LEGAL DISCRIMINATION AGAINST
MARRIED WOMEN IN TEXAS

THESIS

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MASTER OF ARTS

By

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CHAPTER I

INTRODUCTION

The limitations placed upon married women in Texas are contrary to the principles of democracy upon which our state and nation were founded. They are inconsistent with economic necessities of modern living and result in many instances in injustice.

It is the purpose of this study to find out if the marital laws of Texas can be reconciled with our principles of democracy; to determine if, and how, these laws could or might be affected by granting women equal rights in Texas.

Almost sixty years ago Judge Ocie Speer made the following statement in regard to the marital laws of Texas:

The fact that our marital laws are statutory, and that those statutes are so frequently changed, plus the fact that a dozen separate appellate courts are interpreting those statutes, emphasize the unsatisfactory condition of the law upon this subject. The pity is that an enlightened conscience for the rights of the married women of the state and a wholesome desire to simplify the marital laws does not prompt the lawmaking power to abolish the archaic conception of marital legal disabilities and leave the internal affairs of the husband and wife to their own management.¹

The legal hair-splitting that has resulted in the interpretation of the marital laws of Texas is beyond the comprehension of the average

layman. It is in that capacity, that of a layman, this study is pursued. With all humility it is recognized that this survey could not have been accomplished without the assistance and guidance of legally trained minds. Much credit is given to Hermine Tobolowsky and other members of the Texas Business and Professional Club for material they have prepared in the campaign for equal rights for women.

The report of the Texas Legislative Council, as well as the *Treatise on Marital Status of Women,* compiled by Ocic Speer have been used extensively. Numerous books and articles have been used in the search for a definition of democracy that is compatible in latitude to application in the State of Texas.

During the fifty-sixth legislative session in Texas in 1959, there was submitted to that body a proposed amendment to the Constitution that would provide that equality under the law shall not be abridged because of sex. George Parkhouse introduced this amendment in the Senate on February 3. It provided:

> Equality of rights under the law shall not be abridged because of sex. This amendment is self-operative, but the Legislature shall make necessary adjustments in any laws which contravene its provisions. 2

The bill was referred to the Constitutional Amendments Committee and a public hearing was held on February 24. It was then referred to the Attorney General's office for opinion "as to the effect

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2 Senate Journal, 56th Session of the Texas State Legislature, SIR 5, February 24, 1959.
in the event of its adoption upon the existing statutes and upon the rules announced by court decisions relating to or that will affect community and property rights."³

The objections raised in questions at the hearing were centered largely on issues pertaining to the marital status of women. Before marriage the single woman has the same contractual powers and other powers over her own property as any man. Since other laws that are discriminatory regardless of marital status were not emphasized, it was implied that the major objection to granting equal rights to women was the effect it would have on the marital laws.

It is therefore the purpose of this paper to make a thorough study and analysis of the statutes and court decisions with a view to obtaining information relative to the statutes that could or might be affected by passage of an equal rights amendment. The Attorney General's reply to the Committee on Constitutional Amendments included a list of statutes that he stated could or might be affected by the proposed equal rights amendment.⁴ It is this list that is used in making this survey.

To provide a background study of woman's status in society, a review of this subject is considered pertinent and is included as a part of this study. This is done in Chapter II.

Since the Constitution of Texas is based upon both the English Common Law and the Spanish Community Property Law, that subject is discussed in Chapter III.

Chapters IV, V and VI deal with the numerous laws that were cited in the Attorney General's reply. Since it was inferred that there were other laws that might be affected, several of these have also been included.

The efforts to change the marital laws and the objections voiced to such changes have been considered in Chapter VII.

In Chapter VIII a comparison is made of Texas marital laws and those of other states that have community property laws.

Chapter IX is devoted to a summarization and conclusions arrived at as a result of this study.

Any study of marital laws is a complicated undertaking, and this survey is admittedly only a beginning. The main objective is to emphasize and illustrate the need for granting equal rights to women in Texas.
CHAPTER II

THE HISTORY OF WOMEN'S RIGHTS MOVEMENTS

Status of Women in Society

The most pathetic picture of all history is the great conflict that
women for centuries have been waging for their liberty.

Men armed with all the death dealing weapons devised by human
ingenuity, and with the wealth of nations to support them, have waged
wars of extermination to gain freedom; but women with no weapon
other than argument, and no wealth save justice of their cause, have
carried on this war for educational, political and economic liberty in
which they are still engaged today. ¹

The equal rights movement is in harmony with the evolution in
the status of women. Women love liberty as well as men do. The love
of liberty is the corollary of the right of consent to government. All
the progress of this nation has been along the line of extending the
application of this idea. The equal rights movement is in harmony with
the growth of the idea of the worth of the individual which has had its
best expression in the United States.

One by one the shackles that have bound women for centuries have
been unloosed. A review of this progress seems in order to understand

¹Susan B. Anthony and Ida H. Harper, The History of Women
Suffrage, Vol. IV, 4 volumes (Indianapolis, Indiana, 1902), p. 245.
the problem facing women today in their struggle for equality with men.

The Doctrine of "The Natural Inferiority of Women"

In the evolution of man, physical strength was the criterion of greatness. For many centuries survival of man depended upon the fittest. Women, smaller in stature, having a less agile and weaker body, were scorned. Only the strong were respected. Subjected as they were, they were allowed to live in many instances only because of their biological function. Their minds were not permitted to develop. They were treated as chattels and slaves, and girl babies were disposed of in one way or another. Sometimes they were raised to adulthood in order to bring a higher price. A woman shared her home with many other wives. Weak protests which were voiced occasionally only brought death. With no one to defend them, women have been kept in subjection until comparatively recent times.

"Because she is a woman" has been the sum and substance of all arguments against women claiming equality with the other half of the race to which they undoubtedly belong. Of this Bell Squires said that at times there had been doubt that women did belong to the same race as men, for some have claimed that the male was the race itself; women, the female, being only the medium by which the race was reproduced.  

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Although religion became perhaps the most potent force in maintaining woman's subordinate position, it was Christianity which credited women with souls, equal in the sight of God, to those of man. It was Christian ethics which elevated women morally. Yet even today, dissenters of one kind or another within the Church believe that woman's place is determined by limitations of mind and body, a punishment for the original sin of Eve. However, in order to fit her for her proper role of motherhood, the Almighty took special pains to endow her with such virtues as modesty, meekness, compassion, affability and piety. Of this chastening of all womankind Bell Squires says:

They have cursed all women for the sake of the sin of one; why did not they forgive and honor all women for the sake of the service of the other? If too, Jesus, the "Son of Man" was the "new Adam," bringing in a new dispensation for all mankind, then why should not Mary have been the "new Eve," bringing in a new dispensation for all womankind? One has but to read the laws that have disgraced Christendom to learn that even to this day the curse of Eve is still in operation against her daughters, except in a few places where equal rights prevail.

It was this dogma of woman's divinely appointed inferiority that has repressed and crushed women for centuries.

The Status of Women in America

Not long after the first white men landed on the shores of America it was realized that men alone would never be able to build a stable community, but that without women it would remain a loose, constantly

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4Bell Squires, op. cit., p. 20.
shifting aggregation of adventurers. The addition of women became important. Ninety young women were shipped out of England on one ship alone in 1619. They came willing to marry the settler, the price being only the cost of their transportation. Husbands who had come alone sent back for their wives and children. Succeeding immigrants brought their families, and in this new land women found a certain unconditional egalitarianism which was largely the result of the frontier economy.5

The rugged frontier existence took a high toll of lives of men and left many women widowed. To survive they carried on their husbands' businesses often as store-keepers, printers, inn-keepers as well as tilling the soil. Consequently, although women would continue to be regarded as inferior and subordinate human beings for many years to come, the roles they assumed in the early colonial days had a lasting effect.

While the alterations in the status of American women received impetus from a small active group of feminists, the transition was also a part of the development of the democracy that was transforming a wilderness to a nation of wealth and importance. Of this participation in a nation's development, the historian Arthur M. Schlesinger has remarked that

... Any consideration of woman's part in American history must include the protracted struggle of the sex for larger

5Flexner, op. cit., p. 9.
rights and opportunities, a story that is in itself one of the noblest chapters in the history of American democracy.⁶

During the rise of national democracy in the United States, women asserted claims to rights and privileges denied them in law and custom. From the time of the American Revolution, women became more active in public as well as private affairs. They not only carried on domestic industries that fostered national independence, but they wrote and printed pamphlets, tracts, poems and plays in support of the Revolution; they organized boycotts against British goods and participated in essential work throughout the war against Britain. At the conclusion of the war they expressed their own opinions respecting the course of events, and forceful women objected to the way in which men proposed to monopolize voting and lawmaking in the new nation whose interests women were promoting and defending.⁷ One of these, Abigail Adams, wrote to her husband in 1777:

In the new code of laws which I suppose it will be necessary for you to make, I desire you would remember the ladies and be more generous and favorable to them than your ancestors. Do not put such unlimited power into the hands of the husbands. Remember, all men would be tyrants if they could.⁸


⁸Abigail Adams, Familiar Letters of John Adams and His Wife Abigail Adams During the Revolution, as cited by Flexner, op. cit., p. 15.
Thomas Jefferson and the co-signers of the Declaration of Independence had declared that "man was endowed with certain and inalienable rights." The founding fathers who drew up the Constitution apparently regarded the contribution the women were making as a negligible factor for they disregarded them completely in spite of the "natural rights" doctrine announced previously. At the time the Constitution was drawn up, the prevailing body of jurisprudence governing the political, economic and social status of women was the Common Law of England. Under that law women enjoyed very little in the way of legally enforceable rights. In the political sphere they were not permitted to vote, to hold public office, to serve on juries or to act in other public capacities.

In the economic realm women were limited in the range of employment in which they were permitted to engage. Married women were under disabilities to enter into independent contracts and in their own right to hold and dispose of property. Women were thought of by men as their property and the denial of civic and legal rights was the natural consequence of this conception. A woman married became civically dead. Husband and wife were one, and the husband was the one. The wife became a femme covert, or woman under the cover or wing of her husband, and being so hidden, the Common Law was blind to her existence and recognized the husband as the only personality in the sight of the law.9

9Speer, op. cit.
The process of removing "disabilities" and achieving equality for women has been long and arduous, and success has been accomplished largely through the untiring efforts of determined and ambitious groups of women who have worked toward the goal of equal treatment under the law. Any treatment of this subject would be incomplete without reference to the courageous leaders of women's rights movements.

In 1818 Hannah Mather Crocker, in her tract "Observations on the Real Rights of Women" rejected the creed that woman must forever occupy an inferior position because of her inherent frailties, as demonstrated for all time by the fall of Eve. In her tract she stressed that "the sentiment must predominate that the powers of the mind are equal in the sexes."\(^{10}\) A year later Emma Willard introduced novel pedagogical ideas that resulted in the first endowed institution for education of girls, a school that opened in 1821.\(^{11}\) There were other women, such as Lucy Stone, who referred to the opening of Oberlin College in 1833 as "the gray dawn of our morning"; Mary Lyon who founded Mount Holyoke in 1837; and Sarah J. Hale, editor of Godey's Ladies' Book who deleted the word "female" from Vassar Female College, founded by the brewer Matthew Vassar in 1861. It was Frances Wright who achieved both fame and notoriety by her lectures on equal education for women. She argued that men were themselves degraded by the

\(^{10}\) Flexner, op. cit., p. 26.

\(^{11}\) Ibid., p. 27.
inferiority imposed on women, that every relationship shared by women suffered as long as she was regarded and treated as a lesser human being. 12

Catharine Beecher made a lasting contribution as the founder of teacher training institutions. As men from the East moved westward she saw an opportunity for the surplus women left behind to engage in the teaching profession if they had adequate training. And the need for educating women was of vital importance in order to disprove the theory that the learning processes were limited to men only.

By 1848 sufficient interest had been aroused in equal rights for women for a convention to be held at Seneca Falls, New York, to discuss the social, civil and religious rights of women. Here Lucretia Mott and Elizabeth Cady Stanton paraphrased the Declaration of Independence into a Declaration of Principles. They included in it the statement:

The history of mankind is a history of repeated injuries and usurpations on the part of man toward woman, having in direct object the establishment of an absolute tyranny over her. To prove this, let facts be submitted to a candid world. 13

A movement had been launched that would have a revolutionary effect in the lives of women from that day forward in America and throughout the world.

The nineteenth century was the age of woman's struggle for equal educational opportunities and for recognition in politics. The twentieth

12Ibid.

century marks to a great degree the realization of these efforts. The anti-slavery movement among the women of the North promoted the active demand for civic rights, and though the question of woman suffrage was widely ridiculed, it was also supported by a few prominent statesmen and preachers.

The women were appalled when Section II of the Fourteenth Amendment to the Constitution was passed recognizing only "males" as eligible voters. Women were definitely denied the protection in suffrage which the amendment granted. They determined that only by banding their forces could they obtain results, and in May, 1869, through the efforts of Elizabeth Stanton and Susan B. Anthony, the National Woman Suffrage Association was organized for the purpose of securing a national amendment extending suffrage to women. However, it was not until 1917 that the Judiciary Committee of the House of Representatives ordered the Susan B. Anthony Federal Suffrage Amendment reported without recommendation. This amendment read as follows:

The right of the citizens of the United States to vote shall not be denied or abridged by the United States, or by any state, on account of sex.

