time of filing, but only if it is timely inscribed. LA. R.S. 9:5141 (1950); Kinnebrew v. Tri-Con, 244 La. 879, 154 So. 2d 433 (1963); Note, Security Devices—Mortgages on Immovables—When Effective Against Third Persons, 25 La. L. Rev. 783 (1965). LA. R.S. 9:5141 provides that mortgages, when filed, shall be immediately indorsed by the recorder with date, hour, and minute of filing, which shall be recorded with the registry of the instrument, and all such instruments shall be effective against third parties from the time of filing. The Kinnebrew court concluded that the intent of section 5141 was to place mortgages on the same footing as conveyances with reference to their registry—that is, to make them effective against third parties from the time of being deposited with the recorder, at least if the acts are timely and duly inscribed. 244 La. at 890, 154 So. 2d at 437.

Under the public records doctrine established in McDuffie v. Walker, 125 La. 152, 51 So. 100 (1910), third parties are held to constructive knowledge of that which is of public record, and an erroneous indexing does not affect the validity of the recordation of an act of sale. The index is for convenience only and not a part of the official record. Agurs v. Belcher & Creswell, 111 La. 378, 35 So. 607 (1903).
prevailing practice in some areas of running only the conveyance indices in the name of the current owner will not be sufficient under the provisions of this new law to detect the presence of matrimonial regime contracts and amendments which could have the effect of a conveyance without being recorded in the conveyance records.

**Substance of Marriage Contract**

With respect to the substance of the matrimonial regime contract, section 2833 provides, in effect, that the parties will be free to contract as they wish—modifying or limiting the matrimonial or community regime, excluding it altogether, or electing to be separate in property. However, the parties may not through this contract renounce or alter the marital portion or the established order of succession or prohibit gratuitous dispositions permitted by law. The provisions of the contractual matrimonial regime may be made retroactive if they do not prejudice the rights of third parties. Those provisions of the legal regime that the parties have neither excluded, limited, nor modified, will be in effect. Because of the broad freedom provided in section 2833, presumably the contract could contain a provision, *inter alia*, for one spouse to confer upon the other full and complete authority to acquire, alienate, encumber or otherwise deal with community property, movable or immovable. If this be so, why would section 2843 provide that the power of attorney from one spouse to the other to alienate, encumber or lease community immovables must expressly describe a particular community immovable and, by implication, may not confer this authority generally with respect to all immovables of the community? Could it be argued

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29. Comment (b) to *La. R.S.* 9:2834 (Supp. 1978) provides:
   A matrimonial regime contract is subject to the general rules of conventional obligations except as specifically provided in this Title. For example, this Section authorizes retroactive provisions in a matrimonial regime contract but such provisions may not prejudice the rights of third persons. See Articles 1969 and 1502 of the Louisiana Civil Code of 1870.
that a power of attorney executed by both spouses as principal and agent before a notary public and two witnesses constitutes a type of marriage contract and therefore is governed not by the provisions of section 2843 but by section 2833? Apparently the provisions of section 2833 could be used to circumvent the requirements of section 2843.

**Legal Matrimonial Regime**

The provisions of the new legal matrimonial regime characterize the property of married persons as either community or separate, with section 2838 regulating the community property and section 2839 regulating the separate property of the spouses. Under the latter, separate property comprises things belonging to the spouse prior to the marriage, things acquired by the spouse with separate assets or with separate and community assets when the amount of the community investment is inconsequential, and things acquired by the spouse by inheritance, donation or bequest. The donation by one spouse to the other of community property also transforms into separate property an equal portion of the donee's interest therein and the fruits and revenues thereof unless the act of donation stipulates to the contrary. The fruits and revenues of other separate property, however, constitute separate property only when an act passed before a notary public and two witnesses reserving them as separate property has been filed in the mortgage records of the parish where the spouse is domiciled and, in the case of immovable property, where the immovable is situated.32

Sections 2838 and 2839 each contain a change of particular note to real estate attorneys: comment (d) to section 2838 provides, in effect, that neither spouse is barred from presenting evidence of the separate character of property because of failure to include a statement in the acquisition that the property is being purchased with separate funds for the purchasing spouse's separate estate. Section 2839(2) states in effect that the declaration in the acquisition that the things are acquired with the separate assets of the acquiring spouse may be con-

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32. The provision with respect to the filing of the act differs from the present law, which requires that the act be duly recorded only in the conveyance records of the parish where the community is domiciled.
troverted by the other spouse or by their creditors, but without prejudice to the rights of third persons.\textsuperscript{33}

\textit{New Freedom of Spouses to Contract with Each Other}

Corollary sections to the Matrimonial Regime Law dealing with capacity of spouses to contract with each other are sections 3 and 5 of the Act. Section 5 repeals Civil Code articles 1751\textsuperscript{34} and 2446,\textsuperscript{35} and section 3 amends Civil Code article 1790\textsuperscript{36}

\textsuperscript{33} \textit{La. R.S. 9:2839(2) (Supp. 1978).} This legislative pronouncement runs contrary to the present jurisprudential stance that the husband, as distinguished from the wife, is prevented from offering evidence of the separate character of property that he acquired during marriage if he failed to include a double declaration in the act of acquisition. \textit{La. Civ. Code} arts. 2402 and 2334. \textit{See also Smith v. Smith, 230 La. 509, 89 So. 2d 55 (1956); Phillips v. Nereaux, 357 So. 2d 813 (La. App. 1st Cir. 1978).} This section also affects the jurisprudence with respect to property acquired by the wife during the marriage even with an inclusion of the separate property declaration. Such property is still presumed to be community property and a subsequent sale would require signature of both the husband and wife. \textit{See Johnson v. Johnson, 213 La. 1092, 36 So. 2d 396 (1948), wherein the court held that where a wife during the marriage, although living separate and apart from the husband, purchased property in her name with a recitation of the paraphernality of funds, the property purchased was still presumed to be community property and a prospective purchaser was justified in refusing to accept title from the wife without her husband's signature. Section 2839(2) will certainly benefit those who find it inconvenient to have the husband join in the subsequent sale of property acquired by the wife with separate funds, although until this section has been interpreted by the Louisiana Supreme Court it may well be the practice to continue to require both husband and wife to sign all transactions involving immovable property whether it be separate or community, except those where the property is clearly separate.}

\textsuperscript{34} \textit{"Married persons cannot, during marriage, make to each other, by an act, either \textit{inter vivos} or \textit{mortis causa}, any mutual or reciprocal donation by one and the same act." \textit{La. Civ. Code} art. 1751.}

\textsuperscript{35} \textit{"A contract of sale, between husband and wife, can take place only in the three following cases:
1. When one of the spouses makes a transfer of property to the other, who is judicially separated from him or her, in payment of his or her rights.
2. When the transfer made by the husband to his wife, even though not separated, has a legitimate cause, as the replacing of her dotal or other effects alienated.
3. When the wife makes a transfer of property to her husband, in payment of a sum promised to him as a dowry.
Saving, in these three cases, to the heirs of the contracting parties, their rights, if there exist any indirect advantage." \textit{La. Civ. Code} art. 2446.}

\textit{Does the repeal of Louisiana Civil Code articles 1751 and 2446 remove all incapacities to contract? There might still be a question as to the contractual ability of the spouses to waive the obligation to provide alimony or child support. An agreement waiving alimony and child support made after legal separation but before divorce does
to delete reference to incapacity of husband and wife and article 1791 to remove the incapacity of married women. These provisions are significant, when read in context with the other sections of the new act, particularly since no mention is made in the new law itself of the deletions. Previously these repealed and amended Civil Code articles have been interpreted by the courts as forbidding any type of real estate sale between spouses not specifically covered by the three exceptions included in Civil Code article 2446, whether the transfer be direct or indirect. Even the sale between a husband and wife

not fall within the exceptions outlined in Civil Code article 2446 and “is a nullity and can be given no effect.” Ward v. Ward, 339 So. 2d 839, 841 (La. 1976). See also Russo v. Russo, 205 La. 852, 18 So. 2d 318 (1944). However, the court in Nelson v. Walker, 250 La. 545, 197 So. 2d 619 (1967), found that the wife’s error in waiving her right to alimony as part of the consideration for a partition agreement involving a piece of real property entered into after legal separation was only a “relative nullity.” Consequently, nothing prevented the agreement from being ratified and confirmed after her incapacity ceased, and her title was cured by prescription.

36. LA. Civ. CODE art. 1790, as amended by 1978 La. Acts, No. 627, will read:
Besides the general incapacity which persons of certain descriptions are under, there are others applicable only to certain contracts, either in relation to the parties, such as tutor and ward, whose contracts with each other are forbidden; or in relation to the subject of the contract, such as purchases, by the administrator, of any part of the estate which is committed to his charge. These take place only in the cases specially provided by law, under different titles of this code.

