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CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY
AND THE LAW OF TEXAS 1840-1913

Rice University

Ph.D. 1980

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CONCEALED UNDER PETTICOATS:
MARRIED WOMEN'S PROPERTY
AND THE LAW OF TEXAS
1840-1913

by

KATHLEEN ELIZABETH LAZAROU

A THESIS SUBMITTED
IN PARTIAL FULFILLMENT OF THE
REQUIREMENTS FOR THE DEGREE

DOCTOR OF PHILOSOPHY

APPROVED, THESIS COMMITTEE

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May, 1980
ABSTRACT

CONCEALED UNDER PETTICOATS: MARRIED WOMEN'S PROPERTY AND THE LAW OF TEXAS 1840-1913

by

Kathleen Elizabeth Lazarou

Central to this study is the argument that the development of the law of Texas governing married women's property rights from 1840 to 1913 reflected a national rather than an isolated and indigenous process. Texas' first marital property rights act in 1840 and subsequent legislation were components of a national movement of the first half of the nineteenth century by American states to clarify, codify, and reform the property rights of married women, the so-called Married Women's Property Acts. Like other states' acts, the 1840 Texas statute initiated a series of piecemeal changes in the property rights of married women which concluded with more substantive alterations in the twentieth century.

Despite Texas' Spanish-Mexican heritage and its subsequent adoption of a version of the Spanish community property system, its marital property statutes resembled in substance the marital property acts of those states
whose legal bases was the English common law. By protecting the property of married women from irresponsible and dissolute husbands, Texas' acts functioned in the same manner as those states' acts which derived solely from Anglo-American custom. In the most fundamental way, Texas' laws like other states' laws constituted a family support scheme or a social welfare policy for a society unaccustomed to collective solutions.

Shared or diffuse socioeconomic needs produced common responses among the states despite legal cultural differences. Those needs prompted lawmakers to define the rights, remedies, and responsibilities of family members. Texas' comparatively conservative response was a variation of a national pattern and from that perspective was a miniaturization of a national experience.
To my parents
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INTRODUCTION

Central to this study is the proposition that the development of the law of Texas governing married women's property rights from 1840 to 1913 reflected a national rather than an isolated and indigenous process. \(^1\) Texas' first marital property rights act in 1840 and subsequent legislation were integrants of a national phenomenon of the first half of the nineteenth century, the so-called Married Women's Property Acts. Through statutory law, Texas' and other states' lawmakers attempted to clarify and reform the property rights of married women. Like other states' acts, the 1840 Texas statute initiated a series of piecemeal changes in the property of rights of married women which concluded with more substantive alterations in the twentieth century.

Despite Texas' Spanish-Mexican roots and its subsequent adoption of a version of the Spanish community property system, its marital property statutes resembled in substance the marital property acts of those states whose legal substratum was the English common law. By protecting the property of married women against irresponsible and dissolute husbands, Texas' acts functioned in the same way as those states' acts which derived solely from Anglo-American custom. Shared or diffuse
socioeconomic needs produced common responses among the states despite legal cultural differences. From that perspective Texas' laws cast a variation of a "national scheme" and in that sense symbolized the nation writ small.

The idea of this study emerged from the literature on women that the Women's Liberation Movement of the last decade generated. The professional legitimacy of women's history was intensely questioned by various sectors of the scholarly community. The law served as a useful analytical tool because it incorporated women into a traditional or professionally-acceptable area of inquiry and offered substantive documentation to a subject suspect of being otherwise "soft."

A maiden investigation of the American experience revealed that dramatic changes in a woman's legal status occurred when she married. These changes were acutely evident in her proprietary or civil capacities. As a single woman she could own property and enjoy fully all the concomitant rights of property ownership, the rights to contract, to sue and to be sued. Upon marriage she fell subject to the old English common law doctrine of coverture which treated husband and wife as a single legal entity.