In 1919 both houses of Congress approved the amendment and it was sent to the state legislatures for ratification.14

Fifty-three years elapsed from the first state suffrage referendum held in Kansas in 1867 to the final ratification of the Nineteenth Amendment in 1920. The movement so arduously fostered and

14Ibid., IV, 218-219.
sponsored by Elizabeth Stanton and Susan B. Anthony was carried on in the agitation for ratification by Carrie Chapman Catt and Anna Howard Shaw. Particularly hostile to woman suffrage were the brewers' associations. The political machines ranked next in hostility, and the anti-suffrage forces made marked use of Catholic opponents.\textsuperscript{15} A Texas Businessmen's Association provided "boilerplate" articles free to newspaper editors opposing women's suffrage. A 1918 National Senate Committee investigation uncovered the association of the Swenson Land Company of Texas with the brewer's organizations dedicated to defeating woman suffrage.\textsuperscript{16} In spite of powerful opposition the states acted with surprising promptness. The thirty-sixth state to vote affirmatively was Tennessee, and women's nation-wide participation in voting on an equal basis with men was assured.

Since 1920, when women won the right to vote, they have moved forward at every level of community life. In 1959 more than 300 of them held seats in state legislatures, thirty held high state-wide elective offices, seventeen served as members of the United States House of Representatives. There have been many women appointed to key positions in the Federal government, in international agencies and on numerous important commissions.

Through constitutional amendment and appropriate statutory enactments in the several states the common-law disabilities of married women with regard to the independent ownership of property

\textsuperscript{15}Flexner, op. cit., p. 299. \textsuperscript{16}Ibid., p. 300.
have gradually disappeared in most states. Women have become eligible for jury service in all states, and in almost all of them changes have been made in the statutes regarding criminal laws, divorce and custody of children, and labor laws.

Since 1923 women's rights groups have supported and pressed for adoption a proposed amendment to the constitution of the United States providing for full equality under the law. This proposed amendment, popularly referred to as the "Equal Rights Amendment," reads:

Article S. J. Res. 69 (1959)

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex. Congress and the several states shall have power, within their respective jurisdictions, to enforce this article by appropriate legislation.17

Today, the active participation of women in the labor market and professional fields is considered essential to the nation's economy and security. Women's mentality and ability are no longer questioned as to comparable quality with that of men. The failure to grant the request for equality of rights, it seems, is based largely on the old argument "because she is a woman."

Development of Woman's Rights Movements in the South and Texas

In the South chivalry as well as religion served as a potent force in maintaining woman's subordinate position throughout the nineteenth

17 United States Senate, 86th Congress, 1st Session, 86-1; S R 69.
century. The prevailing attitude that their position was a sheltered one was as typical in the lower strata of society as among the plantation aristocracy. For in the South "the charm of chivalry, the mellowness of classic culture, the exaltation of womanhood and a delicate sense of personal honor . . ." characterized the planters with millions of under-privileged whites while African slavery formed the background of the scene. 18

No Susan Anthony or Elizabeth Stanton could emerge here. But inequality in political status was hardly an anachronism in the South where only some classes of males, usually on a propertyed basis, were enfranchised. 19

The South's ante-bellum colleges were not coeducational, although a small percentage of the academies were. Women, as a matter of fact, were not provided for in the Southern educational philosophy since the South had no disposition at all to encourage feminine leadership. The South considered education for women more in the light of a social adjunct than anything else. 20 The old ante-bellum academies disappeared with the war, both in name and in many cases in fact. The mass of the common schools during Reconstruction were concerned


19 Flexner, op. cit., p. 48.

20 R. S. Cotterill, The Old South (Glendale, California, 1936), p. 287.
with the first few grades alone. Only in the towns and cities and in a few other favored communities were there high schools. 21

In Texas the Acts of 1839 and 1840 laid the foundation for the present endowment of public education in Texas for the establishment of public schools. However, most people were not ready to accept the free school system. The result of the different concepts concerning the organization of education was that each group followed the practices with which it was familiar. Some taught their children at home or put them in community schools; others employed tutors or sent their children back to the United States; some left them to pick up what rudiments of learning they could by chance. Whatever the system followed, the presence of the principle of educational equality is traceable throughout the organization of the public schools of Texas. 22

In spite of bitter opposition to the "un-sexing" of women, a few courageous women of the South dared to take up the cudgel in defense of women's rights. Two of these, Angelina and Sarah Grimké, daughters of a South Carolina slave-holding family, are outstanding. While they loathed slavery and their first public appearances were lectures against that institution, they later linked the two issues of slavery and the position of women. Opposition to them was so great that they were forced to leave Charleston and flee north to New York.


22 Frederick Eby, Development of Education in Texas (New York, 1925), p. 93.
and the New England states where they spent long years defending the abolition of slavery and equal rights for women. In 1838 Sarah Grimké issued a pamphlet on "The Equality of the Sexes and the Condition of Women." In this article she held that the Scriptures were not divine in origin, and necessarily reflected the agricultural, patriarchal society that produced them. Accepting Eve's responsibility for Original Sin, she turned it neatly on its advocates:

"Adam's ready acquiescence with his wife's proposal does not savor much of that superiority in strength of mind which is arrogated by man. Even admitting that Eve was the greater sinner, it seems to me that man might be satisfied with the dominion he has claimed and exercised for nearly 6000 years, and that more true nobility would be manifested by endeavoring to raise the fallen and invigorate the weak than by keeping women in subjection."

Angelina Grimké had the distinction of being allowed to speak before a committee of the Massachusetts State Legislature in February, 1833, the first woman ever to make such an appearance before a legislative body. The Grimké sisters asked no special favors for their sex. Sarah said, "All I ask of our brethren is that they will take their feet from off our necks, and permit us to stand upright on the ground which God has designed us to occupy."

While the woman's movement gained momentum in the North during Reconstruction, it continued to be frowned upon in the South and was regarded as degrading to women. Clement Eaton gives five

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23 Flexner, op. cit., p. 45.  
24 Ibid., p. 47.  
reasons why there was an almost impenetrable barrier to the movement in the South. One was that many of the most odious abolitionists were also aggressive champions of the rights of women. Too, Pauline theology, which had a tenacious hold on the Southern churches, was hostile to feminine assertiveness. Another was the prevailing romanticism of the South which he says was incompatible with the attempt to equalize the sexes. Eaton also states that women as a class were not sufficiently educated to demand equality of rights with men. Finally, he said, the energies of so many women were used up in childbearing, hence they did not become restive under masculine rule. He cites for example, Mrs. John Calhoun with her nine children, Mrs. Henry Clay with eleven children and Mrs. Robert E. Lee, who presented her husband with a new baby at frequent intervals. These women, typical Southern matrons of the upper-class, could hardly have had much leisure or desire to crusade for woman's rights. There is probably a correlation between the spread of the practice of birth control and the growth of woman's rights. 26

Nevertheless, a few brave women in the South dared to voice protests against inequalities. While some, like the Grimké sisters, fled, a few like Rebecca Latimer Felton remained and succeeded in impressing herself on the consciousness of the South until she became an admired of the "new woman" of the South. 27

26 Ibid.

27 E. Merton Coulter, op. cit., p. 312.
It seems probable that by 1895 much of the opposition to Southern women's participation in the equal rights movement had been broken down. The annual convention of the American Suffrage Society was held at Atlanta, Georgia, in February of that year. It was here that Susan Anthony opened the convention with this introduction: "With this gavel was called to order in 1869 that Legislature of Wyoming which established the first true republic under the Stars and Stripes and gave the franchise to what men call the better-half of the people. We women do not say that, but we do claim to be half."28 Many of the delegates were from Southern states, and the leaders of the organization were impressed with the enthusiasm evinced by these delegates. Of them Elizabeth Stanton said, "In sweetness of voice, grace of manner and personal charm they have all the qualities to make most effective speakers, while in the fervor of their equal rights sentiments they go even beyond their sisters from the North and West."29

28 Anthony and Harper, op. cit., IV, 244.

29 Ibid., p. 236.
CHAPTER III

SYSTEMS OF MARITAL LAWS

Two basic systems of marital law are found in the United States. Generally, each springs from a different historical background. Conclusions relating to woman's status under the laws of Texas must take into account the influence of the English common law as well as that of the Spanish legal system.¹

Common Law

The common law of England was the result of the Norman conquest which placed England as a conquered land under a feudal law that reached down to the lower ranks, giving even the humblest husband more authority than a feudal lord over his wife. Whatever property rights the pre-conquest wife had possessed disappeared; and, as marriage was indissoluble, not until a woman became a widow did she come into her sole remaining property right, her dower. This latter status was rather the creation of the Church than of the common law, but the two combined to impose upon women rigid disabilities.²


One of the doctrines of the English constitution was that colonists settling in uninhabited countries take with them so much of the common law as was suitable to their condition. The law brought over to the United States by the early settlers, and established in the various colonies, formed the basis of modern American law. Blackstone's Commentaries on the Laws of England was used as a standard textbook for the training of lawyers in the United States for more than a century, and it was from this source that the majority of American states derived their laws concerning marital property. ³

Under the common law, the legal existence of the wife was completely merged in that of her husband. They were in law one, and that one was the husband. Ocic Speer with reference to the wife's rights and disabilities under common law states:

Her separate existence and identity as a distinct person were suspended during coverture, or incorporated in that of her husband, under whose protection she performed everything. By her marriage all her rights to personal property vested in him absolutely, and a freehold estate in her realty continued during their joint lives, and by possibility during his life should he survive. She was incapable of contracting or acting as a feme sole, and of suing or being sued as such. The husband could not grant anything to his wife, or enter into any covenant with her, for that would admit her separate and distinct existence. Nor could she bind him by any contract, or incur any debt, without his consent, with certain exceptions in which there was a legal implication of her authority to act as his agent, and of his liability to pay for necessaries. But in equity her individuality was recognized, and her capacity to hold a separate estate, with the

incidental powers of control, management, and disposition admitted, in the same manner as though she were a sole.  

The "common law of England" which was familiar to the Anglo-American settlers in Texas, was somewhat different from law known in England. Even before the common law was brought across the Atlantic to become the basic law of the English colonies, England had been forced to rid herself to some extent of the conception that the legal personality of the wife was merged completely in that of her husband and that she was without will or judgment of her own. Courts of equity had gradually created and recognized for married women certain rights, interests and capacities which enabled them to hold, use, enjoy and alienate property.  

Each of the states of the United States, in framing its constitution as well as through court decisions, had so modified the English common law that the form in which the early settlers knew it was rather the law of the states from which each came. The background of the framers of the constitution of Texas must be taken into consideration in order to understand their interpretation of the common law. Nearly all of them were from the southern states, eleven being from the Carolinas.  

4Ocie Speer, Law of Marital Rights, p. 87.  


6Rupert N. Richardson, "Framing the Constitution of the Republic of Texas," The Southwestern Historical Quarterly, XXXI (January, 1928), 197.
civil law in operation under Mexican jurisprudence was unfamiliar to them, and they favored the version of English common law as known to them in the states from which they emigrated. Consequently, the constitution which was ratified September 1836 contains in Section 13, Article IV, the following provisions:

Congress shall, as early as practicable, introduce by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require; and in all criminal cases, the common law shall be the rule of evidence.7

Texas therefore reflects in its legal system many facets of common law which failed to recognize the wife's rights in many instances.

Community Property Law

Basically, community property law is derived from the Spanish civil law. The Spanish civil law was in use in Texas during the Spanish and Mexican sovereignties. It was retained in part by the Republic of Texas when the English common law was adopted in 1836 and was continued when Texas came into the union.

With the decay of the Roman Empire, the Visigoths advanced into Spain and brought into general use their own laws and customs while permitting at the same time the Roman laws to govern the people already there. Late in the seventh century, the laws then in force were organized into a body since known as the Fuero Juzgo. Although

primarily Gothic in spirit, it had incorporated into it the best of the Roman system with which the Goths had become familiar during the period of occupation. Thus an amalgamation of Roman and Gothic law became the general law of Spain, and much of it endures to the present time.