37. LA. Civ. CODE art. 1791, as amended by 1978 La. Acts, No. 627, will read:
“The persons who have treated with a minor, person interdicted or of insane mind, cannot plead the nullity of the agreement, if it is sought to be enforced by the party, when the disability shall cease, or by those who legally administer the rights of such person during the disability.”

38. In Miller v. Miller, 234 La. 883, 102 So. 2d 52 (1958), the court held that a purported dation en paiement by the husband to the wife which did “not comply with the stringent principles governing contracts between husband and wife...” was null and void. Id. at 899, 102 So. 2d at 57. See also Smith v. Smith, 239 La. 688, 119 So. 2d 827 (1960).

39. Vicknair v. Trosclair, 45 La. Ann. 373, 12 So. 486 (1893). In Douglas v. Douglas, 51 La. Ann. 1455, 26 So. 546 (1899), a married woman conveyed real estate to a third person who conveyed to her husband by deeds dated the same day, before the same notary and witnesses, in the same handwriting, and recorded the same day. The court held that this must be viewed as one transaction, the object of which was to divest the title of the wife, and vest it in her husband, and therefore the transaction was a fraudulent simulation. However, in Bordelon v. S. Gumbel & Co., 118 La. 645, 43 So. 264 (1907), the wife, for the purpose of enabling her husband to borrow money, made a fictitious sale of her property to the proposed lender for cash, and the latter, by a separate act, passed and recorded on the same day and before the same notary and witnesses, sold the property on credit to her husband. The act by which the
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after judicial separation has been questioned unless it is clearly shown in the act that the sale was made to accomplish a community property settlement. The new provisions permitting unlimited changes in the marriage contract, coupled with the removal of the prohibitions contained in the Civil Code, expand the freedom of spouses to contract with each other beyond the establishing, modifying, or terminating of the matrimonial regime. However, there may be a void left in the Civil Code with the removal of these prohibitions relating to interspousal contracts. Consequently it may now be possible under the provisions of the new law for one spouse to sell to the other or grant to the other an option, a right of first refusal, a lease, or some other right relating to immovable property, all without question. It could be argued that, just as a sale which on its face shows it is from parent to child is presumed to be a simulated donation and therefore subject to attack by the forced heirs and creditors of the donor, likewise a sale from husband to wife, although technically permitted, would constitute notice to third parties that this is possibly a simulated sale.

husband thus acquired did not recite, or otherwise show on its face, that the property had been acquired from the wife. Ten years later, after living on and improving the property which had been assessed in the husband's name, a second mortgage was placed on the property. In choosing between the rights of the wife and the second mortgagee the court held for the mortgagee, distinguishing Vicknair v. Trosclair and Douglas v. Douglas on the basis that "in [those cases] the creditor had not parted with his money on the faith of the public records, and without notice of the rights of the wife, as in this case." 118 La. at 647, 43 So. 2d at 265. See also First Nat'l Bank v. Garlick, 137 La. 282, 68 So. 610 (1914), wherein the court upheld a similar transaction, distinguishing Vicknair v. Trosclair and Douglas v. Douglas and stating that the two sales involved "were not made on the same day, or before the same notary and witnesses, but some four years apart, and before another notary and other witnesses, and were on their face absolute." 137 La. at 287, 68 So. at 612.

40. In Love v. Dedon, 239 La. 109, 118 So. 2d 122 (1960), the former wife filed suit against the former husband to rescind and set aside two deeds whereby each had transferred to the other interests in land and a house on the basis that the properties were acquired during their marriage and that, although judicially separated, they were still legally married at the time of execution of the acts of sale and thus such acts were illegal and void. Parol evidence was admissible to establish that the motive or real consideration in executing the two deeds was to effect a settlement of the community previously existing between the parties. Both deeds were upheld.

41. See notes 34, 35, 36 and 37, supra.

42. An action to annul a simulated contract under Louisiana Civil Code article 2239 is imprescriptible, Succession of Webre, 247 La. 461, 172 So. 2d 285 (1965), and forced heirs have an absolute right to attack simulated obligations made by their parents. A "simulated sale" results when parties utilize the form of a sale, but no price
Dissolution and Reestablishment of the Community

The matrimonial regime, whether it be the regime established by contract or the legal regime existing by operation of law, will be dissolved by the death of one of the spouses, by a judgment of divorce or separation from bed and board, by a judgment decreeing the separation of property, or by contract of the spouses.\textsuperscript{3} The Matrimonial Regime Law, however, literally provides for dissolution only by a judgment substituting the separation of property for the existing regime, which judgment is “retroactive to the day of the filing of the petition,”\textsuperscript{4} a provision not inconsistent with present law.\textsuperscript{5} There should be little question, however, that if dissolved by death, the regime is dissolved as of the moment of death,\textsuperscript{6} or, if dissolved by contract, at the date of the dissolving contract. The dissolution by contract, however, would not be effective against third parties until filed for registry in the mortgage records of the parish where the spouses are domiciled, and in relation to immovables, until filed for registry in the mortgage records of the parish where the immovable is situated.\textsuperscript{7} The date that the community regime is dissolved in a suit for separation from bed and board, or in a suit for divorce, a subject of considerable litigation in the past,\textsuperscript{8} will still be covered, respectively, by Civil Code arts. 2236, 2239, 2444, 2480.

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  \item[43.] \textsc{La. R.S.} 9:2848 (Supp. 1978).
  \item[44.] \textsc{La. R.S.} 9:2856 (Supp. 1978).
  \item[45.] \textsc{La. Civ. Code} art. 2432.
  \item[46.] \textsc{La. Civ. Code} art. 2876(3). \textit{See Succession of Hollier,} 158 So. 2d 351 (La. App. 3d Cir.), \textit{rev’d and remanded,} 247 La. 384, 171 So. 2d 656 (1964). By contrast, in the case of bank deposits and collections, \textsc{La. R.S.} 10:4-405 (Supp. 1974) provides that the death of a customer does not revoke authority previously given until the bank knows of the fact of death and has reasonable opportunity to act on it.
  \item[47.] \textsc{La. R.S.} 9:2834 (Supp. 1978).
  \item[48.] The Louisiana Supreme Court in 1918 held that the judgment of separation “\textit{from bed and board} retroacted to the date of filing of that suit . . .” \textsc{Gastauer v. Gastauer,} 143 La. 749, 753, 79 So. 326, 328 (1918) (emphasis added). Years later, in \textsc{Tanner v. Tanner,} 229 La. 399, 86 So. 2d 80 (1956), it concluded that “the court committed inadvertent error in such pronouncement and that it meant to say and hold: ‘The judgment in the \textit{suit for separation of property} retroacted to the date of the
\end{itemize}
\end{footnotesize}
Code articles 155 and 159, which provide that each judgment carries with it the dissolution of the community retroactive to the date on which the original petition in the action was filed.

With respect to the reestablishment of the community after dissolution, it is questionable, in view of the freedom of contract provisions of the new law, whether the requirements in Civil Code article 155 will continue to be applicable. Under Civil Code article 155 the reestablishment of the community (which must be recorded in the conveyance records of the parish where the parties are domiciled) is limited to a reestablishment of the community as it previously existed without any new provisions or modifications being made. Under the new

filing of that suit . . . .” 229 La. at 415, 86 So. 2d at 85 (emphasis in original). Therefore the judgment of divorce or separation from bed and board was not effective until judgment. In 1962, article 155 was amended by the legislature to specifically make the judgment for separation from bed and board “retroactive to the date on which the petition for same was filed,” without mentioning divorce. LA. CIV. CODE art. 155. In the case of Malone v. Malone, 260 La. 759, 257 So. 2d 397 (1972), the court in dicta interpreted the effect of article 155 as legislatively restoring the interpretation of the pre-Tanner jurisprudence that in a suit for divorce as well as for separation, the community is dissolved retroactively as of the date of filing of the petition.

49. LA. CIV. CODE arts. 155 and 159, as amended by 1977 La. Acts, No. 483. Article 159 limits the retroactive dissolution of the community of acquets or gains to those cases where the community of acquets or gains exists on the date of filing the original petition of separation from bed and board, Foster v. Foster, 246 So. 2d 70 (La. App. 4th Cir.), cert. denied, 258 La. 774, 247 So. 2d 867 (1971), or divorce, Malone v. Malone, 260 La. 759, 257 So. 2d 397 (1972). Article 155 specifically provides for the retroactive dissolution of the community of acquets or gains in those cases where the community of acquets or gains exists on the date of the filing of the original action for separation from bed and board. See note 50, infra. Upon the filing of a suit for separation from bed and board or divorce it is not required, but often customary, for the plaintiff to obtain a temporary restraining order which must be recorded in the conveyance records; in order to afford notice to third parties of the dissolution of the community, however, one must file a lis pendens in the mortgage records of the parish where the property to be affected is situated. LA. CODE CIV. P. arts. 3604, 3751, 3752.