Husband and wife were one; however the husband was the one. By virtue of marriage he acquired ownership and
control of her property. She in turn lost her proprietary freedoms and became dependent upon his beneficence, a mere moral obligation to support her and her children. By expunging her legal identity, marriage for a woman amounted to a civil demise.

The doctrine of coverture was rooted in ancient feudal custom which accorded male members of a family line, as a military expedient, absolute control of the family domain. Feudalism excluded women from military duty, and women acquired no property rights. As a concept in which to ground family law feudal custom proved purely fictitious. Implicitly that custom assumed that a husband was naturally affectionate and caring and that he administered his family's assets vigilantly. It was a grotesque assumption where a husband was a scoundrel because for the wife the common law doctrine provided no remedies.

Through the invention of a special trust, the equity courts in England and in the United States offered a married woman an approximate right to contract to protect her wealth or, more accurately, her father's wealth, from a wasteful husband or son-in-law. This legal remedy only partially met the more diffuse need to secure families against improvident husbands and fathers. It was a tool for the rich because it was a complex and ultimately expensive process. For families of moderate
means, equity was no recourse. Some jurisdictions had no equity courts.

During the first half of the nineteenth century the American states embarked on statutory reforms of their marital property laws which had been essentially judge-made law. The reason for these changes remains unclear. Ostensibly, the Married Women's Property Acts contemplated the protection of a married woman's property. They either expanded her civil rights, immunized her property against her husband's creditors, or both. Most likely these acts expanded and codified the tentative efforts of earlier legislators and judges to align the law with social practice. On that assumption, the acts reflected traditional legal processes where the law ratified rather than spearheaded social change.

As legislators attempted to synchronize law with reality, timeless perceptions of a woman's family role clashed with social needs. To reconcile these differences lawmakers engaged in a balancing act to broaden the property rights of married women without upsetting conventional family patterns. The result was a series of fragmented rather than comprehensive reforms. Why these changes occurred and what they signified in one state are the heart of this inquiry.

Since the definition of marital property rights has been a prerogative of the individual states, the
selection of Texas as a case study was practical. Its exotic legal heritage made it an especially appealing subject. In general, literature on the legal status of Texas women lacks historical perspective. Save for a couple of outdated theses, most of the literature consists of law journal articles, hornbooks and similar technical material. Addressed to practicing lawyers and judges, these texts are narrow in scope.

Historical writing attending to Texas' marital property laws does so cursorily. Since such laws reflected a confluence of cultures, these works tend to treat them in an isolated manner, implying that they were idiosyncrasies in the development of American marital property law. In some instances these works summarily portray Texas' marital property laws as inherently fairer to married women than those states' laws founded on strictly Anglo-American custom because Texas laws incorporated the Spanish community property principle which recognized husband and wife as equal owners of property acquired during marriage. Closer scrutiny of the Texas experience dispels these impressions.

In this investigation diaries, newspapers, personal papers, the stuff of traditional historical research, were inadequate and in most instances offered no assistance at all. Consequently, this study reduced to that of the bare bones of legal history—constitutions,
statutes, case law, and the attending documents such as legislative debates and minutes, committee reports, constitutional convention proceedings and court records. For Texas, court cases below the appellate level were irretrievable or nonexistent. Since the Texas Supreme Court cases were organized and accessible, this study relied solely upon them for its analysis of the judiciary. Necessarily these cases represented only a portion of the private actions in Texas that underwent public review.

Employing the formal law as the only frame of reference subjects this study to the criticism that it is "law office" history or that it neglects social practices because the law itself fails to do so. The value of the formal law as an analytical tool lies in its role as regulator of social behavior. In that capacity it represents a standard of a society's values or an institution about which those values cluster.

Litigation proceedings were valuable to this study because they represented that juncture where the formal law intersected with fact, manifesting the force of the living law. For this study court records revealed the degree to which a married woman's actual family position deviated from her legal standing, in turn projecting the internal contours of a family.