Under Gothic law women enjoyed a great measure of liberty. Matrimony was carefully guarded; the wife brought no dower. Instead, the husband gave one to her. She was regarded as a companion, sharing the work and dangers of her husband. Legal succession of property was unknown among the Goths when they reached Spain, for among frontier people little property had usually been amassed, and the constant pushing forward into new territory made such transference often impossible, but the Fuero Juzgo shows their acceptance of the Roman laws of inheritance. 8

From the Goths came a conception of conjugal property which was carried over into the Spanish colonial world, that of a community of ownership in the earnings of a married couple. While the spirit of the Spanish law was largely liberal to married women in that it recognized their right to community and separate property, the subordination impressed upon women by the Catholic Church largely prevented their exercising these rights. The tenets of this faith left the management of women's affairs to men whose authority was rarely questioned. 9

8Mattie Lloyd Wooten, Status of Women in Texas, p. 302.
9Ibid., p. 303.
So long as Mexico remained a viceroyalty of Spain, the laws affecting women, thus briefly outlined, prevailed. When independence was secured, Texas also was a part of the new nation. The laws regarding women and property were thereby little affected. The efforts of those in control of the government of Mexico between 1821 and 1836 were largely directed toward the establishment of a stable government, and practically no laws were enacted which concerned women as a group or as individuals. The Catholic Church maintained its hold on both the home and the government.\(^\text{10}\)

In 1840 the Texas Congress passed laws which assumed some of the basic tenets of the Spanish civil law. The basic idea of the Spanish law concerning community property is that upon marriage, unless otherwise agreed, the husband and wife become partners as to subsequent "gains and acquests," with the profits of the partnership to be divided equally upon its dissolution. Both partners contribute all their time and efforts and their incomes from individual capital investments. The husband is the manager of the partnership property as well as of the separate property contributed to the partnership.\(^\text{11}\) In 1840 the Texas legislative body passed a law which provided that all property held by the wife previous to their marriage or acquired by her afterward by gift, devise or descent remained her separate property which could be disposed of by the husband but reverted to the wife at the death of the

\(^{10}\text{Ibid., p. 305.}\)

\(^{11}\text{Texas Legislative Council, op. cit., p. 22.}\)
husband. If there were no children, one half of the community property belonged to the wife. Prenuptial contracts were recognized which did not impair the legal rights of the husband over the person of his wife or of their children. Marriage was made a civil act; the right of the wife to reserve separate property was guarded by requiring that such be recorded; the husband was given the right to sue for his wife, and recourse to the courts was provided the wife in case of non-support of herself and children. In 1841 the form in which a wife could dispose of her separate property was prescribed. When the constitution of the state was drawn up in 1845, Article 7, Section 19 of that document sustained the right of the wife to her separate property as well as to community rights. This provision was repeated in all of the succeeding constitutions, including the constitution of 1876 under which the state is now governed. 12

Hence, there are embodied in the constitution of Texas certain elements of the Spanish system which maintain the wife's rights to separate and community property as opposed to the common law which granted her none. 13 The status of women, especially married women, has been elevated in certain respects relating to her property rights by the civil law of Spain. Many of the influences of the common law, however, still persist and continue to limit the legal rights of Texas women.

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12H. P. N. Cannel, op. cit., V, 19, for Constitution of 1861; V, 377, for Constitution of 1866; VIII, 828, for Constitution of 1876.

Concerning most types of community property in Texas the husband's powers are virtually the same as they have been since 1846. He can sell community property, either land or personality, with the exception of the homestead without the wife's joinder or consent. He is free to borrow money and mortgage the community property for any enterprise. He has considerable power to make inter vivos gifts of community property. His creditors can look to the community property, except for certain classes of exemption, as well as to his separate property for the collection of judgments against him. The homestead cannot be disposed of except by the joint conveyance of both husband and wife. With this exception, the wife in Texas has no control over community real property so long as her husband lives with her and is sane. A married woman cannot maintain a cause of action without alleging some emancipation from her husband or without her husband's joining her as a real party, although the husband may sue alone to recover community liability.

The "common law" in its broadest sense means "those rules and precepts of law in any country, or that body of its jurisprudence, which is of equal application in all places, as distinguished from local laws and rules." Community property law, on the other hand, is wholly

14 Texas Legislative Council, op. cit., p. 29.

15 Vernon's Annotated Revised Civil Statutes (Kansas City, Mo., 1958), Article 4619; and Vernon's Probate Code (Kansas City, Mo., 1956), Sec. 157.

16 Texas Legislative Council, op. cit., p. 8.
statutory and is based on the Spanish civil law. Whereas the common law is based on the presumption that the wife is subject to the husband, the community law is based on the concept of a partnership between the husband and wife. 17

Texas retains laws that are much the same as when the state constitution was adopted over 100 years ago. Many concepts in Texas statutes concerning management of marital property can be traced to common law rather than civil law origin. However, her archaic laws are frequently attributed to Spanish civil law that prevailed when Texas' independence was achieved.

17 Ibid., p. 9.
Importance of Property As A Right

Property as a civil right is a legal not an economic concept. Legally, "property" is not the goods themselves; ownership or rights to the goods, constitutes property. In other words, the individual has rights of property. He or she may have the right to have possession of the house or automobile or a bond as property which is physical custody. One may have the right to use property; to have "adverse possession," which is the right to keep others from using the property without consent; the right to "dispose" of property by gift or sale or by will and the right to transfer property for gain by renting "property."

The United States Constitution protects the rights of the property of its citizens. Again, the explanation is partly historical. In the early days of English struggle for liberty, human rights were thought of primarily in terms of property rights. The integrity and freedom of the individual were symbolized by the inviolability of his property. In his Treatises on Civil Government, the English philosopher John Locke placed property first. He wrote: "The rights of property are the most sacred of all the rights of citizens, more so in some respects than liberty itself."¹ Locke contended that the laws made in civil society

should be modeled on the law of nature. "For the law of nature is the will of God."² The amount of power to be exercised by the legislature should be limited to what is for the public good. The end of its exercise is "the preservation of the property, lives and liberties of its subjects."³

So important was the matter of property to the citizens of the United States that they included constitutional restraints on the power of government to regulate these rights in the Fifth and Fourteenth Amendments. These amendments forbid the Congress and the states, respectively, to deprive any person of property without due process of law.

As has been stated, there is a curious fusion of the culture traits brought together by the Spanish and English people evident in the Texas Constitution. Traces of Gothic and Roman culture are intermingled with the English common law system. The status of women, especially that of married women, has been elevated in certain respects relating to her property rights by the civil law of Spain. Many of the influences of the common law, however, still persist and continue to limit the legal rights of Texas women.

It is the existence of these laws that the Attorney General of Texas referred to in replying to the Committee on Constitutional Amendments in March, 1959. Of the forty-six laws pertaining to women,

²Ibid., p. 90. ³Ibid., p. 89.
many deal directly with the matter of property. The Attorney General states in his reply that it had long been the established policy of that office not to write opinions on abstract questions of law except specific fact situations and absent questions of constitutionality. The reply includes a list of forty-six statutes which it said, among others, could be affected by the proposed equal rights amendment. 4

Property Laws and Their Analysis

In Texas, in any marriage there may be three types of property --the wife's separate property, the husband's separate property and the community property. The separate property of either the husband or the wife is that property he or she owned before marriage or acquired afterwards by gift or inheritance. The community property is that property which is acquired by the joint efforts of both parties during marriage plus the income from all separate property. The rents and revenue from the separate property of each become community property. The community property is under the absolute control of the husband during his lifetime. 5

In 1957, the 55th Texas Legislature took under consideration a constitutional amendment that would repeal the restrictions on the right

4 Reply to Committee on Constitutional Amendments. See Appendix.

5 Vernon's Texas Statutes, Articles 4613 (husband's separate property) and 4614 (wife's separate property).
of a married woman to control her own separate property, as pro-
vided by Article 4614.⁶

The proposed amendment would give the authority to the wife to
manage, control and dispose of her own property without the joinder of
her husband, as well as to sue and be sued in her own name and to
contract in her own right. The House of Representatives passed this
legislation by an overwhelming majority—there were only two opposing
votes. Amendments to the bill were offered in the Senate, however,
which further complicates the already confused Texas property laws.
These amendments were adopted and consequently the injustices
against women are still perpetuated.⁷

The amendment, as finally adopted, provides that a wife, if
twenty-one years of age or over, may file a duly acknowledged state-
ment with the County Clerk of the county in which she resides electing
to have sole management and control and disposition of her separate
property and that thereafter such married woman shall have authority
to sell her lands, stocks and bonds without her husband's signature and
to contract, sue and be sued.⁸

The amendment has not provided married women with an equal
status with men. It requires virtually the same procedure as the

⁶Ibid., Acts 1957, 55th Legislature, Article 4614 as amended.
⁷Ibid., p. 1234.
⁸Ibid.
Trader Statute which will be discussed later, and has offered little relief to the subordinate position married women are placed in in Texas. There are five major objections to the amendment which are summarized as follows:

(1) By it a burden is placed upon a married woman to do something which no single man or woman or married man has to do, and inertia and lack of knowledge will prevent many women from meeting the requirements of the law of filing. For those who fail to file, the husband’s signature is still required. A married woman has to pay an attorney's fee to have a statement of intention filed and must also pay a filing fee. The total cost is approximated at forty dollars. This alone is a financial discrimination against her.

(2) Filing her intentions makes it a matter of public record that she owns separate property, and of course; except in the case of real estate, ownership of other forms of wealth are not ordinarily made part of the public record. Many married women will not want to record such information for all who desire to see--it is an invasion of the privacy of married women.

(3) Another objection is the fact that the amendment was poorly executed and does not set out the form of the required statement nor the requirements as to content. Neither does it provide that the husband's signature on such a statement is unnecessary. In view of existing laws in Texas and the tendency of the courts to restrict women's control of their property, it is to be expected that such a
signature will be required. As will be pointed out later, the husband's signature is required in the trader's statute.

(4) Since specific repeal of the free trader statute was deleted, and since such statute never applied to ordinary sales of real estate, stocks and bonds, nor did it ever provide the right to sue and be sued and to contract, a married woman must still go to the expense and inconvenience of having her disabilities of coverture removed before she can go into business with her own funds.

(5) The amendment also deleted a requirement of the original bill that both the husband and wife be joined in suits for necessaries purchased by the husband for the wife and children. The law stipulates that the husband alone may be sued, and since the community property is most often used to pay off such judgments, the wife's interest in the community property may be foreclosed without the wife having had the opportunity to defend the suit even though she may have a good defense. Where the husband and wife are having marital difficulties, the wife may not even know that such a suit has been filed. There are instances where, as a matter of spite, the husband will permit judgment to be taken without defending the suit even though a good defense exists.  

It is generally considered that the amendment is so ambiguous that it will take many years and many court decisions to determine its

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9Texas Federation of Business and Professional Women's Clubs, Inc., Legal Discrimination Against Women in Texas (Fort Worth, Texas, 1958), p. 3.
requirements. This amendment has a bearing on several of the statutes that will be discussed in this and succeeding chapters. Since it was Senator Lane who recommended and urged the passage of this amendment, it will be referred to subsequently as the Lane amendment.

Article 1983 is a statute pertaining to the right to sue for recovery of the wife's separate property. The law provides that the husband may sue alone or jointly with his wife for recovery of the wife's separate property, but if he fails or refuses to do so, she must get a court order before she can sue to recover her own property. This is an example of laws of Texas that force married women to additional expense and inconvenience that no other person in the entire state is required to submit to. For those women who do not want to make the ownership of their property a matter of public record for all to see and hence do not register it as provided in the Lane Amendment, the requirement that the husband sue for the wife's property is still in effect. There are numerous cases on record that hold where the husband's merely joining his wife in the suit is insufficient to fulfill the requirements of the statute—that he must actually be the party bringing the suit.

10Vernon's Texas Statutes, Article 1983.

Article 4616, which is not listed in the Attorney General's reply but is presumably one included in the statement "among others," also pertains to the wife's separate property. It provides that neither the separate property of the wife nor the rents from the wife's separate real estate, nor interest on notes and bonds, nor dividends from stock owned by her, nor the personal earnings of the wife shall be subject to debts contracted by the husband. 12

The law provides that the wife shall have sole management, control and disposition of her separate property, but that the joinder signature of her husband is necessary for the conveyance or encumbrance of her separate real estate, and also that his signature is necessary before she can sell her separate stocks and bonds. This same law provides that the husband shall have the sole management and control and disposition of his separate property. It also stipulates that his separate property shall not be subject to the debts of his wife, except for necessaries. The husband can sell, mortgage or give away his separate property without his wife's consent. 13 He can sell community property, either land or personal, with the exception of the homestead without the wife's joinder or consent. He is free to borrow money and mortgage the community property for any enterprise. His creditors can look to the community property, except for the classes

12Vernon's Texas Statutes, Article 4616.

13Vernon's Probate Code, Sec. 157.
specifically exempted under Article 4616. He has considerable power to make inter vivos gifts of community property.

It seems that the only way a married woman in Texas can have the enjoyment of her property is to spend it foolishly, for if she invests it the returns of the investments become community property and the proceeds are under the complete control of her husband and subject to his debts. In the case of Strickland v. Wester, Tex. 112 S.W. (2d) 1047, which reached the State Supreme Court, a married woman purchased some lots with her earnings as a school teacher. When, after her husband's death, his creditors sought to levy on the lots for debts which he had contracted, the wife protested. She claimed the lots were purchased with her own earnings and that since she had always kept her earnings in her separate bank account, such earnings constituted a gift of her earnings from her husband. Hence, such a gift became her separate property. The Supreme Court ruled that although she and her husband, who was also a school teacher during his lifetime, had agreed that her personal earnings should be her separate property, the agreement was not valid. The community property law cannot be changed by contract. The wife's personal earnings were not subject to payment of debts contracted by her husband, but they

14Vernon's Texas Statutes, Article 4616.


16Tittle v. Tittle, 220 S.W (2d) 637.
constituted a part of the community estate. The Court said, "A careful consideration of the question has led to the conclusion that when such earnings are converted into other property, that property is subject to payment of debts contracted by the husband the same as any other community property." However, if the situation were reversed and the husband purchased the property, the wife's creditors could not recover, for the community property is not liable for her debts.

Article 4617 is another of the laws not specifically included in the reply but closely associated with Article 4619 which is listed. Both deal with the method of obtaining control of the community property where the husband abandons the wife. Article 4617 provides that if the husband is insane, or has permanently abandoned his wife, or refuses to join her in conveyances, she may apply to the district court and if she can satisfy the district judge that the conveyance will be advantageous to her, the district judge may grant her permission to sell or encumber her own property.17

This means that the married woman who may be in immediate need of funds and has ample property, stocks or bonds to supply her needs at the very time she is beset by other troubles, such as insanity of her husband or abandonment, must make her troubles a matter of public record by applying to the district court for an order to dispose of her own property, must suffer the embarrassment of publicly airing her private affairs, must have the opinion of a district judge.