50. LA. CIV. CODE art. 155 provides for the retroactive dissolution of the community of acquets or gains to the date of filing the petition for separation from bed and board. In addition it provides for the reestablishment of the community of acquets or gains retroactive to the date of filing the petition for the separation from bed and board, but only if the spouses jointly execute the reestablishing act before a notary and two witnesses and record the act in the conveyance records of the parish where the spouses are domiciled. This principle of reestablishment was tested in Austin v. Succession of Austin, 225 La. 449, 73 So. 2d 312 (1954), wherein the spouses reconciled shortly after the judgment of separation from bed and board but failed to execute the reestablishing act in accordance with article 155. The court found that there was no community regime, and upon the husband’s death in 1951 the wife had no claim to
however, the spouses may contract (which contract is to be recorded in the mortgage records, not only of the parish where the parties are domiciled but also where the immovable property is located) at any time or times and may make as many modifications as they wish as long as they do not renounce or alter the marital portion or the established order of succession, or prohibit gratuitous dispositions permitted by law.\(^2\)

The removal of the prohibition against post-nuptial modification of the marriage contract and the repeal of the codal limitations on the legal capacity of spouses to contract with each other establish a freedom not heretofore experienced by married persons domiciled in Louisiana or owning immovable property in Louisiana. The greatest impact the new law will have on real estate practice in Louisiana probably will come not so much from new requirements in the law as from this new freedom to contract. As the contractual regime with all its possible variations becomes better known, there could develop a community property system in Louisiana wherein a uniformly structured legal regime, experienced under the present

any of the property acquired by the husband since their reconciliation. The reconciliation of the spouses extinguishes every effect of judicial separation from bed and board except the dissolution of community of acquets or gains.

Article 155 also provides that the reestablishment of the community shall be without prejudice to the rights validly acquired in the interim between rendition of the judgment and recordation of the act of reconciliation. This section should be construed as referring to the rights of third parties, not the rights of the spouses, but Corkern v. Corkern, 270 So. 2d 209 (La. App. 1st Cir. 1972), application withdrawn, 272 So. 2d 372 (La. 1973), indicates that spouses may in effect reestablish the community as of the date of the reestablishing act rather than the date of filing of the suit for separation from bed and board. The reestablishing act in Corkern stated it reestablished the community as of the date of the filing of suit for separation from bed and board. The reestablishing act in Corkern stated it reestablished the community as of the date of the filing of suit for separation, but then proceeded to except from its provisions all assets acquired by each spouse between that date and the date of the reestablishing act. Professor Pascal submits that the Corkern decision is wrong, because the parties had not followed the dictates of article 155, and because tolerating any other type of reestablishing act would be against public order; the rule of article 155 is not subject to being contracted against by the parties. The Work of the Louisiana Appellate Courts for the 1972-1973 Term—Matrimonial Regimes, 34 LA. L. Rev. 255 (1973).

51. See text at notes 28, 29, and 30, supra.

52. See text at notes 28, 29, and 30, supra. Perhaps the most important aspect of the change in the law with respect to the legal capacity of spouses to contract with each other is that this ability may extend to matters beyond matrimonial regime concerns and may bind third parties with recordation only in the mortgage records.
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law, becomes more the exception than the rule for parties investing in real estate.

Nature of Each Spouse's Ownership Interest in the Community of Gains

The nature of each spouse's ownership interest in the community of gains, a subject of no little controversy in the past, is defined in section 2838. Five words should be brought sharply into focus: "Each spouse owns a present undivided one-half interest in the community property."

"Each" Spouse

The use of the word "each" denotes not merely equality, but, in this context, an equality in ownership. The word "each," as an adjective, is defined as "[b]eing one of two or more individuals that together form an aggregate,"53 or as "[e]very one of two or more considered or treated distinctly from the rest,"54 and also as "[o]ne of two or more persons, objects, or things considered individually or one by one."55 It would appear, therefore, that the connotation intended for the first two words of this section, read in context, is: "Each spouse, considered individually and distinctly from the other, one by one, owns . . . ."

"Owns"

The Civil Code provides that one who owns immovable property in Louisiana has a right by which a thing belongs to him in particular, to the exclusion of all other persons,56 and this ownership right is vested in him who has the immediate dominion of the thing, and not in him who has a mere beneficiary right in it.57 This right of ownership is entirely distinct from the right of possession, for the right of ownership exists independently of the exercise of it, although the owner exposes

himself to the loss of his right of ownership in a thing if he permits it to remain in the possession of a third person in a manner and for a time sufficient to enable the latter to acquire it by prescription. The Civil Code further provides that there are three different degrees of the right to a thing: (1) a full and entire ownership, (2) the mere use and enjoyment, or (3) a servitude due upon an immovable estate. The full and entire ownership is in turn divided into two classifications: perfect ownership, which is perpetual and unencumbered by any right toward any person other than the owner; and imperfect ownership, which terminates at a certain time or on a condition or involves the charge of any real right on the immovable toward a third person, such as usufruct, use, or servitude. This Civil Code term "perfect ownership," as defined by the Louisiana Supreme Court, means the right to use, enjoy, and dispose of property to the exclusion of others, and consists of three elements united in the same person: "usus" or right to use, "fructus" or right to the fruits, and "abusus" or right to dispose. In the new Matrimonial Regime Law, however, the type of ownership each spouse has in community property is not described as "full and entire ownership," "perfect ownership," or "imperfect ownership," nor is the ownership right described as being "vested in" each spouse. The legislature did not choose simply to provide that "each spouse owns an undivided one-half interest" in the community property but instead chose to define this ownership interest of each spouse as a present one. Conceivably, this section of the new law would have the same legal significance without the use of the word "present," particularly since the words "each spouse owns" render this section equally applicable to husband and wife. One might ask whether the use of the word "present" was the result of political or sociological considerations, or whether the word was in-

58. La. Civ. Code art. 496.
62. The new Matrimonial Regime Law is perhaps evidence that the law is never static—it is ever changing to reflect the different sociological, political, and economic needs of society. This resiliency or changing quality, while often vigorously resisted, is necessary for the continued viability of the law. In writing about Mr. Justice Holmes and the Constitution, Mr. Justice Felix Frankfurter observed that "[t]he eternal
tended to perform a legal function in modifying the type of interest owned by each spouse.  

A "Present" Interest

A brief review of the historical development of the definition of the wife's present ownership interest during the community indicates that the use of the word "present" to describe this interest is not new. According to modern legal scholars, French and Spanish authorities originally characterized the nature of the wife's ownership interest during the community in various ways—as a mere expectancy, a benefit of survivorship, a hope, or as being revocable and constructive in nature. Over the years this characterization developed toward a co-ownership theory, but with no definite conclusion as to the origin of this theory. Due to the relatively recent discovery in New Orleans of redactor Moreau Lislet's manuscript source notes of the Louisiana Digest of 1808, there is little question but that the Louisiana community property system is almost entirely Spanish in origin and nature, rather than French. Accordingly, Nina Pugh points out that the Spanish wife, equally with her husband, had dominio (ownership interest and possession) of the bienes gananciales (ganancial assets) but she did not tiene (hold) them: "The husband, who was said 'to have and to hold' the gananciales, was empowered to act in regard

struggle in the law between constancy and change is largely a struggle between history and reason, between past reason and present needs." F. Frankfurter, Mr. Justice Holmes and the Constitution 40 (1927).

63. For an interesting review of some of the deliberation by the Council of the Louisiana State Law Institute prior to the drafting of the new Matrimonial Regime Law, see Riley, Women's Rights in the Louisiana Matrimonial Regime, 50 Tul. L. Rev. 557 (1976), wherein that writer, the Law Institute's reporter, suggests that "[u]nder the legal regime, each spouse shall be declared in the Code to have full ownership of an undivided one-half interest in each asset of the community." Id. at 574 (emphasis added).

64. The late Professor Daggett stated in Daggett, The Modern Problem of the Nature of the Wife's Interest in Community Property—A Comparative Study, 19 Calif. L. Rev. 467 (1931), that "[i]n this maze of ancient statutes and learned annotations, anything and nothing may be proved about as elusive a thing as the wife's interest in the community." Id. at 571. See also Pugh, The Spanish Community of Gains in 1803: 'Sociedad de Gananciales,' 30 La. L. Rev. 1 (1969); Roundtree, Nature of the Wife's Interest During the Existence of the Community, 25 La. L. Rev. 159 (1964).