Within the narrow compass of the formal law,
configurations of a larger scheme emerged. Despite its Anglo-European lineage, Texas marital property law was an integral part of mainstream America. With other states' laws, Texas' marital property laws arose to respond to pervading socioeconomic needs. Common exigencies produced similar reactions, as Texas demonstrated beginning in 1840 with its rendition of a married women's property act.

After sharp controversy between advocates of a legal system based on the common law and those of a scheme founded on the civil or continental law, Texas legislators in 1840 hammered out an apparent compromise. In a single act they appropriated the common law of England, provided it did not conflict with state law, as the "rule of decision" for its courts and adopted an indigenous version of the Spanish community property system to govern the property rights of husband and wife. Where state law did not regulate, the courts in marital property suits applied the rigorous rules of the common law.

Adhering to Spanish tradition, Texas recognized a married woman's right to own property but not her right to manage or control it. Though a married woman retained ownership of or title to her lands and slaves, her husband through marriage gained control of them and of the community property of which she owned half. Subsequent
legislation in fulfillment of a constitutional mandate to define further the property rights of a married woman shifted the separate-community property boundaries but left the management provisions intact. Not until 1913 did the Texas legislature liberalize the law to allow a married woman a measure of control over her property and over a slice of the community. Where statutory construction was shoddy, the courts refined and consolidated rather than undid the handiwork of the legislators.

Unlike the common law, the Texas law, faithful to the Spanish system in its recognition of a married woman's right to own property, rendered a married woman a legal identity separate from that of her husband. In abridging a married woman's right to control property, Texas law, like the common law, denied her basic civil rights. To redress the imbalance or to dilute the concentration of powers in the husband, the 1840 statute protected a wife's property from her husband and limited its liability to essentials for herself and for her children. As the court cases demonstrated, only extenuating circumstances, such as death, divorce, abandonment, illness or other similar absences of a husband, activated a married woman's full civil capacities.

What emerged from these strictly legal retorts was more than a clarification of creditors rights, a
feminist's litany or a model of male oppression. Whatever prompted these laws, in the absence of any comprehensive support system, they comprised in the crudest sense a family maintenance scheme for a society unaccustomed to collective solutions. By sheltering a wife's property from her husband's creditors, the law offered a family a source of subsistence or security against a squandering husband. Enscconcing a married woman's property rights in the state's constitution beginning in 1845 demonstrated the importance of such guarantees to the body politic and in the most incipient way represented a general welfare policy.

Like other states, Texas, seemingly as a matter of socioeconomic expediency, sought to define the rights and obligations of husband and wife without toppling conventional family structure. As long as Texas lawmakers tenaciously clung to traditional perceptions of a married woman's family role, in reconciling custom with socioeconomic imperatives, they virtually assured a married woman an arrestment of her civil rights. Though less progressive in its resolution than those states that expanded a married woman's civil freedoms to secure her property against a thriftless spouse, Texas nonetheless tapped the rhythm of a broader social drift.

Paradoxically, these laws recognizing the legal identity of a married woman in an age that emphasized
individuality and self-reliance, represented in the simplest way the beginnings of public solutions to private misfortunes. In documenting a nineteenth-century community's experience in regulating one of the most private of affairs—a family—this study by probing a nethermost area of public law seeks to comprehend nineteenth-century American public policy-making and its subsequent development.
FOOTNOTES - INTRODUCTION

1 The title of this study derived from a speech by Abner S. Lipscomb to the 1845 Texas constitutional convention. See Chapter IV for the full quotation and its context.