17Vernon's Texas Statutes, Article 4617.
substituted for her in the management of her property, must go to the expense and inconvenience of hiring an attorney and securing a court order to do what common sense and justice should permit her to do in the first place. If property of a fluctuating value is involved, such as stocks, she may suffer irreparable financial damage by the delay occasioned by the necessity to secure a court order. Furthermore, she may find that no buyer is willing to accept title from her as the purchaser may fear that her husband, upon regaining sanity or upon resuming the marital relationship may contest the judge's order, as he has a perfect legal right to do, and the purchaser may thus find himself innocently involved in a law suit.\textsuperscript{18}

Article 1619 pertains to a married woman's method of obtaining control of the community property where the husband has disappeared for a twelve-month period. This article provides that all property acquired by either the husband or the wife during marriage, except separate property, is community property and may be disposed of by the husband only, but if the husband disappears for twelve months, the wife may then file an application with the district court to manage the community property, and she may be granted such power. Although the property may consist of rental property and is vacant, the wife has no right to rent it or obtain income from it although she may be in desperate need of food and clothing for herself and children. Since a court order permitting a woman to manage and control the community

\textsuperscript{18}Texas Federation of Business and Professional Women's Clubs, \textit{op. cit.}, p. 2.
property during the disappearance of her husband does not deprive her
husband of the right also to manage or dispose of the property, she
will find great difficulty in getting anyone to purchase from her. They
may become involved in a lawsuit if the husband also converts the same
property.

Articles 6646 and 6651 are among those included in the Attorney
General's reply. These laws provide for registration of the wife's
separate property in order to protect it from the husband's creditors.
The history of these statutes show the aversion that married women
have to making their separate property a matter of public record. The
courts have generally ignored them and have recognized the wife's
ownership of separate property. 19

Article 4620 is omitted from the list and is presumably included
"among others" mentioned. It provides that the community property
shall be liable for the debts of the husband and wife contracted during
marriage, except in such cases as are specifically excepted by law. 20
If taken at face value, this law seems to treat husband and wife alike.
However, Article 4623 provides that neither the separate property of
the husband nor the community property of both, other than the rents
and revenue from the wife's separate property, shall be subject to
debts contracted by the wife. An exception is made for the necessaries

19 Ibid., p. 3.

20 Vernon's Texas Statutes, Article 4620.
furnished herself and her children. According to strict interpretation of the law, the community property is liable for the debts of the husband only, and since the wife's right to contract is limited by Texas law, even the provision making her rents and revenues subject to their debts is illusory.

Article 1064 is another of the statutes pointed out by the Attorney General that would or could affect the equal rights amendment. It pertains to the time allowed married women for redemption of property sold at a tax sale. While this statute causes no particular hardship, the phraseology is such that it places married women in the same category with infants and lunatics regarding extension of time for redemption of property sold under tax sale.

Similarly, Article 5535 pertaining to the Statute of Limitations for the commendement of personal actions of married women classifies minors, married women, prisoners or persons of unsound mind in the same grouping. It is difficult to conceive that the fine women of Texas have this ignominious rating. That they were placed there originally is revolting, but that they remain there in this enlightened age is beyond comprehension.

Again it is found that Article 7152 pertaining to rendition of property for tax purposes classifies minors, married women and idiots together.

21Ibid., Article 4623. 22Ibid., Article 1064.
23Ibid., Article 5535.
Articles 1299 and 1300, respectively, provide for a separate acknowledgment for married women in the conveyance of their separate property and homestead. Articles 6605 and 6608 set out the requirements of the separate acknowledgment and its form. The Texas law provides:

No acknowledgment of a married woman to any conveyance or other instrument purported to be executed by her shall be taken, unless she has had the same shown to her, and then and there fully explained by the officer taking the acknowledgment on an examination privately and apart from her husband; nor shall he certify to the same, unless she thereupon acknowledges to such officer that the same is her act and deed, that she has willingly signed the same, and that she wishes not to retract it.24

Basically, this has been the law of Texas since its passage in 1841, with amendments in 1846. The law was apparently enacted in the belief that a wife might be in such fear of her husband that she would not express an unwillingness to the transaction in his presence, but would do so out of his sight and hearing. Preservation of the requirement grew out of the idea that the conditions which prompted it continued to exist. These included the married woman's disabilities under the common law, the fact that she was subject to her husband, and her lack of education and business as well as experience. The separate examination was meant to give a wife who might be in fear of her husband an opportunity to protest the transaction, and the requirement for an explanation by the officer taking the acknowledgment

24 Laws of the Republic of Texas Passed at the Session of the Fifth Congress (Houston, 1845), pp. 144-145.
assumed the wife's ignorance and inability to understand the trans-
action.  

Supposedly, the separate acknowledgment protects the married
woman from coercion on the part of her husband to sell her separate
realty or the homestead.  It is possible for anyone who has a good
reputation, can sign his or her own name and make bond, can become a
notary.  As a matter of practice, a majority of acknowledgments are
taken by notaries public, most of whom are not lawyers and are
incapable of explaining fully the effects of complicated conveyances.

No separate acknowledgment with its attendant explanation is
required in order for a single woman to pass title to her property.
Certainly there is nothing in the mere act of marriage that deprives a
married woman of the mental capacity to understand her own convey-
ance and would place her in the position of requiring an explanation
from a notary who has never seen the instrument before the moment she
walks into the notary's office.

In the case of Vanderwalk vs. Matthaei, 176 S.W. (2d) 304, the
Supreme Court of Texas states that "the separate acknowledgment
statute has been productive of much more injustice and wrong than it
has prevented."  Strict adherence to the letter of the law has opened the
door to fraud.  The Texas reports contain a large number of cases in
which the husband and wife have sold land which was either the separate

25 Texas Legislative Council, op. cit., p. 64.
property of the wife or the homestead and have later sued and recovered
the land by proving that the wife's acknowledgment was not taken
strictly according to the provisions of the law.\textsuperscript{26}

All notaries are supposed to keep a record of each transaction.
The majority of them do not do so. Often, years elapse and with no
one to prove otherwise the married woman is entitled to recover her
property although it works untold hardship on the purchaser.\textsuperscript{27}

Section 177(a) of the \textit{Probate Code} provides that on the death of
either of the partners to the marriage the survivor who qualifies as
community administrator is entitled to administer the entire com-
munity estate except that the executor of the estate is entitled to
administer the community property which was under the management
of the deceased spouse.\textsuperscript{28}

The husband has complete control and management of the com-
munity property during his lifetime, which means that on the death of
the wife he may continue to administer her one half of the community
property just as he did during her lifetime to the exclusion of her
executor. The wife has no such control during the husband's life-
time; she cannot control his one half community property and such
control passes to the husband's executor. At the time this provision
was written into the bill, the Legislature frankly stated that it was

\textsuperscript{26} \textit{Texas Legislative Council, op. cit.,} p. 67.

\textsuperscript{27} \textit{ibid.,} p. 69.

\textsuperscript{28} \textit{Vernon's Probate Code, Sec. 177(a).}
placed there because women did not have business ability to manage the community estate. 29

With the high percentage of working women holding responsible positions, the thousands of educators and legions of trained women who are rearing families, Texas women have amply proved their intelligence and ability. This latter provision of the Texas Probate Code seems totally unjustifiable. The equal rights amendment would obliterate this unjust discrimination against married women in Texas.

Section 199 of the Probate Code is equally discriminatory. This statute provides that a married woman who is appointed executrix, administratrix or guardian may sign the bond which the law requires either with or without the joinder of her husband. It also provides that such bond can be enforced only against the wife's separate property and that the husband shall be bound thereby only if he signs it. 30 If the husband is appointed executor, et cetera, there is no provision for the joinder of the wife in his signature. Yet the entire community is liable, including the wife's one half of the community property.

The situation in Texas regarding property laws seems ironical. Under the community property system as it is administered in Texas, the husband and wife each own one half of the community property, but the husband is given the sole management and control. This is the

29 Texas Legislative Council, op. cit., p. 65.

30 Vernon's Probate Code, Sec. 199.
case even though the community property is acquired by the wife, and he alone can convey it or give it away.

While the wife owns one half, she must die in order to exercise the powers of ownership. She can will her one half to anyone she pleases; but so long as she lives she cannot enjoy her one half except through the benevolence of her husband.
CHAPTER V

CONTRACT LAWS

Definition and Nature of Contract

The legal term for a contract is an agreement enforceable by law. Enforcement of good faith in matters of bargain and promise is among the most important functions of legal justice. The obligation created by contract is determined solely by the will of the parties; the business of the law is to give effect, as far as possible, to their plain intention.

Under the common law, married women were incapable of contracting in their own names. Since the existence of the wife was by fiction of law merged in her husband, she could make no contracts. Her sole power to make contracts at all was dependent upon his authority expressly given her to act for him or impliedly given by law for the purchase of such things as necessaries for herself and children. Of this Ocie Speer says:

While this fiction of unity was a creature of the common law, and is said to be not recognized by us, yet it is to this alone that all the disabilities of coverture are traceable. It accounts for her inability to contract with strangers, with her husband, her inability to make conveyances, and to sue and be sued. We have only in part forsaken it. By that fiction she could make no contract binding herself or her separate estate. In equity, however, she might bind her estate, but not herself personally. All her contracts, agreements, covenants, promises, and representations were regarded as void for the reason

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already stated, since the law has always required that there should be at least two parties to every contract, and the wife, not being sui juris, was not able to meet the requirement.  

It was evidently not the intention of the framers of the laws of Texas to adopt common law rules with reference to marital rights. For under the Spanish system of community property, the wife, who owned and controlled her separate property, could contract concerning it if she did so with the assent of her husband. This was the basis of the marital laws adopted in Texas. The married woman's disabilities concerning the power to contract in Texas has not been removed completely. The courts have followed a rather strict rule of construction as to the contractual powers of married women which reflects the common law heritage and adoption of the common law as the rule of decision. The "disability of coverture" is especially apparent in the matter of contractual powers of married women in this state.  

Analysis of Contract Laws that Could or Might Be Affected by An Equal Rights Amendment

The Attorney General's office refers to two closely allied contract laws. These laws are Articles 4623 and 4624, both of them pertaining to a married woman's right to contract for necessaries for

1Ocie Speer, op. cit., p. 195.
2Texas Legislative Council, op. cit., p. 46.
herself and children. 3 The former stipulates that neither the separate property of the husband nor the community property of both, other than the rents and revenues from the wife's separate property, shall be subject to debts contracted by the wife except for necessaries furnished by herself and her children. This contractual power is qualified in Article 4624 in that a person seeking to bind the wife by such a contract must show that the debt is in fact for necessaries and that it is reasonable and proper. A married woman in Texas thus becomes a legal hazard to businessmen. A man cannot be forced to pay for the expenses of his wife and children unless it can be proved that these expenses were for "necessaries" and that "they were reasonable and proper expenditures."

Regarding the matter of "necessaries" Ocie Speer says:

What is deemed a necessary for one family might not be such for another, and still a luxury for a third. A proper consideration of the circumstances of each transaction, including the condition and surroundings of the parties, aided by common sense, is the only guide in determining questions of this character. 4

But the judge wrote this before the days of modern appliances and television and expansion of credit as we know it today. "Charge it" is the sesame to the treasures easily obtained from the modern department store and anything from the baby's bassinet to the baby grand is sent home for trial. "Keeping up with the Jones's" has created "necessaries" the worthy judge never dreamed of. If our legislators

3Vernon's Texas Statutes, Articles 4623 and 4624.

4Ocie Speer, op. cit., p. 206.
today were as canny and shrewd as the framers of the constitution, they would call a special session to have the law amended. For jurors and judges are hard to convince that draw-drapes and electric dishwashers are "necessaries," and the bills for such items are hard to collect. Unless the wife has separate property which can be attached, the bill can go unpaid, for neither the husband's separate property nor the community property are subject to the debt.

Article 4616 as amended by the 55th Legislature in 1957 has been discussed at great length in Chapter IV. While the amendment grants the wife the right to contract, it is by and large the same type of grant existing in Article 4626 and the objections to it are the same as to this most discriminatory statute of all.

Article 4626 pertains to the procedure available for a married woman desirous of having her disabilities of coverture removed. Under this law, called the Texas sole trader statute, a married woman, with the consent and joinder of her husband, may initiate a court proceeding to be declared a feme sole for mercantile and trading purposes. After the decree is entered, she may contract and be contracted with and sue and be sued in her own name, and her contracts and obligations become binding upon her. All her separate property, not otherwise exempt from execution, becomes liable for her debts.

Vernon's Texas Statutes, Acts 1957, 55th Legislature, Article 4616 as amended.

Ibid., Article 4626.
This law requires that a married woman who wishes to engage in a business for herself and has the means with which to purchase or establish such an enterprise, must first apply to the district court to have her disabilities of coverture removed and her husband must sign the application. She must set out in her application the causes which make it advantageous to her to be declared a feme sole for trading purposes. The law states that at any time in term thereafter, the court may hear the petition and evidence regarding it. If it appears to the court that it would be to the advantage of the married woman applying, the court will enter a decree declaring her a feme sole for mercantile or trading purposes. After the entering of the decree, she may contract and be contracted with and sue and be sued in her own name.