65. Pugh, supra note 64, at 1-2 n.1.
to them. He was described as \textit{in actu} (in control) as well as \textit{in habitu et in creditu} (in present interest as creditor) in regard to the \textit{bienes gananciales}, but no less a co-owner.\textsuperscript{66} Similarly, Professor Bartke concludes, "Scholars now uniformly agree that at least as early as the 18th Century the Spanish wife had a \textit{present}, existing property interest in the community, rather than an expectancy."\textsuperscript{67} Thus, the late Professor Morrow in 1959 declared that, as a result of Spanish influence, "the wife in Louisiana, has, just as the husband has, an \textit{immediate, present} one-half interest, \textit{as owner}, in all community property from the time of its acquisition."\textsuperscript{68} A corollary to this development of the use of the word \textit{present} to describe the wife's ownership interest in the community property has been the evolution, beginning in the 1920's, of the federal income tax laws.\textsuperscript{69} Under tax law passed in 1926,\textsuperscript{70} if the wife was declared to own a present vested interest in community property, she would be able to declare in her separate tax return one-half of the annual community income; otherwise all of it would have to be reported on her husband's return, resulting in a larger tax burden.\textsuperscript{71} The United States Supreme Court in 1930, when confronted with this issue in the Louisiana test case of \textit{Bender v. Pfaff},\textsuperscript{72} determined that

\begin{itemize}
  \item \textsuperscript{66} Id. at 12. \textit{Bienes gananciales} means ganancial assets. See \textsc{Bouvier's Law Dictionary} 460 (1934), for a definition of \textit{ganancial} as property "held in community," and \textsc{L. Ross, Dictionary of Legal Terms} (3d ed. 1966), translating \textit{bienes gananciales} as "property of a couple acquired after marriage, community property."
  \item \textsuperscript{68} Morrow, \textit{Matrimonial Property Law in Louisiana}, 34 Tul. L. Rev. 3, 17-18 (1960) (emphasis added). It is of interest also to note that there are other community property systems in which the wife's interest has been described as a "present" one. Bartke, \textit{supra}, note 67 at 219-21. Texas, California, and New Mexico law couch the wife's interest in terms more of expectancy than of ownership. The remaining four community property states (Nevada, Idaho, Arizona, and Washington) characterize the wife's interest as a present interest.
  \item \textsuperscript{70} Pub. L. No. 69-20, 44 Stat. 9, 130 (1926).
  \item \textsuperscript{71} For a good review of how tax problems became the cause for change in our community property law, see Roundtree, \textit{Nature of the Wife's Interest During the Existence of the Community}, 25 La. L. Rev. 159, 173-74 (1964).
  \item \textsuperscript{72} 282 U.S. 127 (1930).
\end{itemize}
"[i]nasmuch, therefore, as in Louisiana, the wife has a present vested interest in community property equal to that of her husband, we hold that the spouses are entitled to file separate returns . . . ."\textsuperscript{73} In Poe v. Seaborn,\textsuperscript{74} another case decided in the same year, the Court found that "[t]he law's investiture of the husband with broad powers, by no means negatives the wife's present interest as a co-owner."\textsuperscript{75}

**Legislative Evolution of "Present"**

While commentators have been quick to categorize the wife's interest in the community of gains, the Louisiana Civil Code did not provide a definition of that interest until the amendment of article 2398 in 1976. Among the present articles of the Louisiana Civil Code dealing with community property and the wife's interest therein during the existence of the marriage are article 2399 providing that marriage is a partnership or community of acquets or gains, if there is no contract to the contrary;\textsuperscript{76} article 2404 providing that the husband is the head and master of that partnership or community of gains, administering all its effects;\textsuperscript{77} article 2406 providing in part that the effects composing the partnership or community of gains are to be divided into two equal parts upon the dissolution of the marriage;\textsuperscript{78} and article 2410 providing that the wife may exonerate herself from debts contracted during the marriage by renouncing the partnership or community of gains.\textsuperscript{79} Although the liberal use of the word partnership connotes a concept of a vested ownership interest as partner, there is no specific language defining the nature of the wife's interest in community property in these articles; therefore, the repealing of these articles, coupled with the unequivocal language of section 2838, underscores the significance of the use of the word "present" to describe the wife's ownership interest.

\textsuperscript{73} Id. at 132 (emphasis added).
\textsuperscript{74} 282 U.S. 101 (1930).
\textsuperscript{75} Id. at 113 (emphasis added).
\textsuperscript{76} LA. CiV. CODE art. 2399.
\textsuperscript{77} LA. CiV. CODE art. 2404.
\textsuperscript{78} LA. CiV. CODE art. 2406.
\textsuperscript{79} LA. CiV. CODE art. 2410.
This legislative recognition in Louisiana of the wife's present ownership interest during the community evolved gradually from a "no sort of right" in the Digest of 1808; an absence of any clear definition, but a restriction on the husband's right to convey community property by gratuitous title, in 1825; and a minor word change in 1870 to the definition of "present, undivided one-half share" in 1976 and "present undivided one-half interest" in Act 627 of 1978. Yet categorization of this interest by the Louisiana Supreme Court during this same period vacillated.

*Jurisprudential Evolution of "Present"

In the 1830's it was held that the right of the wife to the one-half was a "legal right" and could be enforced when the marriage was dissolved or the community ceased; but in the 1840's and 1850's the court changed its mind and concluded that Louisiana's laws had "never recognized a title in the wife during marriage," and then held that the wife had only an

80. LA. DIGEST of 1808 art. 66. The pertinent provision in the 1808 Digest provided:

The husband is head and master of the partnership or community of gains; he administers said effects; disposes of the revenues which they produce and may sell or even give away same without the consent and permission of his wife, because she has no sort of right in them until her husband be dead. (Emphasis added.)

81. LA. CIV. CODE art. 2373 (1825). The 1825 Code omitted the last portion of the first paragraph found in the corresponding article in the 1808 Digest (see italicized language in note 80, supra) and rewrote the alienation provision thusly: "and may alienate them by an encumbered title, without the consent and permission of his wife."

82. LA. CIV. CODE art. 2404. The Civil Code of 1870 changed the word "encumbered" in article 2404 to the word "onerous" so that the alienation portion read: "and may alienate them by an onerous title, without the consent and permission of his wife."

83. LA. CIV. CODE art. 2398.

84. Dixon v. Dixon's Executors, 4 La. 188, 194 (1832). The court also stated that while "admitting that the wife's title to the property did not vest, until the community was dissolved, still her right to have an equal portion of such property acquired during coverture, as might be found at its dissolution, existed." Id. at 192.

85. Guice v. Lawrence, 2 La. Ann. 226, 227 (1847). The court stated the rule of the Spanish law to be that the husband is, during marriage, "real y verdadero dueño de todos, y tiene en el efecto de su dominio irrevocable"—the husband is, during marriage, the true and veritable owner of all, and he himself holds irrevocable dominio over all. Id. at 228 (emphasis added) (writer's trans.). The court cited the commentator Febbrero to the effect that the ownership of the wife under the Spanish law, from which
“eventual interest.” The trend reversed itself in the 1920's when the court held that the wife's interest during marriage was “not a mere expectancy,” and that title for half of the community property was "vested in the wife the moment it [was] acquired by the community” in “absolute ownership, subject to the husband's power of administration.” Accordingly, in the 1940's, in the often cited case of Succession of Wiener, the court held the community to be “a partnership” in which the husband and wife owned equal shares, “their title thereto vesting at the very instant such property [was] acquired.” This judicial attitude continued in the 1950's with the holding that a stock transfer in a company charter could not “negative the wife's present interest as co-owner”; and in provisions of the Louisiana Civil Code on the same subject were taken, is revocable and fictitious during marriage.


88. 203 La. 649, 14 So. 2d 475 (1943).

89. Id. at 657, 14 So. 2d at 477. Succession of Wiener held unconstitutional a portion of the Revenue Act of 1942, thus finding that the payment of estate taxes was due only on the decedent's share of the community and not, as the tax collector had alleged, on the entire community. The court not only found that the community was a partnership but also that the wife was “the half-partner and owner of all acquisitions made during the existence of the community, whether they [were] property or income,” and that the husband, being the head of the partnership, “did not in any way affect the status of the property or the wife's ownership of her half thereof.” Id. at 666-67, 14 So. 2d at 480-81. This partnership theory was emphasized by the following language at the conclusion of the opinion:

It is obvious, therefore, that the wife's interest in the community property in Louisiana does not spring from any fiction of the law or from any gift or act of generosity on the part of her husband but, instead, from an express legal contract of partnership entered into at the time of the marriage. There is no substantial difference between her interest therein and the interest of an ordinary member of a limited or ordinary partnership, the control and management of whose affairs has, by agreement, been entrusted to a managing partner.

Id. at 669, 14 So. 2d at 481-82. The Louisiana Supreme Court reversed the tone of Wiener without citing authority in Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973), but just three years later, in T.L. James & Co., Inc. v. Montgomery, 332 So. 2d 834 (La. 1976), the court nevertheless cited Wiener with approval.