2 For a discussion of the literature on the legal status of women in Texas and on the legal status of women in general, see the Bibliographical Essay to this study.
CHAPTER I

ENGLISH ANTECEDENTS

S. F. C. Milsom observes that generally societies have invented their constitutional, administrative, and political systems but have borrowed their system of private law from others.\(^1\) English property laws reflected the customs and practices of feudalism, which resembled that established by the Normans across the channel.\(^2\) According to R. C. van Caenegem, English feudalism, as a Norman import, was designed by the aristocracy, and it and a minority of free natives enjoyed it. The purpose of feudalism, he explains, was to maintain harmony among landowners and was not to serve the whole kingdom. Until the thirteenth century—two hundred years after the Norman invasion—the Norman and the Anglo-Saxon "nations" were separate. During that century, concludes van Caenegem, English law became "English" and "common" and distinct from continental law. Paradoxically, he notes, English common law, judge-made law based on custom and precedent, derived from feudal law which was created by kings and justices of continental origins; it was this mixed lineage that made the common law peculiarly English.\(^3\)
Feudalism effected major changes in the legal status of women. Prior to the Norman invasion, under Anglo-Saxon law, women were independent property holders. When a woman married, she became an equal partner with her husband and was entitled to half the family property. As a widow, she was an independent citizen. Feudal law emphasized the need to preserve family estates by keeping them under male dominance to protect them from plunder. For women, this practice excluded them from inheriting property. Feudalism hinged on military service, and this was performed by men.

Key to the feudal system was the principle of seisin. It meant holding land to gain a freehold interest in exchange for homage and fealty or military protection. Since men constituted the military, the system excluded women from property ownership, and the common law, a derivative of that system, upheld that practice which amounted to political-economic reduction. Subsequently the customs and practices of feudal England became the foundation for the marital property laws of modern England.

Under the Normans a married woman upon the death of her husband no longer received half of the family property but one-third. This was her dower or her interest in her husband's estate. It was more profitable for feudal lords who benefited from wardships to grant
the children of a deceased husband more of the family estate than that awarded to his widow. During marriage the third could be diminished but not augmented. Norman law offered virtually no protection for dower.8

A husband controlled all of his wife's property and could give away or sell her dower. She could not interfere. His death provided no relief; if during the marriage, he had disposed of her property despite her protests, after his death she could not reclaim it. Obtaining the dower upon the death of her husband was a troublesome affair. Her heirs could challenge her claim.9

Norman law stripped a married woman of the right to will property. As a widow she could not dispose of her husband's property by will without having obtained his consent before he died. A married woman was bound by her husband's wishes even after his death. The financially-precarious situation of a widow made remarriage attractive and supported a prevailing notion that women were either married or about to be.10

Changes which feudalism introduced into marital property laws were gradual. In the Domesday Book, a survey of English land authorized by William the Conqueror around 1086, women were found holding lands as widows and as married women.11 At least until 1127, women were found possessing land independent of their
husbands. This hybrid of Anglo-Saxon and Norman laws and customs which lasted through the beginning of the thirteenth century prompts Sir William Holdsworth to remark that the law of England during that time had not "yet made up its mind as to the position of married women." As the military tenure of land became custom and as feudalism matured, by the fifteenth century the abridged property rights of married women were entrenched in English law.

On the Continent the reverse occurred. As feudalism developed, the shackles which that institution placed upon the ability of married women to hold property began to drop away, and powerful widows or dowagers emerged. As English feudal law embraced more of the populace, becoming increasingly "common," feudal law in Europe remained operative largely among the landed nobility. The free peasants, who owned mostly moveable goods, adhered to customs and practices akin to those of the Anglo-Saxons.

In England, feudal principles became the axis for the common law doctrine of coverture. According to that doctrine,

. . . by marriage, the husband and wife [were] one person in law: that is, the very being or legal existence of the woman [was] suspended during marriage, or at least [was] incorporated and consolidated into that of the husband; under whose wing, protection, and cover, she perform[ed] everything; and [was] therefore
called in ... law-french a *feme covert* ... and her condition during her marriage [was] called *coverture.*\(^{16}\)

Though applicable to only the landed peerage originally, feudal principles, as the center of the common law doctrine, bound all English women eventually.