The above law which was passed in 1911 has had few changes made. An amendment in 1937 substituted the district court of the county in which the married woman desired to transact business for that of the county in which she was a resident and made a few changes in phraseology. 7 Prior to 1911 and the passage of Article 4626 married couples were forced to resort to the subterfuge of divorce if they for any reason wished to separate their property. If they wished then to live together and enjoy each other's companionship, they could do so under common law rules of marriage. 8

7 Texas Legislative Council, op. cit., p. 76.
8 De Beque vs. Ligon, 292 S.W. (2d) 157.
It is doubtful that the adoption of Article 4626 has contributed much toward the preservation of the institution of marriage. The causes of divorce are many, but a substantial number of them can be traced to economic factors. Many women supplement their husband's income by working. A great number of them spend their lifetime as employees, whereas if the law permitted them they could be in business for themselves. Society looks with disfavor upon divorce and the act of seeking a writ of femme sole is allied closely to divorce in the minds of many.

Consequently, the trader statute has done little toward freeing the married women of Texas. Although a woman has her own funds and although operation of her own business would not involve the community property or make it liable, the law of Texas prevents her from going into business. She is prevented from investing her own money in enterprises that should be her own prerogative to choose, or using it in any way except to squander it unless her husband joins her in the enterprise. The only alternative is to go before the court and expose her knowledge of potential investments. She is required by law to state her reasons why removal of disabilities would be advantageous to her. As a result, she is more often than not forced to divulge information regarding potential lucrative investments. By the time the court has declared her a femme sole the opportunity to purchase the land, lease or building in which she intends to invest has passed. Other persons who have the freedom to contract avail themselves of this information she has been forced to reveal. By the time her
disabilities are removed someone else has purchased or gained title to the property. If she withholds the information and falsifies, she is guilty of perjury. She faces a penalty of a prison sentence.

One married woman who moved from an eastern state where she had operated a garment manufacturing business proceeded to establish a similar business in Texas. When she started negotiations, she was informed that she would first have to have her disabilities of marriage removed. She exclaimed, "Why I have never thought of marriage as a disability -- I have always thought it was kind of nice."9

The State of Texas is seeking new businesses. They are overlooking the potentialities of industry and business operated by women. Altering the trader statute or, better still, granting women equal rights with men would encourage this type of business. The trader statute is an infringement on the rights of the individual. Operating a business under it is difficult. This was pointed out in the case of J. B. Hirshfield and Company vs. Evans. In the opinion rendered, the following statement is made:

The Legislature having the right to confer sole management, control, and disposition of the wife's separate property on her, had also the right to prescribe the conditions and restrictions . . . . The circumstances under which the wife may become a femme sole being prescribed, the rule of implied exclusion obtains.10

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9Texas Federation of Business and Professional Women's Clubs, The Court of Public Opinion, p. 2.

A married woman in Texas cannot become a member of a partnership without compliance with Article 4626 because a co-partner in a mercantile enterprise is a merchant who must possess the elements of competency of a trader. Whether the wife seeks to become a business partner of her husband or of another woman who is a fema sole, the difficulties are the same. They exist even when a married woman, joined by her husband, seeks to become the partner of a third person. The wife who seeks to create a partnership by investing her separate funds is giving the co-partner the right and power to control the income from her separate funds. This income under the Texas law is community property.11

The married woman’s citizenship rights are challenged by Article 4626. As a citizen she should have the freedom to locate and operate a business wherever she chooses. But under this statute she can petition the court for this right to transact business only in the district court of the county where she wishes to transact business. If her business expands or becomes one that affects any or all of the remainder of the state, she would have to file a petition in each of the district courts of the state where she wished to do business.12

The Texas courts are already overburdened with litigation, and Article 4626 adds to this burden. Separate and apart from the injustices the statute imposes upon married women, it is an

11Texas Legislative Council, op. cit., p. 71.
12Vernon’s Texas Statutes, Acts 1937, 45th Session, Texas Legislature, Article 4629(d).
unnecessary evil to the taxpayer. The courts are supported by the taxpayers and increases in litigation add to the financial burden of the taxpayer. Repeal of the law, and granting women equal rights with men, would lessen the strain on the courts of Texas, the costs of their operation and lighten the burden of the taxpayer or release tax money for purposes much more important and necessary.

Untold benefits are to be derived from the abolition of this archaic concept of marital legal disabilities. If the internal affairs of the husband and wife were left to their own management, common fairness through equality would be gained, and the simplicity and certainty of the law would be established.\textsuperscript{13}

\textsuperscript{13}Cie Speer, \textit{op. cit.}, p. v.
CHAPTER VI

MISCELLANEOUS LAWS

A change in the legal status of Texas citizens can be effected only by alterations in any of three media: first, through the expression of the sovereign will of the people by means of the Constitution, either state or national; second, by means of laws passed by the Legislature and approved by the Governor, and if national, passed by the Congress and sanctioned by the President; third, through judicial decisions, a type of law entirely absent under the Spanish system, but one which is of great importance since it is through these court decisions that many modifications of the status of women have come. For that reason court interpretations of certain laws have been cited in the preceding chapters and will be cited in relation to the miscellaneous laws that pertain especially to married women in Texas.

Marriage Age, Jury Service, Wife's Right to Dispose of Community Property

Article 4603 pertains to the age at which males and females may marry. The law stipulates that a boy can marry at sixteen and a girl at the age of fourteen. ¹

It was this law the sponsor of the Lane amendment referred to in urging the passage of the amendment to Article 4614. He stated that he

¹Vernon's Texas Statutes, Article 4603.
wishes to prevent fourteen-year-old girls from marrying in order to control their own property. The amendment stipulates that a wife, if twenty-one years of age or over, may obtain sole management of her property and other rights by filing a duly acknowledged statement with the County Clerk of the county in which she resides.

While statistics on the number of fourteen-year-old girls who own separate property and marry are unavailable, it seems safe to assume that they are in a minority. For these few, the rights of mature, capable women who do own their separate property and are equally capable with men to negotiate and contract, are waived. It would seem a more intelligent approach to the matter of girls marrying at fourteen would be to repeal the statute that permits marriage at such an immature age.

Article 2135 pertains to jury service exemptions. This article was passed in 1914 and was later amended by the 55th Legislature to include women as jurors. The original statute provided many exemptions for men, and when the amendment was passed and women were included as jurors, numerous exemptions were provided for them as well. The few exceptions that differ from those exempting men in certain occupations and professions that pertain exclusively to women

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2Texas Federation of Business and Professional Women's Clubs, op. cit., p. 3.

3Vernon's Texas Statutes, Article 4614.

are those such as women who have legal custody of children under sixteen years of age, nurses, wives of husbands summoned on the same jury panel and spouses of attorneys in practice. It is difficult to see how the equal rights amendment would affect this law adversely.

It has been previously asserted that much of our law is based upon judicial decisions. This is true of Articles 602-606 of the Penal Code which are listed as laws that could or might be affected by the passage of an equal rights amendment.

These laws stipulate that the wife may dispose of community property only when her husband has abandoned her and a sale of the property is necessary. In the case of Lasater vs. Jamison, the court has declared that one dealing with a married woman in connection with the community property, deals with her "at his peril," for "... He knows that the law does not vest in the wife the power to convey the community property unless the husband has abandoned the administrations thereof, deserted his wife, and reduced her to the necessity of providing for herself."6 This latter rule the court has declared to be "for the protection of the delinquent husband."7

In the event the husband disappears and his whereabouts are unknown for at least twelve months, the wife may then have full control of the community property upon filing a petition in the District Court.

5 Penal Code, Articles 602-606.

6 Lasater vs. Jamison, 71 Tex. 203.

7 Clements vs. Ewing, 71 Tex. 370; 9 S.W. (2d) 312.
and obtaining an order from the court authorizing her to control the property. Where the husband is insane or has permanently abandoned his wife or refuses to join in a mortgage or conveyance of transfer, the wife may then act independently, but must apply to the District Court for an order to deal with a specific piece of property and must give satisfactory proof that the transaction will be advantageous to her, as though she were a ward.

Criminal Laws

Article 532 of the Penal Code prohibits traveling women dancers from performing in a tent or temporary structure and provides a fine of $100 to $500 and confinement in jail of not less than 30 days nor more than one year for violation. Since this is a free country, a woman should have the right to determine where she wants to perform in the course of pursuing her occupation without restraint. Man and wife dance teams associated with circuses and carnivals are affected by this law in Texas. The number of married women dancers, however, most certainly is not great. A change in the law of Texas would hardly work adversely for them nor for the multitude of women who are not engaged in that occupation.

8 Penal Code, Articles 602-606.

9 Vernon's Texas Statutes, Article 4617.

10 Penal Code, Article 532.
Article 32 of the Penal Code provides that a woman who commits an offense by persuasion of her husband shall in no case be meted a death sentence, and that in cases not capital she shall receive only one half the statutory punishment for the crime committed. This law reflects the influence of the common law. It rests mainly upon the supposition that the wife's acts are the result of the superior will and influence of the husband. Discrimination here actually favors the wife, but a crime is no less serious because it is committed by a married woman. It is generally recognized that all people should be held responsible for their own acts.

Article 1220 provides that homicide is justifiable when committed by the husband upon one taken in adultery with his wife. Since there is no penalty for justifiable homicide, the husband upon proving the facts may go unpunished. On the other hand, should the wife under the same circumstances kill her husband's paramour, she may be charged with and found guilty of murder. It seems that a killing which is murder when perpetrated by the wife should also be murder when committed by the husband.

Article 402 pertains to allegations of ownership of the separate property of a married woman or her husband in a criminal

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11 Penal Code, Article 32.

12 Cite Speer, op. cit., p. 370.

13 Penal Code, Article 1220.
indictment.\textsuperscript{14} This, it seems, would not be materially affected by the equal rights amendment.

Section 109(a) of the \textit{Probate Code} pertains to the parental guardianship of a minor. The father and not the mother is considered the natural guardian of their children and he is legally entitled to be appointed the guardian of their estate.\textsuperscript{15} The father determines the course of the education of the child, his opinion rules in the care of its health, his consent is required for the child to work, his judgment dictates in the matter of its punishment, even against the mother's protest. His consent alone authorizes the issuance of a marriage license to a minor child.\textsuperscript{16} If the mother has views different from the father's, she must yield legally, though she may have a deeper understanding of the child's nature and needs.

\textbf{Divorce Laws}

\textit{Article 4629} stipulates the grounds for divorce. In Texas they are conspicuously unequal for women and men. Provided that neither is insane, a divorce is granted on the basis of one of the following causes: cruelty, mental and physical; conviction of a felony subsequent to marriage, with imprisonment in the state penitentiary if

\begin{itemize}
\item \textsuperscript{14}\textit{Penal Code}, Article 402.
\item \textsuperscript{15}\textit{Probate Code}, Sec. 109(a).
\item \textsuperscript{16}Ibid., Article 405.
\end{itemize}
conviction was not made on the basis of testimony presented by the spouse; and living apart without cohabitation for three years.\textsuperscript{17}

The familiar phrase "cruelty, mental or physical" has peculiar connotations in Texas. If the husband abuses his wife for suspicions of indiscreet conduct, she cannot use this as a cause for complaint, but must "mend her ways." On the other hand, so long as the husband treats his wife with kindness and consideration at home, whatever he does away from home must be tolerated by the wife. Of this, Ocie Speer says:

\dots\ it can make no difference what his conduct toward the outside world may be, no court will hear her prayer for separation. To the world he may be an outlaw, a brigand, the "vilest of the vile," yet he would not be guilty of the excesses defined in the statute.\textsuperscript{18}

Judge Speer quotes Judge Lindsay's ruling that "unless she is so affected, in body or in spirit, duty enjoins forbearance and submission, and the fostering of the spirit of the poet:

\begin{quote}
'I know not, I ask not, if guilt's in the heart, I but know that I love thee, whatever thou art.'\textsuperscript{19}
\end{quote}

Regarding this discrimination, particularly with reference to the matter of adultery, Judge Brown of North Carolina said,

\begin{quote}
One act of adultery on the part of either party to the marriage is ground for divorce in every state of this union except Kentucky and Texas, and no injurious results have followed
\end{quote}

\textsuperscript{17}Vernon's\textit{ Texas Statutes, Article} 4629.

\textsuperscript{18}Ocie Speer, \textit{op. cit.}, p. 738.

\textsuperscript{19}Schreck vs. Schreck, 32 Tex. 590.
in those states which repudiated the fallacy that public policy requires such discrimination between husband and wife.20

In the State of Texas, the rights of the husband and wife to the custody of their children are equal if there are no extenuating circumstances. Where there are no children, the community property may be divided as in the case of death. The court, however, may make such provision as it deems essential for the support of the wife or children in case they exist, or an invalid husband. If necessary, it may place separate property or community property in the hands of trustees, the rents and profits to be applied to the maintenance and education of the children or support of the wife.21

Unless a divorced wife has children or others living with her to make her the head of a family, she cannot hold her interest in the homestead allotted to her exempt from her debts.22

Until recently the Texas courts have held that a married woman in Texas cannot sue her husband for injury done to her or her property in an action to compel him to support her or her children. Article 4639(b) as amended by the 56th Legislature in 1959 now makes provision for maintenance and support of minor children without the necessity for divorce.23

20Prendergast vs. Prendergast, 146 N. W. 225.

21Butler vs. Butler, 265 S. W. (2d) 415.

22Bahn vs. Starcke, 89 Tex. 203.