90. Messersmith v. Messersmith, 229 La. 495, 508, 86 So. 2d 169, 173 (1956) (emphasis added). The husband in a community settlement dispute with his former wife had alleged, unsuccessfully, that shares of common stock in the company employing him should not be divided in kind, but that he should be allowed to retain all of the stock and instead merely pay one-half of its book value and assets because of provisions in the company charter.
1968 when the court in *United States Fidelity and Guaranty Co. v. Green*⁹¹ followed *Wiener* in holding that "the wife's rights in and to the community property [did] not rest upon the mere gratuity of her husband; they [were] just as great as his and [were] entitled to equal dignity."⁹² In 1973, however, the trend reversed again when the landmark case of *Creech v. Capitol Mack, Inc.*⁹³ held that since the wife was given options at the dissolution of the marriage in regard to claiming or renouncing her one-half interest in the community of acquets and gains, her interest was only "imperfect ownership" not becoming perfect ownership until dissolution of the community.⁹⁴ In 1976, however, *Creech*’s reasoning was repudiated when the supreme court held, in a later case, that the wife's one-half interest was "at all times real, vesting in her the right to dispose of her interest by will and giving her the right to demand her one-half interest upon dissolution of the marriage..."⁹⁵

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⁹¹. 252 La. 227, 210 So. 2d 328 (1968).
⁹². *Id.* at 233, 210 So. 2d at 330. In disallowing the collection of an antenuptial debt of the husband by garnishing the joint account of the community as well as the salary of the wife, it was held that the wife did have an ownership interest in the community. The court found that prior decisions giving the wife a mere expectancy or residuary interest were incorrect because they were based "on a wrong translation of the Spanish word *dominio* used by the commentator Febreno as meaning dominion or control instead of ownership in describing the authority of the husband over the community estate." See text at note 66, *supra*. This decision protected the fruits of the wife's labors from the husband's prenuptial creditors and was rendered to secure the wife's vested interest in the community.

⁹³. 287 So. 2d 497 (La. 1973).
⁹⁴. *Id.* at 509. According to the reasoning of the *Green* case which *Creech* specifically overruled, the facts in *Creech* presented a distinction without a difference. *Creech* involved the wife of a first marriage who sought the court's assistance in collecting a debt arising out of the community property settlement of the first marriage and in enforcing a judgment against her former husband by seizing his assets in the second community. The court, citing *Guice v. Lawrence*, 2 La. Ann. 226 (1847), allowed seizure of the entire community property (not merely the husband's interest therein), subject only to an accounting by the husband (upon dissolution of the second community) for the enrichment of the entire community property (not merely the husband's interest therein), for the enrichment of his separate estate through the discharge of antenuptial debts. The court's decision was authored by Justice Barham with a strong dissent by Justice Summers, who felt that the *Green* case should not be overruled.

⁹⁵. *T.L. James & Co., Inc. v. Montgomery*, 332 So. 2d 834, 844 (La. 1976). The facts of this case are not dissimilar from those in *Messersmith v. Messersmith*, 229 La. 495, 86 So. 2d 169 (1956), except that here the employer of the deceased husband provoked concursus proceedings against the widow and heirs of the employee to determine if the employee retirement and profit-sharing plans and group insurance plans with a named beneficiary were payable at death to the beneficiary free of any claims
Legislature vs. Creech, a Reaction to "Present"

Both the 1973 Louisiana Supreme Court decision in Creech v. Capitol Mack, Inc. and the 1976 legislative definition of the wife’s interest as "present" had a direct impact on the language used in section 2838 of the new act and, therefore, deserve closer scrutiny. In Creech the Louisiana Supreme Court confronted the issue of whether the wife was in fact vested with an ownership interest in community property, thereby precluding the seizure of community assets to satisfy the antenuptial debts of the husband due his first wife. The court cited the 1847 case of Guice v. Lawrence, quoting with approval that court’s discussion of early Spanish law as explained by Febrero:

The ownership of the wife . . . is revocable and fictitious during marriage. As long as the husband lives and the marriage is not dissolved, the wife must not say that she has gananciales, nor is she to prevent the husband from using them, under the pretext that the law gives her one-half.

The court also commented,

by the widow and forced heirs. The principal issue was whether proceeds of a profit-sharing and retirement plan are earned income of the husband and constitute community acquets or gains, therefore entitling the widow to one-half of the proceeds which vested subsequent to her marriage to the employee. The court interpreted Civil Code article 2334 to mean that the wife is not vested only with ownership of one-half of the community, but is likewise owner of half of community income. It held, in its rehearing opinion written by Justice Summers, that, unlike life insurance contracts, the contractual agreement for the retirement and profit-sharing plans could not prejudice the rights of forced heirs or the community ownership of the spouses. Riley, supra note 63, at 569 n.59. As authority for its statement the court cited Bender v. Pfaff, 282 U.S. 127 (1930); Poe v. Seaborn, 282 U.S. 101 (1930); Messersmith v. Messersmith, 229 La. 495, 86 So. 2d 196 (1956); and Succession of Wiener, 203 La. 649, 14 So. 2d 475 (1943); but strangely enough did not mention the 1973 decision in Creech v. Capitol Mack, Inc., 287 So. 2d 497 (La. 1973).


98. 287 So. 2d at 501, quoting Guice v. Lawrence, 2 La. Ann. 226, 228 (1847).
Febrero says the wife has dominion, but Febrero also says that the wife does not have the use of the community or even of her one-half interest. The wife does have dominion, but since use and control are necessary ingredients to perfect ownership, that dominion or ownership which the wife has falls short of perfect ownership.99

The court then held that the entire community interest in a house and lot belonging to the second community could be seized in satisfaction of the debt incurred by the husband to his first wife prior to the second marriage, subject to an accounting by the husband upon the dissolution of the second community for the enrichment of his separate estate through the discharge of antenuptial debts.100 It concluded that “the wife’s interest in the community [was] imperfect ownership without use.”101

The 1976 legislature reacted to this decision by providing in Louisiana Civil Code article 2398 that “[e]ach spouse owns a present undivided one-half share in the community property subject to the management of the community by the husband . . . .”102 In addition, a few months later, the legislature passed a concurrent resolution in the second extraordinary session, clarifying the legislative intent. Although the resolution quoted in full the request of the Louisiana Law Institute that the legislature “reaffirm the pre-Creech view that each spouse has a vested interest in each asset of the community,”103 it nevertheless did not adopt the requested language but instead simply stated that “the sole purpose of adopting Article 2398 was to preclude possible adverse Federal estate tax consequences and in no manner to restrict the authority of the husband relative to management, control or administration of community property.”104 Thus, the 1976 legislature concluded not that each

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99. 287 So. 2d at 508 (emphasis in original).
100. Id. at 510. The court noted that “in both France and Spain the law has evolved to expressly provide for satisfaction of antenuptial debts out of the community’s property.” Id. at 509.
101. Id. at 510 (emphasis added).
104. Id. House Concurrent Resolution No. 23 was published with article 2398. This concurrent resolution was in direct response to the characterization of the wife’s interest in Creech.
spouse has a vested interest but that each spouse owns a present undivided share. In 1978 this "present . . . share" wording in Louisiana Civil Code article 2398 was utilized in section 2838 of the new law to read, "present . . . interest." Although the comment to section 2838 states, "[t]his provision reproduces in substance Article 2398 . . .," it neglects to mention the concurrent resolution that followed article 2398 or the change of the word "share" to the word "interest."

The use of the word "present," therefore, to describe the ownership interest of each spouse in community property appears to follow, if not the explicit terminology of the Louisiana Civil Code itself, then at least the trend of the evolution of the Code. This word has been used by legal scholars and legislatures in several other community property states, and the primary purpose for using it may have been to contrast, for tax purposes, the wife's presently vested undivided interest during the existence of the community with the interest recognized at the termination of the community.

"Undivided" One-Half "Interest" in the Community Property

The word *undivided* was employed by the legislature both in the 1976 amendment to article 2398 as "undivided share" and in new section 2838 as "undivided interest," thus indicating a legislative intent to create an ownership in common.  

105. The use of the word "present" in article 2398 seems to have evolved, not from the terminology of our Civil Code or from definitions laid down by the Supreme Court of Louisiana, but from a need to contrast, for tax purposes, the wife's presently vested interest with a future interest that one might acquire, for example, by inheritance. Therefore, this word usage by the legislature in 1976, being in direct response to the characterization of the wife's interest in *Creech*, could be interpreted liberally as a presently vested interest.

106. Of special interest is the provision in section 10 of Act 627: "The source notes, comments, and special notes contained in this chapter reflect the intent of the Legislature."

Although the change from "share" to "interest" could be viewed as a substantive change, the legislative intent in new section 2838 to reproduce the substance of article 2398 without the limitations of House Concurrent Resolution No. 23 seems evident.

107. See text at notes 67 and 68, supra.

108. See note 68, supra.

109. This co-ownership type of relationship between husband and wife is mentioned in comment (b) to section 2838 which provides: "Married persons owning community property are not treated like other co-owners of property who may force a partition at will, Louisiana Civil Code article 1289. The spouses are subject to specific
The Louisiana Civil Code provides that co-owners have an unrestricted right to use and enjoy immovable property owned in indivision\textsuperscript{110} subject only to the obligation to account to other co-owners.\textsuperscript{111} This ownership right of the co-owner is fortified by the provision that no one can be compelled to hold property with another, unless the contrary has been agreed upon.\textsuperscript{112} Therefore the co-owner has the right to demand the division of a thing held in common by the action of partition, and, although the parties may agree that there shall not be a partition for a certain limited time,\textsuperscript{113} they nevertheless may not contract that there shall never be a partition of a thing held in common.\textsuperscript{114} However, the co-owner's imprescriptible right to partition\textsuperscript{115} is not conferred by the legislature on a husband and wife co-owning property under the new Matrimonial Regime Law. Although co-owners owning immovable property together have perfect vested ownership, with each co-owner having a similar ownership right to his particular share, the same underlying rationale is not made applicable to the co-ownership relationship of husband and wife. While both spouses together have full, complete, perfect, vested ownership of a community immovable, neither spouse enjoys in his or her own right the same ownership of his or her share or interest as is afforded to other

\textsuperscript{110} LA. CIV. CODE arts. 491 and 494.

\textsuperscript{111} LA. CIV. CODE art. 494; Juneau v. Laborde, 229 La. 410, 82 So. 2d 693 (1955); Harper v. O'Neal, 363 So. 2d 930 (La. App. 2d Cir. 1978).

\textsuperscript{112} LA. CIV. CODE art. 1289 provides: "No one can be compelled to hold property with another, unless the contrary has been agreed upon; any one has a right to demand the division of a thing held in common, by the action of partition."

\textsuperscript{113} LA. CIV. CODE art. 1298; Gallagher v. Gallagher, 339 So. 2d 483 (La. App. 2d Cir.), cert. denied, 341 So. 2d 897 (La. 1977). However, a stipulation against partition is likely to be rejected by the courts if it is too "vague and indefinite." Walker v. Chapital, 218 La. 663, 50 So. 2d 641 (1951).

\textsuperscript{114} LA. CIV. CODE art. 1297 provides: "It cannot be stipulated that there never shall be a partition of a succession or of a thing held in common. Such a stipulation would be null and of no effect."

\textsuperscript{115} LA. CIV. CODE art. 1304 provides:

The action of partition can not be prescribed against, as long as the thing remains in common, and such community is acknowledged or proved. Thus, though coheirs have enjoyed their hereditary effects in common for an hundred years and more, without making a division, any of them can, at any time, sue for a partition.
co-owners of Louisiana immovable property. This seems to afford only a limited species of co-ownership to each spouse in community property. If section 2838 were authority for the statement that each spouse is vested with title, in perfect ownership, to an undivided interest in community property, why would there be a limitation on the right to partition or, for that matter, on the right of one spouse to deal with that spouse’s share of community immovables? The legislature tried to remove the past restrictions on spouses by giving them complete freedom to contract and by treating them as co-owners; however, the spouses were not vested with the full rights of co-owners because the comment to section 2838 denies them the right to force a partition at will.

Defining the exact nature of the ownership interest of each spouse in the community of gains has been a controversial subject primarily because of the absence in the law prior to 1976 of specific language defining that interest. The new law defines that interest. Section 2838 states that each spouse owns a present undivided one-half interest in the community property. It should be noted, however, that despite the use by the legislature of the words, “each . . . owns . . . present . . . undivided . . . interest” in section 2838, the nature of the equal ownership interest of each spouse in the community immovables appears to be something less than the full or complete or perfect ownership interest afforded other co-owners of Louisiana immovable property under our codal scheme.

MANNER OF ALIENATING OR ENCUMBERING COMMUNITY PROPERTY

“Management,” the title of Subpart B of Part II of the Matrimonial Regime Law, is a term that connotes the vesting of a power only of administration. The first section in Subpart B is section 2842, entitled “Management of Community and Separate Property Generally,” which provides that

118. For the text of comment (b), see note 109, supra.
119. LA. CIV. CODE art. 2996 provides: “A mandate conceived in general terms, confers only a power of administration.”
"[e]ach spouse acting alone may manage, control, and dispose of his or her separate property, and except as otherwise provided by law, each spouse, acting alone may manage, control, and dispose of community property." This provision creates an important conceptual change and perhaps for many is the most significant aspect of the Matrimonial Regime Law. It sets the tone for equality in the management of community property generally but does not regulate the alienation, encumbrance or lease of community immovables.

Due to a concern for the well-being of the family, certain transactions were deemed by the legislature to require concurrence. Consequently, for the attorney in real estate practice, the key section in the entire Matrimonial Regime Law is section 2843 entitled "Alienation of Community Property; When Concurrence of Spouses Required." This section provides in part for the alienation, encumbrance or lease of community immovables only upon the concurrence of the spouses. The legislative comments amplifying section 2843 provide that the spouse who joins in a transaction becomes a party thereto unless personal responsibility is expressly negated.

The concurrence of a spouse can be accomplished through an appearance in the instrument itself or through use of a

120. LA. R.S. 9:2843-47 (Supp. 1978) set forth the requirements of concurrence of the spouses for the alienation of community property and the sanctions for unauthorized alienation.

121. LA. R.S. 9:2842 (Supp. 1978) (emphasis added). This section is evidently designed to confer on each spouse broad management control over the entire community interest, the interest of both spouses; however, a general grant of authority to manage and control property does not normally confer power to dispose of it. LA. Civ. CODE art. 2996. Perhaps in the comments following section 2842 the intent of the legislature is better stated:

Each spouse has the power to manage community property without the consent or concurrence of the other, except in instances deemed of such importance to the well-being of the family that concurrence is required. Other sections provide instances of such importance to commerce that one spouse is entitled to act to the exclusion of the other. See Secs. 2843, 2844.

LA. R.S. 9:2842, comment (Supp. 1978). The concept of general management authority under section 2842 ideally should not have combined the power to dispose of separate property, a right in no way restricted by the matrimonial regime, with the power to dispose of community property, a right of which very little is left after excluding those exceptions contained in the subsequent sections.


power of attorney, but in either case, the spouse's appearance can be worded to avoid any assumption, by such joinder, of a more personal liability than is minimally necessary in order to accomplish the transaction. Otherwise a spouse who simply joins in a transaction, in proper person or through the use of a power of attorney, would thereby incur liabilities and obligations as a party to the transaction, e.g., in warranting title or repaying the debt, which obligations may be satisfied from the separate property of the spouse.

The unauthorized alienation, encumbrance, or lease of community property by one spouse is voidable at the instance of the other spouse. The term "voidable" has been interpreted as rendering the contract enforceable until declared void in an action brought for that purpose, unless in the meantime the authority so exercised has been ratified, either expressly

124. The warranty obligation of co-sellers is by its nature indivisible. Joint sellers were found to be jointly liable for the return of the purchase price but solidarily liable for eviction damages in Collins v. Slocum, 317 So. 2d 672 (La. App. 3d Cir.), cert. denied, 321 So. 2d 362 (La. 1975). This warranty liability can be limited by particular agreement. LA. Civ. Code art. 2503. For example, the parties could provide that the warranty of the spouse is an in rem obligation only (limited to the value of the asset conveyed or leased), that the property is conveyed without any warranty or recourse whatsoever by the spouse, or only with a special warranty limited to the time the property was owned by the spouse or particular vendors in the chain of title.

125. In order for the liability of co-obligors to be in solido, wherein "they are all obliged to the same thing, so that each may be compelled for the whole," LA. Civ. Code art. 2091, solidary liability must be expressed rather than presumed. LA. Civ. Code art. 2093. The liability of the wife could be limited by an express declaration that the joinder of the wife is done solely for the purpose of expressing her consent in the mortgaging of the community property without the wife's being named in the mortgage as a named mortgagor or executing any note as a co-maker. LA. R.S. 10:3-401 (Supp. 1974). In the case of collateral mortgages, where the note given is not an evidence of the debt but is to be pledged to secure an underlying obligation or obligations, the mortgage might also contain the consent from the wife that the collateral mortgage note (technically an asset of the community) be pledged by the husband from time to time for debts past or future as convenience may require.