23Vermont's Texas Statutes, Acts 1959, 56th Legislature, Article 4639(b) as amended.
Article 1984 provides that the husband and wife shall be sued jointly for debts contracted by the wife for necessaries and for expenses which she has incurred for the benefit of her separate property. However, Articles 1985 and 1995 provide that while the husband shall be joined as a defendant in suits against the wife for her separate debts no personal judgment shall be rendered against him. The joinder of the husband is necessary even though the wife had had suit instituted against her before marriage if she thereafter marries before judgment is rendered. Even though divorce proceedings are pending and the husband and wife are living apart, the husband must be joined in any suit against the wife.

Labor Laws

Labor laws that have been enacted in the State of Texas apply to both married and unmarried women. Legislation limiting the hours of work and setting up conditions of employment for women was designed to protect them. It is singular, however, that in Texas, these statutes specifically provide that the restrictions shall not apply in

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towns of 3,000 population or less. The laws are discriminatory in that respect that their application is regional. Another objection to the labor laws is that in some instances employers are reluctant to employ women if special arrangements must be made for their comfort and convenience. From a health standpoint, safe, sanitary and healthful working conditions are as essential to men as to women and the requirement should be made for both sexes.

Articles 5173-5180 pertain to the protection of female employees. Most of them make provisions for the maintenance of healthful conditions of employment. Sanitary surroundings, lighting, safety precautions, rest room facilities and numerous requirements that are accepted today for both men and women wherever they are employed are included in these statutes.

Articles 1567 and 1568 of the Penal Code prescribe penalties in the event immoral conditions exist on the premises where females are employed. The law states that in any establishment where five or more persons are employed, all or part of whom are females, the employer is forbidden to permit any influence or practice or condition that would be injurious to females. It could hardly be argued that the health and safety of a father and husband is immaterial to his family,

27 Penal Code, Articles 5173-5180.

28 Ibid., Articles 1567 and 1568.

29 Ibid., Articles 1567 and 1568.
or that protection of his morals is not as important to his family and the entire community as protection of the morals of a female employee.

Article 5172A pertains to working hours for women in certain lines of employment. The law prohibits women from working in certain industries for more than nine hours in any one calendar day nor more than fifty-four hours in any one calendar week; in a few designated industries women are prohibited from working more than eleven hours during any twenty-four hour period and not more than sixty hours per week. None of these provisions apply to men. Consequently, men often receive preference in employment.

The law does not limit the number of hours a woman may work for different employers. The limitations placed upon some employers with regard to the number of hours women employees can work has forced many women to hold down two jobs in order to have sufficient income to meet their needs. Women should have the same freedom to contract with employers as to their hours of work and compensation as men. With the existing laws, the industrial status of women citizens in Texas is not legally the same as that of men.

*Ibid.*, Article 5172A.
CHAPTER VII

SURVEY OF EFFORTS TO CHANGE LAWS

Review of Changes to Date

The removal of barriers to women's participation in the function of government and to the exercise of individual freedoms by married women have, in view of their comparatively recent subjective status, been rapid. Yet the goal of women's complete emancipation from the handicap of obsolete laws and equal standing with men, in Texas, has not been accomplished.

The belief in certain basic doctrines of the democratic faith was affirmed by nineteenth-century Americans. One basic belief was the acceptance of a common law which was capable of being changed and developed to meet expanding human needs; another belief was in the rights of the free and responsible individual.¹

The Seneca Falls Convention of 1848 reflects this spirit of the century. Women were gradually being released from the restrictions upon them by this general acceptance that the common law was capable of being changed and that women were free and responsible individuals. While women still suffer numerous minor disadvantages, the fundamental rights have largely been secured. The dependence of women

under the common law has been almost entirely obliterated by statutory enactments in all states other than Texas.

Volume II of the 1942 edition of Texas Jurisprudence contains a photographic reproduction of Article 110 of the Ancient Customs. It pertains to "Community Between Persons Married, of What Goods and Day." It is based on the laws of Urban III, who was made Pope in 1185 and those of Honoré the III, who held the papal seat from 1216 to 1229. Of this document, the editor of Texas Jurisprudence makes this comment: "Note the striking similarity of this Communante de Biens - this prototype - and the Texas Community Act . . . ." That was written in 1942 and to paraphrase a recent popular song "There's been few changes made."

In Texas, the Act of the Republic of January 20, 1840, was the first legislative definition of woman's status, particularly regarding property. The constitutional provision of 1845 attempted to define and distinguish between separate and community property. "The succeeding constitutions of 1861, 1866 and 1876 contain the same provisions as did the constitution of 1845, and such has continued to be the fundamental definition of the wife's separate property . . . . The community estate especially is a creature of the statute."  

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2 Texas Jurisprudence, p. 50.

3 Ibid., p. 76.

4 Texas Legislative Council, op. cit., p. 11.
Many of the gains Texas women have made in their struggle for equal status with men have been through Federal regulation. One of these gains pertains to citizenship.

Until within the last quarter of a century the marriage of a woman to an alien deprived her of her American citizenship. A federal statute dealing with the effects of marriage upon citizenship, as adopted in 1931, provides that a woman who is a citizen of the United States shall not cease to be a citizen by reason of her marriage. Thus women were placed in the same position as men with respect to citizenship.

The franchise, granted to Texas women, was not derived directly from the state but from the Federal government. An early attempt to secure the franchise was made in 1876. During the constitutional convention that was held in Texas that year, a section declaring for women's suffrage was offered and passed by the Committee on State Affairs. It subsequently died in the process of adoption of the constitution. The Nineteenth Amendment to the Federal Constitution conferred upon the women of the United States equal suffrage. Texas, the ninth state to ratify the proposal, was also the first southern state to do so. Tennessee, on August 15, 1920, was the thirty-sixth state to ratify the Amendment. Their ratification fulfilled the requirement of

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5 The Code of the Laws of the United States of America, Supplement VII, (Washington, D.C., Dec. 7 to June 16, 1933), Title 8, Sec. 9, p. 81.

6 Journal of the Reconstruction Convention, 1st Session (Austin, Texas, 1876), pp. 245-246, 577-580.
the approval of three fourths of all the states, and the Amendment, known as the Anthony Amendment, became a part of American law.\textsuperscript{7}

The right to hold office was settled shortly after the matter of suffrage had been decided. The question arose over the eligibility of Miriam A. Ferguson to hold the office of Governor of Texas. The ruling of Judge Greenwood of the Supreme Court that Mrs. Ferguson was eligible set a precedent that since that time has not been challenged.\textsuperscript{8}

After the matter of suffrage was settled and that of holding office had been decided upon, the right to serve on juries became the next issue. This right was obtained by the individual states. In 1953 the Fifty-Third Legislature of Texas passed an amendment which gives women the right and duty to serve on juries in Texas. The amendment was submitted to the people for referendum and was voted upon favorably in November of that year.\textsuperscript{9}

An amendment to the state constitution was passed in 1957 which qualifies women to serve in the militia. Married women are not excepted. The amendment was passed by the Fifty-Fifth Legislature as an emergency and it became effective May 10, 1957.\textsuperscript{10} The vote on

\textsuperscript{7}Vernon's Texas Statutes, Article 2955.
\textsuperscript{8}Dickson vs. Strickland, 114 Tex. 176; 265 S. W. 1012.
\textsuperscript{9}Vernon's Texas Statutes, Acts 1955, 54th Legislature, Article 2133 as amended.
\textsuperscript{10}Ibid., Acts 1957, 55th Legislature, Article 5766 as amended.
this amendment is interesting. It was passed by unanimous vote in both the House of Representatives and the Senate.

The principle of educational equality has been present throughout the organization of the public schools of Texas. President Lamar advocated public education and made a definite appeal for its support in his first message to the Congress of the Republic. At this early date, the foundation for the present endowment of public education in Texas was laid,11 The leading institutions of higher learning are open to both sexes with two exceptions. The State Agricultural and Mechanical College is restricted to men and the Texas Woman's University is restricted to women.

No profession or occupation is legally forbidden to women in Texas. They practice law and medicine, hold high positions in banks and many women are managers and owners of a variety of businesses and industries. Many own and manage ranches throughout the state. The teaching profession in the elementary and secondary schools is monopolized by women.

When it is remembered that less than a hundred years ago women were virtually ostracized if they attempted any kind of occupation outside the home, their participation in political and civic affairs unheard of, the changes that have taken place seem substantial. Yet, in spite of all the freedom granted in every sphere--legal, industrial, civic

and educational, Texas legislators have been reluctant to remove the shackles that bind the married women of the state to certain ancient tenets that still survive.

In regard to property, the Spanish law of conveyances prevailed until the adoption of the common law in 1856. Few changes were made, however, until the Act of 1841. This act was the first legislative requirement as to the married woman's deed or rather the acknowledgment of it. Although this statute was amended in 1879 with a few changes in phraseology, it remains basically the same to the present day.\(^\text{12}\)

Despite attempted modifications, the definitions of separate and community property have remained the same in Texas for over a century. An act passed in 1913 gave the wife management of her separate property, within certain limitations, and the management of the community property was divided between the husband and wife. Since that time there have been numerous changes and revisions, but the wife's status has not been materially improved. Her personal earnings—the reward of her labor, skill and industry—become a part of the community property and are under the husband's control and sole right of disposition.\(^\text{13}\) It was hoped that the amendment to Article 4614 in 1957 would change the wife's legal status. It has been pointed out in a previous chapter that the amendment fails to do so. In regard to a wife's right to enter into business, this statement is found in Texas

\(^{12}\) *Texas Jurisprudence*, p. 242.  \(^{13}\) Ibid., p. 95.
Jurisprudence: "It is well-nigh impossible for a married woman to engage in a mercantile enterprise with success."

The review of amendments and interpretations of the ancient law adopted in 1846 in the preceding chapters is of necessity cursory. Basically, so far as a married woman's freedom to enjoy the same rights as all other citizens, the law still restrains her. She has no contractual powers except under certain conditions, her separate property is not hers to dispose of as an individual, her earnings become a part of the community property and thereby is managed by her husband. It is of no value to her except when she dies --she may will her one half of it. The married woman's right to engage in free enterprise in Texas is restricted. She is not credited with having sufficient knowledge to know what she is signing if she wishes to dispose of community property. She cannot sue her husband for injuries committed against her or compel him to support her or their children except in an action for divorce or obtaining permission to sue through filing her intentions with the County Clerk. She owns one half of the community property and her earnings are included as such, but she is not a necessary or proper party to suits concerning it, although she is bound by the judgment.15

The men of Texas guaranteed equal legal rights by Article I, Section 3 of the Texas Constitution. In 1959 a dedicated body of women

14 Ibid., p. 267.

15 Texas Legislative Council, op. cit., pp. i-iv.
went before the Texas Legislature requesting passage of an amendment
to the constitution guaranteeing equal rights to women. Their efforts
were thwarted by the Senate Committee on Constitutional Amendments.
And so, even today, parts of the archaic law of a Pope in the twelfth
century still govern over three million women in the State of Texas.

Analysis of Objections to Change

One of the most frequent questions asked when the subject of
equal rights for women arises is "What are the objections to granting
equal rights to women?" Perhaps the most plausible answer is stated
(although not in context) by Eugene Adams:

... The most insidious foe to human freedom is stubborn
conservatism which refuses to change things even when
they stand most patently in need of change ... 16

Stubborn conservatism may be attributed to the sex mores which
define marriage. They cover all the relations of men and women both
out of and in the marriage relationship.17 Woman's position was first
defined by the mores of society, and later laws were enacted to
strengthen and enforce them. The opposition to change is based on
the old set of mores defining woman's roles around the home, and
legislation cannot find standing ground except on existing mores. If,
through the process of education and propaganda, the folkways and
mores are sufficiently altered, then positive legislation will be

16 Eugene T. Adams, et al., The American Idea (New York,
1942), p. 263.

17 William Graham Sumner, Folkways (New York, 1906),
pp. 55-57.
simple. Tied in closely to the mores is the influence of Blackstone's Commentaries and the heritage of religious concepts concerning women's inferiority which have been visible throughout the entire course of progress in the struggle for equality. These concepts and many other arguments were used at the public hearing on the Legal Rights Amendment which was held by the Senate Committee on Constitutional Amendments on February 24, 1959.

One of the objections voiced at the hearing was that the present laws of Texas protect women, and the Equal Rights Amendment would destroy that protection.

The many inconveniences and hardships, financial burdens and insulting innuendos resulting from the marital laws of Texas display a considerable ambivalence to this statement. All single women and those who are married upon being widowed are singularly able to protect themselves without these peculiar machinations of the law written in the name of protection. The labor laws which apply to all women restrict women rather than benefit them. Aside from these laws, the state is indifferent to the welfare of a woman unless she is married. It seems that the situation should be reversed if women need this protection. Those who are alone in the world might need the

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19 Flexner, op. cit., p. 229.
protecting arm of the law. Upon marriage a husband should serve in that capacity. If, as in the case of the separate acknowledgment requirement, the wife is to be protected from her husband, then Texas husbands are a separate and distinct species--no other state has such a law.

Opposition to the amendment was voiced because its passage would entail changing too many laws at one time. Yet in recent years the Probate Code repealed about 250 laws at one time; the Corporate Code changed over 1,000 laws by its passage. In this connection it was stated that long standing property titles would be affected and perhaps upset by this amendment. Under present laws the husband and wife retain title to their own separate property. They have joint title to community property. The only difference the equal rights amendment would make would be that the wife would have management and right to dispose of her portion of the community property which she does not have under existing laws.

Another objection discussed by the committee members referred to the bank accounts of husbands and wives. Article 4622 provides that funds on deposit in any bank or banking institution whether in the name of the husband or wife is presumed to be the separate property in whose name they stand. It has as its primary purpose the protection of banks and does not supplant presumption that property acquired during marriage is community property. 21

Some of the senators questioned the affect the amendment would have on income tax laws. The 1948 Federal Revenue Act permits married persons to divide the tax burden on family income. It is presumed that some of the committee members questioned the affect the equal rights amendment would have on filing a joint income return. That is optional, and under Federal law husbands and wives are permitted to file alike in every state of the union.

Another objection expressed at the hearing was that the amendment would interfere with the husband's management of his own business if he were in business for himself. The husband now conducts the business, which is supposedly community property, as he sees fit. The law would not alter that necessarily, but would give the wife the same privilege to engage in enterprise without going to the expense and inconvenience of having her disabilities of coverture removed.

Some of the senators feared that the amendment would deprive a wife of the advice and counsel of her husband. This is of course absurd. In any happy marriage, the partners have mutual respect for each other's judgment and ability. There is no law that can prevent a woman from asking and receiving advice from her husband.

Another objection voiced by some of the committee members was the Equal Rights Amendment would permit women to attend Texas Agricultural and Mechanical College. Women are not prohibited by law from attending this school. The regulations promulgated by the regents of the college determine admission.
Much concern was displayed over the effect of the Equal Rights Amendment on the management of community property. The basic principle of community property law is equal legal ownership by husband and wife regardless of whether it is acquired by either husband or wife. Since the amendment states that equality under the law shall not be denied or abridged because of sex, this basic principle of community property could not possibly be destroyed or changed by the equal rights amendment. The Texas Legislature has provided by statute that the husband shall have the sole management and control of the community property, and the courts have held that this gives him the power to sell or give it away without his wife's consent. The one exception to this is proof of attempt to defraud the wife when they are on the verge of divorce. The principle of sole control resting in the husband is not a part of the Texas Constitution; it was established by a law passed by the Texas Legislature. It is not basic nor necessary to the community property system. The Equal Rights Amendment would make joint ownership a reality rather than the fiction that it is today. It can hardly be maintained that a wife owns one half of the community property when she can be deprived of her portion without her consent by the action of her husband; she can will it to another, but she cannot use it for her own benefit except through the beneficence of her husband. 22

22Hermine Tobolowsky, Community Property and the Equal Legal Rights Amendment (Fort Worth, Texas, 1958), p. 1.
The time-worn "heritage of religious concepts" was offered by some of the senators as an objection to the amendment. The Equal Rights Amendment is a contradiction of the Bible, it was said. The matter of settling any question by people's interpretation of the Bible is never satisfactory. The matter of an injunction in the Bible that men should dominate women is best answered by John Mill:

We are told, that St. Paul said, "Wives, obey your husbands"; but he also said, "Slaves, obey your masters!" It was not St. Paul's business nor was it inconsistent with his object, the propagation of Christianity, to incite any one to rebellion against existing laws . . . . To pretend that Christianity was intended to stereotype existing forms of government and society, and protect them against change, is to reduce it to the level of Islamism or of Brahminism. There have been an abundance of people, in all ages of Christianity, who tried to make it something of the same kind; to convert us into a sort of Christian Mussulmans, with the Bible for a Koran, prohibiting all improvement. But they have been resisted, and the resistance has made us what we are, and will yet make us what we are to be. 23

If any of the precepts of the Bible are to be accepted as a guide, then certainly Isaiah, 31:9 must not be ignored: "Rise up, ye women that are at ease; hear my voice, ye careless daughters; give ear unto my speech." 24 The amendment could not affect personal relationship. The passage of it would not prevent the husband from being head of the household.

The matter of a movement to write a new Constitution was discussed at the hearing. It was suggested that it would be a waste of


time to pass the Equal Rights Amendment for that reason. There is no assurance that if such an unexpected eventuality is accomplished, that it will be adopted. In the meantime, while it is written and adopted, women must go on incurring financial loss and undergoing hardships and injustices because of existing laws.

Proponents of equal rights for women are frequently confronted with the assertion that some women oppose such an amendment. There has never been in the entire history of our country any law or constitutional amendment passed which someone did not oppose. There is no more reason for women to be unanimous on legislation affecting them than there is to expect other groups to be unanimous.

The opposition of some women is easily understood because they have been brought up under the illusion that the Texas laws are especially protective and to their advantage. Concerning this belief, although in another context, Mill wrote:

> When we put together three things - first, the natural attraction between opposite sexes; secondly, the wife's entire dependence on the husband, every privilege or pleasure she has being either his gift, or depending entirely on his will; and lastly, that the principle objects of social ambition, can in general be sought or obtained by her only through him - it would be a miracle if the object of being attractive to men had not become the polar star of feminine education and formation of character. 25

It is to be hoped that the polar star of feminine education and formation of character will always be an attraction to men. The progression of civilization depends upon it. But the New Woman of the South and of

Texas is shedding the old clinging vine image of attraction. It has been learned that the man whose wife is a clinging vine is apt to be like the oak in the timber that is found wrapped in vines—dead at the top. The modern wife is a companion and partner to her husband. Her intelligence is her charm. With that intelligence has come a recognition of equal rights that should accompany this type of companionship. The thinking women of Texas believe in and want legal equality.
CHAPTER VIII

COMPARISON OF TEXAS MARITAL LAWS WITH THOSE OF OTHER COMMUNITY PROPERTY STATES

The framers of the Texas Constitution did not adopt all of the principles with reference to marital laws along with the body of the common law. The western and southwestern states tend to give more attention in their constitutions to the branch of law which affects the status of husband and wife than do those states of the north and east. These states, having comparatively recent constitutions, devote more space to laws pertaining to this subject than do those with older constitutions. ¹

In 1848 the first changes were made in the states where the common law prevails regarding women’s rights. New York and Pennsylvania were the first to grant a married woman the right to hold property, to buy or sell, to sue or be sued, to make a contract or a will, to carry on business in her own name, to possess the wages she earned, and to keep her children in case of divorce. ² By the turn


²Anthony and Harper, op. cit., IV, 455.
of the century virtually all of the common law states had made these changes in their constitutions.3

There are seven other states which have the community system of ownership between husband and wife as to property acquired by their joint efforts during marriage. These states are Arizona, California, Idaho, Louisiana, Nevada, New Mexico and Washington.4

It is quite impossible to point out in this discussion all of the similarities and dissimilarities in the statutes regarding this subject in so many states. It is rather the purpose to show that Texas has been negligent in amending her laws in comparison with other states who came into being under the same circumstances and under the same type of civil law.

Separate Property Laws

The matter of separate property laws in Texas has been discussed in Chapter III. It is interesting to note that only in Texas is the joinder of the husband necessary to the encumbrance or conveyance of the wife's separate property.5 It will be remembered that the 1957 Amendment to Article 4614 would have removed this necessity had it not been for the Lane Amendment. Under the existing law, the married woman in Texas, if she is over twenty-one years of age, may

3Ibid., pp. 452-464.

4Texas Legislative Council, op. cit., p. 90.

5Ibid., p. 97.
go before the County Clerk in the county where she resides and declare her separate property and obtain control thereby, but the law failed to stipulate whether or not her husband's signature is necessary when she makes this application. Otherwise, if she wishes to mortgage or sell her separate property, she must obtain her husband's signature. This is also true if she wishes to dispose of her stocks and bonds. The only exception is if her husband abandons her or becomes insane.

In Louisiana a married woman may undertake responsibilities and obligations the same as any other responsible person. In no case does the law require that her husband join her in management or disposal of her separate property. Likewise, in California, Idaho, Arizona and Nevada, the law provides that in no case shall any act, contract or obligation of a married woman concerning her separate property require the authority of her husband or of the court to give it validity. In New Mexico, the wife is given express power to convey her separate property to the same extent and in the same manner that the husband deals with his separate property. The same situation prevails in Washington.6

The California law does stipulate that the wife's separate property is liable if the debts held against the community estate were contracted as necessaries while living together. Nevada and New Mexico have similar laws—both of them requiring that in the event of

6Ibid., pp. 97-98.
the husband's infirmity or the absence of community property, the wife must support him out of her separate estate. 7

In Idaho, the separate property of the wife is not liable for the debts of the husband. The wife is liable for her own debts whether they were contracted before or during marriage. However, she is free to contract regarding her property with the same degree of freedom accorded her husband. 8

It is singular that the laws of Texas impose upon married women restrictions that are not required of any other citizen in the United States. They are peculiarly segregated as incapable and untrustworthy of conducting their own affairs and managing their own property although in many instances they have shown unusual ingenuity and ability in accumulating it. Once they take the marriage vows their capabilities become limited.

Community Property Laws

The community property laws in the other seven states are quite similar to those of Texas with the exception of Nevada. Here the husband has entire control of the community property. In both Nevada and New Mexico provisions favor the husband when he is the survivor and as to testamentary power over the community property. 9

The law in all of the community property states favors the husband, giving him the full management of it. So long as he is capable and does not desert her, the wife has no power of control, and

7Ibid., p. 99.  8Ibid.  9Ibid., p. 90.
debts contracted by her are not chargeable to the community property except for necessaries.

In Texas, Louisiana and Nevada, community property may be disposed of without the signature of the wife. In the other community property states, the wife's signature is necessary. An exception is made in Texas if the property is the homestead.

Rents and revenue from separate property of the wife in Arizona, California, Nevada and New Mexico may be retained as separate property. In Idaho, Louisiana, Washington and Texas, such rents and revenue become community property. In Texas, the wife has by implication the management of her personal income and the rents and revenue from her separate property.¹⁰

In addition to rents and revenue, the wife's separate earnings usually become community property in all of the so-called community property states. The law in Washington is in a way an exception. It permits the wife to retain her personal earnings as separate property if there is a specific agreement between her and her husband to that effect. Otherwise, her earnings become a part of the community.¹¹ In Texas, that is not possible. In the case of Davis vs. Davis, Judge Vincent Stine, in regard to the matter of agreements regarding separate earnings in Texas, said:

_We are of the opinion that in order for the personal earnings of the wife, which were earned month by month, according to the testimony in this case, to be changed from that of the community estate to her separate estate, it would_

¹⁰ibid., p. 93. ¹¹ibid., p. 94.
be necessary for the husband each month, as the salary was
earned, to make a gift of the same to his wife. 12

The husband has control of the community property and can dis-
pose of it. Hence, he has the right to dispose of his wife's earnings
since by law they become community property. 13 In the case of
Rowlett vs. Rowlett, the Court of Civil Appeals ruled:

The right of the husband to dispose of the community
estate except for the purpose of defrauding the wife is an
absolute one while the marriage exists. While that relation-
ship continues if not under a disability - as lunacy for
instance - he may expend their joint estate ever so unwisely,
may squander it in "riotous living" or may give it away to
objects meritorious or without merit, yet she cannot be
heard to complain. It is only when he disposes of it for the
purpose of defrauding her that the law will afford her
relief. 14

In Texas, and in a few other states, a married man can bestow
generous gifts on his paramour, wine and dine her, at his wife's
expense, and the wife can do nothing about it. Her earnings belong to
the community estate and he has the disposal of it at his command.

Sole Trader Statute

Restrictions on the married woman's right to engage in business
for herself in a few other states are similar to those in Texas. Two
others, California and Nevada, require some type of court proceedings
for removal of disabilities before a married woman can engage in

13Texas Legislative Council, op. cit.
separate business. There are two common law states, Florida and Pennsylvania, that also have similar laws. With the three mentioned above in the community property group, there are five so-called "free trader" statute states in the nation. Two others, Georgia and Michigan, require the husband's consent if the wife is to enjoy the earnings from her business.  

The requirement of the husband's signature for removal of disabilities of coverture is restricted to Texas only. However, a declaration of necessity is required in both California and Nevada. This is not the case in Texas although the wife is required to state her reasons and to show that it will be advantageous to her to have her disabilities removed.

In California, any creditor of the husband may contest a married woman's application to become a trader. The insolvency of the husband is regarded as the reason, and creditors have the right to oppose the application on grounds that it is an attempt to defraud them.  

The Nevada statute is similar to that of California, and here the wife must declare that not more than $500 of the community property is to be used in the conduct of the wife's business. The wife becomes responsible for her children and the husband is not responsible for her

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15 Texas Legislative Council, op. cit., p. 100.

16 Ibid.
debts unless he consents to them in writing. His separate property is not liable for any debts she contracts.\textsuperscript{17}

That the community property system must have disadvantages is apparent by the actions of four of the common law states—Michigan, Nebraska, Oklahoma and Oregon. These states adopted the community system for a short while in the late 1940's, principally for the purpose of dividing the burden of federal income taxation between husband and wife. Laws in these states permitted the wife to control her personal earnings and any other community property to which she held title. Other community property was under the husband's control. After passage of the 1948 Revenue Act permitting married persons to divide the tax burden on family income, all four states repealed their community property laws.\textsuperscript{18} Both North and South Dakota have now abolished all marital property laws. All property acquired by either husband or wife becomes that person's separate property, and none of it is owned in common.

\textbf{Wife's Right to Sue and Be Sued}

In the event it is necessary to bring suit to recover her property, the married woman in Texas is barred from doing so without her husband joining her, unless she goes before the County Clerk in the county where she resides and files a duly-acknowledged statement of

\textsuperscript{17}\textit{Ibid.}, p. 101.

\textsuperscript{18}\textit{Ibid.}, p. 7.
her intentions. That is, provided she is twenty-one years of age.