126. LA. R.S. 9:2849-50 (Supp. 1978). This is to be contrasted with the concept under present law whereby the wife is given the opportunity to reject the community and thereby avoid personal responsibility or the encumbrance of her separate assets to satisfy community obligations arising out of community contracts executed solely by her husband. LA. Civ. Code art. 2410.


or impliedly. The action for nullity or rescission of a contract may be brought within ten years, unless the situation is one warranting the five year prescription.

Conspicuously missing from the requirement of section

"Contracts, however, made in the name of another, under void powers, will be valid, if ratified by the principal before the other contracting party has signified his dissent to the agreement." See also LA. CIV. CODE art. 1786 (not repealed by the new law), which provides in part:

The authorization of the husband to the commercial contracts of the wife is presumed by law, if he permits her to trade in her own name; to her contracts for necessaries for herself and family, where he does not himself provide them; and to all her other contracts, when he is himself a party to them. The unauthorized contracts made by married women, like the acts of minors, may be made valid after the marriage is dissolved, either by express or implied ratification.

130. In Nelson v. Walker, 250 La. 545, 563, 197 So. 2d 619, 625 (1967), the court found that where a wife after her contractual incapacity ceased to exist due to divorce accepted the benefits of rental on a piece of property and at various times occupied the property, she therefore "ratified the partition agreement and settlement of alimony claim and impliedly confirmed it after her incapacity ceased." Id. at 566, 197 So. 2d at 627.

131. LA. CIV. CODE art. 2221 provides: "In all cases, in which the action of nullity or of rescission of an agreement, is not limited to a shorter period by [a] particular law, that action may be brought within ten years." The Nelson v. Walker court pointed out that at the time the wife signed the purchase agreement in 1964, ten years had elapsed since the date of cessation of her incapacity, therefore in 1964 her title to the property was "good, valid, and merchantable, not suggestive of litigation, and she was able to convey it to a purchaser under an act translative of title." 250 La. at 566, 197 So. 2d at 627.

In Succession of Nelson, 224 La. 731, 70 So. 2d 665 (1953), a case involving an alleged simulated sale, the court held that the action to set aside the sale prescribed in ten years, rejecting a plea of five year prescription, citing Succession of Nelson.

132. LA. CIV. CODE art. 3542 provides: "The following actions are prescribed by five years: That for the nullity or rescission of contracts, testaments or other acts . . . ." If, however, a contract is found to be absolutely null, then the nullity can never be prescribed. See Whitney Nat'l Bank v. Schwob, 203 La. 175, 13 So. 2d 782 (1943). In Louisiana Sulphur Mining Co. v. Brimstone, 143 La. 743, 748, 79 So. 324, 326 (1918), the court held that article 3542 was not applicable to an action to have decreed null a contract void on its face. The act of sale in question had a resolution attached authorizing only the sale of a right of way and the court held that the sale "insofar as it purports to convey title to anything more than a right of way or servitude, [was] null on its face." 143 La. at 749, 79 So. at 326.
2843 is a provision with respect to the acquiring of community property by either spouse without the concurrence of the other. To the contrary, section 2843 specifically provides that encumbrances "created by the operation of law" do not require the concurrence of the spouses. This vesting in each spouse of equal and unlimited authority to purchase for the community, and thereby, for example, create a vendor's lien and privilege, is repeated in a portion of the comment to this section stipulating that encumbrances imposed by law are excepted from the requirement of joinder. Thus, for example, a transaction by one spouse acting alone could result in a valid vendor's privilege or mechanic's or materialman's lien affecting movable or immovable community property. Similarly, as pointed out in the legislative comment, "the recordation of a judgment against a spouse results in a judicial mortgage on community property situated in the parish of recordation." Although either spouse under this section will be able to bind the community with a vendor's lien or privilege arising out of the unpaid portion of the sales price, or with a resolutory condition arising out of the failure to pay or to perform obligations of the purchaser contained in the sale of movable or immovable property, neither spouse, without the concurrence of the other, will be permitted to bind the community in connection with the execution of a promissory note or mortgage on the immovable property being purchased. This contrast will entail close scrutiny of all transactions between and by spouses.

Due to the provisions of the Louisiana Civil Code dealing with mandate, which are not amended by the new act, it is

133. The Law Institute's reporter had suggested that "[e]ach spouse should have equal power to acquire, manage, control, or dispose of all community assets and liabilities or to bind the assets of the community." Riley, supra note 63, at 575 (emphasis added).
135. Id.
136. A mortgage granted at the time of purchase is separate and distinct from a vendor's lien and privilege or a resolutory condition which are imposed as a matter of law. La. Civ. Code arts. 2561, 2564; Louis Werner Saw Mill Co. v. White, 205 La. 242, 17 So. 2d 264 (1944). The granting of a mortgage on immovable property at the time of its purchase is not an encumbrance created by operation of law and is not therefore excluded from the concurrence requirement of section 2843, although it is conceivable that the same impact on the community will result.
necessary, before management authority can safely be relied upon with respect to real estate transactions, for such authority to be expressly granted. This is true whether the authority is intended to be general for all affairs, or special for one affair only, and regardless of whether it authorizes buying, selling, encumbering, accepting or rejecting a succession, contracting a loan or acknowledging a debt, executing or endorsing bills of exchange or promissory notes, or acting as surety. In Civil Code article 2997 this rule is made specifically applicable to the power to sell or to buy.

Our courts have held that to comply with this requirement the terms of the proposed sale or purchase must be mentioned in the power of attorney. Additionally, while the property need not be specifically described, it is preferable to give the general area by parish or parishes where the property is located, although some practitioners have accepted powers of

138. LA. Civ. Code art. 2994. See also LA. Code Civ. P. art. 694, wherein an agent is granted the procedural capacity to sue "when specially authorized to do so," and article 695, wherein a wife is given similar authority to sue for the husband "when specially authorized to do so by her husband." See also LA. Civ. Code art. 2996 which provides: "If it be necessary to alienate or give a mortgage, or do any other act of ownership, the power must be express."

139. LA. Civ. Code arts. 2278, 3039.

140. LA. Civ. Code art. 2997 provides:
   Thus the power must be express and special for the following purposes:
   To sell or to buy.
   To incumber of hypothecate.
   To accept or reject a succession.
   To contract a loan or acknowledge a debt.
   To draw or indorse bills of exchange or promissory notes.
   To compromise or refer a matter to arbitration.
   To make a transaction in matters of litigation; and in general where things to be done are not merely acts of administration, or such as facilitate such acts.
   A mandate to buy or sell must be express and special; if conceived only in general terms, it does not suffice. Lake v. LeJeune, 226 La. 48, 74 So. 2d 899 (1954). See also Bolding v. Eason Oil Co., 248 La. 269, 178 So. 2d 246 (1965).

141. The following language used in a power of attorney was held not to include authority to sell real estate: power to "make [such] purchases and sales as may be necessary . . . ." Sanders v. Ohio Oil Co., 155 La. 740, 99 So. 583 (1924). See also Fleming v. Romero, 342 So. 2d 881 (La. App. 3d Circ.), cert. denied, 345 So. 2d 50 (La. 1977); Comment, Construction of Powers of Attorney in Louisiana, 23 Tul. L. Rev. 242 (1948).

142. See Boykin & Lang v. Wright, 11 La. Ann. 531 (1856). A power of attorney to sell and convey all of the real estate of the principal in a certain parish sufficiently describes the property. Rownd v. Davidson, 113 La. 1047, 37 So. 965 (1906). Indefinite-
attorney or resolutions to sell any and all lands belonging to the principal wherever located.\(^{143}\)

Of all the provisions in the new law involving the alienation or encumbrance of community immovable property, perhaps the one most likely to be misinterpreted at first reading, and therefore the one that should command the greatest scrutiny by an attorney in real estate practice, is the last sentence in section 2843: "A spouse may expressly confer upon the other spouse the sole and irrevocable right to alienate, encumber, or lease a community immovable or a community business or all or substantially all of the assets of a community business."\(^{144}\)

The use of the words "expressly" and "a" in this section, as amplified by the comments to the section calling for "a particular community immovable," requires a specific, express and special power of attorney as to a particular piece of community

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143. A description of "all real estate in the state" belonging to the principal and mentioning the parish or parishes in which the land was located was held to be sufficient in Tensas Delta Land Co. v. Fleischer, 132 La. 1021, 62 So. 129 (1913). This case was cited with approval by the Third Circuit Court of Appeals in Resweber v. Daspit, 240 So. 2d 376 (La. App. 3d Cir. 1970), as authority for the holding that in Louisiana it is not necessary that the mandate to sell real estate be both express and special as required in Louisiana Civil Code article 2997, but need only be express as required in article 2996. The court commented that "this holding in effect strikes the word 'special' from Art. 2997." 240 So. 2d at 379. In Resweber it was held that a power of attorney to sell all or any part of real estate of the principal was valid even though no further description of property was contained in the mandate. The particular language that was approved was contained in a printed form which merely stated "all or any part or parts of the real, personal or mixed estate of the said . . . ." 240 So. 2d at 377. For a comment on this decision, see The Work of the Louisiana Appellate Courts for the 1970-1971 Term—Mandate, 32 La. L. Rev. 165, 201 (1972), in which the writer suggests that the same decision could have been reached not by striking the word "special" from article 2997 but by simply applying Civil Code article 2994 to the mandate. La. Civ. Code art. 2994 reads: "It may be either general for all affairs, or special for one affair only."