Texas is the only state that requires this procedure of married women. California law provides that a married woman may sue alone in all actions. The same is true of Idaho and Louisiana. Arizona permits the wife to sue for her separate property although it requires that she be joined by her husband in other suits. In Nevada, a married woman may enter into an agreement with her husband that she may sue and be sued in general actions, but the law permits her to sue alone when her action concerns the homestead or her separate property.

Washington law provides that where action involves community property the husband is a necessary party to the suit. New Mexico's rules of civil procedure provide that a married woman may sue and be sued as if she were unmarried with certain exceptions.

In Texas, the husband has the right to sue or fail to sue in connection with recovery of community property. Of this, Ocie Speer says:

... We have seen that, although the husband is authorized to sue for and recover the wife's separate property, if he fails or refuses to do so, she can sue in her own name. But it is not so with reference to their community property. The husband... is the sole custodian and manager of the major part of the estate; he alone can convey it; he is the only person authorized to bring a suit for its recovery. The wife is not ordinarily authorized to bring such suits... ordinarily the wife is neither a necessary nor a proper party to such suit... Mere refusal of the husband to bring the suit will not authorize her to do so, nor is it every separation of the parties that will confer such authority. If it were so, she might then,

\[19\text{Ibid.}, \text{p. 98.}\] \[20\text{Ibid.}, \text{p. 96.}\]
at will, deprive the husband of his statutory right of control of the community property, and by her own wrongful conduct obtain an advantage she would not otherwise have.\(^21\)

The law in Texas provides that a married woman may be sued in the county where her husband has his domicile. Thus, if a woman is separated from her husband, she may not even know that she is being sued. Although the husband must be joined in the suit he is relieved from personal liability.\(^22\) He may permit judgment to be taken against his wife without even notifying her that suit has been filed against her.

Only the outstanding contrasts and similarities between Texas marital laws and those of other community property states have been pointed out in this discussion. Generally, the marital property laws in the other community property states are very similar to those of Texas. However, most of the other community property states have modified their laws. It was pointed out in a previous chapter that Texas is now the only state in the union which requires separate acknowledgment of a married woman’s signature on deeds and other instruments in private conference apart from her husband. Ordinarily, a married woman in Texas cannot sue alone concerning her separate property, nor can she sue for her portion of the community property. Texas is one of three states requiring some type of court proceedings for removal of disabilities before a married woman can engage in a

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\(^{21}\) Ocie Speer, op. cit., p. 628.

\(^{22}\) Vernon’s Texas Statutes, Article 1985.
separate business. Texas is the only state that requires the husband's signature on this application to the court. Only in Texas is the joinder of the husband necessary to the mortgaging or sale of the wife's separate property.

From the data presented in this study, it appears that the legal status of women in Texas is inferior to that of women in any of the other community property states.
CHAPTER IX

CONCLUSIONS

In the preceding chapters of this study have been presented a review of the history of women's struggle for equal rights in Texas. A general history of the evolution of women's status has been presented. A statement of Texas marital laws that could or might be affected by the passage of an equal rights amendment in Texas has been reviewed and analyzed. A survey of the objections to granting equal rights to women has been made. There has also been presented a comparison of the marital laws of Texas with those of other community property states. It is the purpose of this chapter to point out certain obvious conclusions resulting from the material reviewed in the preceding pages, and to set forth the major reasons why the existing laws that discriminate against married women in Texas should be repealed.

The issue in Texas revolves around a leading question uppermost in the minds of thinking people today. "Is it not a proper qualification that every human being is entitled to equal justice and freedom?"

It is a travesty that in America a large segment of the adult population is barred from manipulating their own property, the earnings from their own labor and the right to engage in business enterprises. The legal hair-splitting that has arisen over the marital
laws of Texas is beyond the comprehension of the average lay mind. An enlightened conscience for the rights of the married women of the state and a wholesome desire to simplify the marital laws should prompt the lawmaking power to abolish the archaic conception of marital legal disabilities and leave the internal affairs of the husband and wife to their own management.

Today, democracy is on trial in the world. Contending forces of communism and fascism and democracy are struggling for superiority in a great age of rising nations. They are contending for the political, economic and social control of millions of people who sooner or later must make a choice. Their economic dependence and survival demands their allegiance to one or the other of the established nations. If democracy is to appeal to these nations, it must first clarify its own position with regard to human rights. It will have little to offer if behind the facade of wealth and technological strength it hides a blight of injustice and suppression of the liberty which it expounds.

The image of democracy cannot be blurred if it is to appeal to other nations of the world. Nor can it endure in America in the face of other systems of government that are beckoning. The time has come for Americans to take stock of themselves. They must re-examine and interpret the meaning of democracy and make it a living principle by example and not by pretext. Like charity, democracy begins at home.

It is difficult to comprehend that in a country claiming the highest degree of civilization and boasting of freedom as its watchword, the law of the land ranks the wives, daughters, mothers and sisters with
idiots, lunatics and prisoners. Equally difficult to understand is the fact that the moral rights of many women to enjoy the same benefits of freedom of choice are denied by the law.

The apathy which prevails, especially among women, springs mainly from want of thought. They accept the formulated theories of woman's sphere as they accept the formulated theories of the orthodox religions into which they may chance to have been born. However, the intelligent and informed women are no longer willing to accept placidly the uncomfortable position in which the law places them. The dependence of women under the common law has been almost entirely obliterated by statutory enactments in other states. Texas has failed to keep in step with the progress of these sister states. It is time that Texans, men and women alike, banish their complacency and correct this flagrant violation of democracy that exists in the State of Texas. Texans have succeeded in creating throughout the nation and the world an image of magnitude, generosity and chivalry. To many in other parts of the nation and the world where the subjective state of the married women in Texas is known, the Texas stature is reduced.

Strong support for the passage of an equal rights amendment is manifested by the press. An article on this subject in the Dallas Morning News concluded with this statement:

\... The rights measure \... is in the form of a constitutional amendment. If both houses of the Legislature adopt it, it will be submitted to the voters for approval \... .

The Legislature should submit this issue to the people, even
though working out the equality that women now seek will bring many adjustments and require the amendment of many laws.  

From a different section of the state, there has appeared, in a newspaper, this statement:

Should women have equality with men under the laws of Texas? . . . Only recently were Texas women accorded the right to sit on juries. Further moves toward legal equality probably in time could be achieved by carrying the questions to the U. S. Supreme Court for review of the discriminatory laws against the Fourteenth Amendment's guarantee for "equal protection" under the laws. But initial recourse has properly been taken to the Legislature . . . . This is a fundamental democratic issue which the people themselves, including the increasing proportion of women voters, should decide. The Legislature would be well-advised to submit the proposed amendment to popular vote in the next general election.

It is frequently asserted that women do not want equal rights. It is also mentioned that the loss of certain privileges accorded women by present statutes, such as the protection that has been pointed out in preceding chapters, would outweigh the advantages of legal equality.

Actually, the women have never been asked. The story is frequently told that when Pundita Ramabai of India was in this country years ago she saw a hen carried to market with its head downward. This Christian method of treating a poor, dumb creature caused the heathen woman to cry out, "Oh, how cruel to carry a hen with its head down!" and she quickly received the reply, "Why, the hen does not mind it"; and in her heathen innocence she inquired, "Did you ask the hen?"

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The failure to secure justice thus far has not been due to lack of effort, but to the popular prejudice against woman's emancipation. Eloquent, logical argument on any question, though based on justice, science, morals and religion are as light as air in the balance with old theories, creeds, codes and customs.

In reading of the republics of Greece and Rome and the grand utterances of their philosophers in paens to liberty, one wonders that under such governments there should have been a class of citizens held in slavery. Our descendants will be still more surprised to know that the women of Texas, many who belonged to the most highly educated, moral and intelligent class in the state--women of position and wealth in their own names--were virtually in a slave class, as late as the middle twentieth century.

Women who say "we have all the rights we want," and men who insist that "the laws are framed for the best interests of women--to protect them," are recommended to make a study of Texas marital laws. Reforms of every kind have been inaugurated and carried forward by a minority, and this movement to obtain equal rights for women in Texas is not an exception. It will have to be gained for them by the foresight, the courage and toil of the few, just as all other privileges have been gained, and they will enter into possession with the eagerness and unanimity as has marked the success of others.
APPENDIX

REPLY OF THE ATTORNEY GENERAL TO THE COMMITTEE ON CONSTITUTIONAL AMENDMENTS

The Attorney General of Texas
Austin 11, Texas

Will Wilson
Attorney General

March 9, 1959

Honorable Bill Wood, Chairman
Committee on Constitutional Amendments
Senate of the State of Texas
Austin, Texas

Re: The effect of S.J.R. 5, proposing an amendment to the Constitution that equality of rights shall not be denied because of sex, on existing statutes.

Dear Mr. Wood:

In your letter of February 26, 1959, you advised this office that the Senate Committee on Constitutional Amendments passed the following motion:

"It is moved that the Chairman be directed to request the opinion of the Attorney General as to the effect of S.J.R. No. 5 in the event of its adoption upon the existing statutes and upon the rules announced by court decisions relating to or that will affect community and separate property rights, together with the changes, modification or amendments that will be required to comply with the proposed Constitutional Amendment. Also that such statutes and
decisions as may be affected be specified and that such opinion be accomplished with all deliberate speed."

The proposed Constitutional amendment reads as follows:

"Equality of rights under the law shall not be denied or abridged because of sex. This amendment is self-operative, but the Legislature shall make necessary adjustments in any laws which contravene its provisions."

Your request differs from the normal opinion request received from Legislative Committees which usually ask our opinion as to the constitutionality of proposed legislation pending before the Committee. In this request, the question is whether passage of the proposed constitutional amendment would repeal, alter, amend or otherwise affect existing legislation and that is largely a matter of legislative intent.

Since the proposed amendment does not define its terms and its purpose is set forth in a broadly stated abstract principle, a court, to determine the effect of the amendment on existing statutes, would first have to have before it a concrete fact situation in order to determine the nature of the right and equality, or lack thereof, allegedly abridged or denied.

The situation confronting this office in connection with the present opinion request, and indeed a number of requests received by this office, is analogous and for this and other reasons it has long been the established policy of the Attorney General not to write opinions on abstract questions of law absent specific fact situations and absent questions of constitutionality. We, therefore, cannot advise you as to what specific effect the proposed constitutional amendment would have on existing laws or statutes absent specific fact situations.

In an effort to be of such assistance as we can under the circumstances involved, however, we wish to call to your attention the following statutes which, among others, could or might be affected by the proposed amendment:

Section 109(a) of the Probate Code - pertaining to parental guardianship of minors.

Section 177(a) of the Probate Code - pertaining to community administration.

Section 199 of the Probate Code - pertaining to a married woman's qualification as an executrix, administratrix, or guardian.
Article 1064, V.C.S. - pertaining to the time allowed married women for redemption of property sold at a tax sale.

Articles 1299 and 1300, V.C.S. - pertaining to acknowledgments of married women in the conveyance of their separate property and homestead.

Article 1983, V.C.S. - pertaining to a married woman's suit to recover her separate property.


Article 2135, V.C.S. - pertaining to jury service exemptions.

Article 4603, V.C.S. - pertaining to the age at which males and females may marry.

Articles 4614 and 1299, V.C.S. - pertaining to the management, control, and disposition of a married woman's separate property.

Article 4619, V.C.S. - pertaining to a married woman's method of obtaining control of the community property where the husband has disappeared for a twelve month period.

Article 4623, V.C.S. - pertaining to liability of the separate property of the husband and the community property of husband and wife for debts contracted by the wife.

Article 4624, V.C.S. - pertaining to the husband's liability for necessaries for his wife and children.

Article 4626, V.C.S. - pertaining to the procedure available for a married woman desirous of having her disabilities of coverture removed.

Article 4629, V.C.S. - pertaining to grounds for divorce.

Article 5172a, V.C.S. - pertaining to working hours for women in certain lines of employment.

Articles 5173-5180, V.C.S. - pertaining to the protection of female employees.

Article 5535, V.C.S. - pertaining to the statute of limitations for the commencement of personal actions of married women.

Articles 6605 and 6608, V.C.S. - pertaining to the requirements of such separate acknowledgements.
Articles 6647 and 6651, V.C.S. - providing for the registering of a married woman's separate property.

Article 7152, V.C.S. - pertaining to rendition of property by married women.

Article 32 of the Penal Code - pertaining to penalty where a married woman commits an offense as a result of her husband's persuasion.

Article 532 of the Penal Code - pertaining to traveling women dancers.

Articles 602-606 of the Penal Code - pertaining to wife and child desertion.

Article 1220 of the Penal Code - pertaining to justifiable homicide.

Articles 1567 and 1568 of the Penal Code - prescribing penalties in the event immoral conditions exist on the premises where females are employed.

Article 276 of the Code of Criminal Procedure - prohibiting married women from becoming a surety on a recognizance or bail bonds.

Article 402 of the Code of Criminal Procedure - pertaining to allegations of ownership of the separate property of a married woman in criminal indictments.

The desire of the supporters of this amendment to be free of certain outmoded restrictions on their business affairs is understandable. Because of a firm belief in the separation and division of powers doctrine this Administration has consistently abstained from injecting itself into questions of policy in the formulation of the law. We will, however, be glad to furnish the Committee, by testimony or otherwise, any information we might have on this subject.

Very truly yours

(Signed) Will Wilson

WILL WILSON

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