144. La. R.S. 9:2843, comment (Supp. 1978), provides in part:

A spouse may expressly confer upon the other spouse the sole right to alienate, encumber, or lease a particular community immovable or a particular community business or all or substantially all of the assets of a particular community business. The right conferred may be irrevocable although no consideration is given. The right conferred and the revocability of the right may be of unlimited duration, for a definite period of time, or until the happening of an uncertain or certain event.

(Emphasis added.)
immovable property in order for one spouse to represent the other in a community real estate transaction.\textsuperscript{145} Is it necessary that the new law, with respect to community immovables, be so much more restrictive than the codal provisions on mandate regulating one spouse's representation of another with regard to separate immovables? This question is even more significant when one considers that elsewhere in the new law the parties are permitted to modify the contractual marital regime as they wish, which modification could include a general power of attorney regarding community immovables signed by both parties before a notary public and two witnesses and recorded in the mortgage records.\textsuperscript{146}

The power of attorney enabling one spouse to act for the other with respect to community immovables under the new law may be made irrevocable although no consideration be given, and the revocability of the right may be of unlimited duration or for a definite period of time;\textsuperscript{147} but it is not specifically required to be in authentic form as is required for the wife's general disclaimer under the present law\textsuperscript{148} or as is re-

\textsuperscript{145} While no authority is required for either spouse to purchase immovable property for the community, nevertheless the granting of authority to one spouse to sell community immovables must be limited to a particular community immovable. One might even interpret this section to require that the exact description of the particular piece of community immovable involved in the transaction be included in toto in the power of attorney by which one spouse represents another, although it is doubtful that the legislature intended this result. This new provision is inconsistent first with present Civil Code article 2334, wherein the wife is permitted to waive the requirement of her consent without specifying the particular piece of property involved, and also with other provisions of section 2843 itself, which do not require consent for acquiring community immovables or incurring a debt resulting in an encumbrance imposed by law on community immovables.

\textsuperscript{146} See text at note 31, supra.

\textsuperscript{147} For the text of the pertinent part of the legislative comment to section 2843, see note 144, supra.

\textsuperscript{148} \textit{La. Civ. Code} art. 2334, \textit{repealed by 1978 La. Acts}, No. 627, provides that where the title to immovable property stands in the name of both husband and wife, or where title to community immovable property declared to be the family home stands in the name of the husband alone, the requirement that it may not be leased, mortgaged or sold by the husband without the wife's written authority or consent "shall not apply where the wife has made a declaration by authentic act that her authority or consent are not required for such lease, sale or mortgage and has filed such declaration in the mortgage and conveyance records of the parish in which the property is situated." \textit{Id.}
quired for the marriage contract under the new law. Presumably the power of attorney could be any written instrument, since it has been held that the instrument need not be in authentic form to be self-proving but may be an act under private signature, except with respect to mortgages on immovable property. While it is customary to record a power of attorney to sell in the conveyance records of the parish in which the immovable property is situated, it is not required. Such recor-
dation should be done, however, for the sake of preservation in order to avoid the inconvenience of later having to determine whether a power of attorney, referred to as having been at-
tached to a particular instrument, was in fact attached al-
though not recorded with the instrument.

Determined the minimum requirements for the aliena-
tion, encumbrance, lease or even acquisition of immovable

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149. La. R.S. 9:2834 (Supp. 1978). Since one spouse under the new law may confer upon the other a power of attorney under section 2843, one would not expect that the legislature intended that the power of attorney be either incorporated in the marriage contract, or, if by separate agreement, that the form be an authentic act passed before a notary public and two witnesses, or that it be recorded in the mortgage records of the parish where the parties are domiciled, or where the immovable property is located. See text at note 31, supra.

150. La. Civ. Code art. 2992. It has been held that if the ultimate contract must be in writing then the power of attorney authorizing one to make the contract must also be in writing. Opelousas-St. Landry Bank & Trust Co. v. Bruner, 13 La. App. 337, 125 So. 507 (1929). The power of attorney dealing with real estate must be written. Turner v. Snype, 162 La. 117, 110 So. 109 (1926).

151. Weinhart v. Weinhart, 214 So. 2d 154 (La. App. 4th Cir.), cert. denied, 253 La. 57, 110 So. 2d 305 (1968), held that it is not essential for a power of attorney "to be in authentic form. An act under private signature is equally as effective in this situation ..." 214 So. 2d at 258.

152. Foreclosure by executory process with respect to real estate mortgages requires the petition for executory process to be supported by authentic evidence. La. Code Civ. P. arts. 2834-36. If authentic evidence is lacking, executory process is unavailable and the creditor’s remedy is by ordinary process. See American Bank & Trust Co. v. Carson Homes, Inc., 316 So. 2d 732 (La. 1975), wherein it was held that a mortgage executed in the presence of only one witness, with the notary and second witness signing the instrument at a later time, is not an authentic act such as would support executory process. See also Margolis v. Allen Mort. & Loan Corp., 268 So. 2d 714 (La. App. 4th Cir. 1972). Thus the power of attorney must be in authentic form and preferably recorded with the mortgage or sale with mortgage if executory process is to be available.


154. La. R.S. 13:3729 (1950) is known as the ancient records doctrine. Missing powers of attorney and resolutions to instruments that have been recorded for more than thirty years are not required in order to show the authority of the person acting.
property in Louisiana by married persons is a subject demanding further study by the attorney in real estate practice, both when drafting instruments as well as when reviewing prior documentation for marketable title. Changes of particular importance in this area are 1) those requiring the concurrence of the spouses for the alienation, encumbrance or lease of, but not for the acquisition of, a community immovable and 2) the change requiring that the mandate for this purpose be specific, express and special as to a particular community immovable, a requirement which goes far beyond that presently contained in the Code for the vesting in a third party of authority to act for another in real estate transactions.

CONCLUSION

This article has attempted to review significant aspects of the effect Louisiana’s new Matrimonial Regime Law will have on real estate practice in the state, not so much to underscore areas needing legislative clarification or judicial interpretation, as to draw attention to those practices now prevailing that do not comply with the new law. Major conceptual changes deserving more study include the extent to which spouses may legally contract with each other; the characterization of the nature of each spouse’s undivided ownership interest in community property as “present,” word usage which, after a review of the evolution of the source material, now appears more politically and sociologically symbolic than legally significant; and the formalities required for alienating or encumbering, but not acquiring, community property, including an unrealistically restrictive one that “a particular community immovable” be described in the power of attorney. Until the Matrimonial Regime Law, particularly those sections dealing with the alienation or encumbering of community property, has been clarified by the legislature or interpreted by the courts, an attorney in Louisiana real estate practice might prefer to require both spouses, in proper person or appearing through an express and special power of attorney describing the particular real estate involved, to sign all transactions involving immovable property. In examining title, an attorney may need to run all names for the entire period examined in both the conveyance and mortgage indices so as to detect all marriage contracts and
amendments made by prior owners of the property concerned.

A product of several years of concentrated work, the new Matrimonial Regime Law represents, particularly regarding equality in the management of community property, a change whose effects cannot be underestimated. The drafters of the new law, undoubtedly faced with the threat that Louisiana's entire community property system might be declared unconstitutional, may have felt as if they were caught between "Scylla and Charybdis." Despite these mitigating circumstances, by introducing new terms not precisely defined or interpreted consistently by the courts, the legislature may be leaving key words open to interpretations not now intended.

155. Not since the late 19th and early 20th century, when reforms were related to that period of social change commonly called the Industrial Revolution, have matrimonial property systems been in such a state of upheaval. Indeed, current changes are probably even more profound than those that occurred at the turn of the century.


156. In light of the dubious constitutionality of Louisiana's matrimonial regime provisions there is a need for revision by the state legislature. The seven other states which employ a community of gains concept have already changed their provisions concerning the manager of the community.


157. The legislature in using a word should make it mean precisely what they intend it to mean, neither more nor less, particularly in the area of real estate law. See, e.g., Lewis Carroll's penetrating exchange between Humpty Dumpty and Alice in "Through the Looking Glass,"

"When I use a word," Humpty Dumpty said, in rather a scornful tone, "it means just what I choose it to mean—neither more nor less."

"The question is," said Alice, "whether you can make words mean so many different things."

"The question is," said Humpty Dumpty, "which is to be master—that's all."