The legal status of women hinged on their marital status.\(^{17}\) With regard to property, the rights enjoyed between single and married women differed substantially.\(^{18}\) Single women, except in cases of primogeniture, occupied the same status as men. They could own and control property; they could contract, sue and be sued. Widows, observes Lois W. Banner, were freer than single or married women.\(^{19}\) Besides having the benefit of dower, they were no longer virgins.\(^{20}\)

Marriage altered radically the property rights of women. Upon marriage women could not freely acquire or dispose of property. The law either qualified or eliminated their right to own property, to contract, and to sue and to be sued. Suddenly the law forbade women to do after marriage what it allowed them to do before. Legally, marriage was for women an arresting experience. By granting husbands plenary control over family property, the law purported to keep family estates intact. The common law failed to provide remedies for families in the event of negligent, squandering, or infirm husbands. The protection that the common law supposedly afforded married women was
less than complete.

When feudalism crumbled away, its legal shell remained. The status of married women continued unchanged. As personal property began to assume as much value as real property, the unjust nature of coverture became patent. With the rise of mercantilism and capitalism in the sixteenth and seventeenth centuries, women of substantial means and their relatives expressed dissatisfaction with the property arrangements of the common law. They turned to the courts of chancery. These courts employed the principles of equity which comprised a body of law that grew alongside the common law.

Generally it supplemented or supplanted the common law as an exercise of the residual powers of the king to provide remedies that the common law could not. The chancery courts allowed a father or other relative of a woman to establish a separate estate through a premarital settlement or trust. The object was to prevent property left to a woman from passing out of the testator's or family's bloodline and into the hands of a greedy, inept, or bankrupt husband or into the clutches of his creditors. Property "settled on" women by their families actually protected their families' wealth rather than the women themselves.

Most of these trusts were short-term or caretaker trusts, which sought to protect weak members of families.
They were dynastic trusts because they tied property to family where property was not a marketable commodity. When capital and other assets besides land began to assume importance equity provided safeguards for "capital dynasties." 29

A wife's separate equitable estate arose in two ways. First, a wife agreed with her husband either before or during the marriage that any property she received by gift, bequest, or conveyance by him or another was her property. Equity recognized the agreement and treated the property as the separate property of the wife. If there was no trustee, the husband became her trustee. Second, a husband asked the court of chancery for ownership of his wife's personal property. The court granted the request provided he maintained his wife and children adequately. Essentially, he acted as a trustee for his wife's property. 30

Under the rules of equity, a married woman could hold property as a single woman. She could dispose of her separate equitable estate by will, gift, or conveyance, as long as the instrument creating the estate did not prohibit her from doing so. Though the instrument might not have granted her these powers, the courts upheld them as necessary to the trust. A married woman gained a rudimentary capacity to contract. It was limited to her separate estate. By contract, she could incur a debt
against her estate, but she could not bind her person. Unless such contractual powers were excluded in the creation of the estate, she could change that estate by contract though that contract would not benefit her estate or herself. She was free to do what she wished with her property, including the freedom to assume risk, something which the common law protected her from.\textsuperscript{31}

By invoking the principle that though a married woman could not hold property in her own right someone could hold it for her, equity courts permitted married women to possess property independently of their husbands. Through this judicial invention, the courts made law. According to the common law, that estate was still the property of the trustee. Under equity, the trustee had to manage it in conformance to the terms of the trust and to the wishes of the woman. For a woman, a trust was to offset the financial disadvantages of marriage. Upon marriage, a woman received her \textit{maratagium}, which was the dowry that her father presented to her at that time, and she received the right to support by her husband. There were no provisions in the common law or in equity that obligated a wife to maintain her husband under any circumstances.\textsuperscript{32}

What seemed a basic change in society's attitudes towards married women was actually a mechanism to protect the rights of those who endowed women with property. The
prejudices in the public sector toward women continued, and in the private arena the doctrine of coverture continued to apply to evidences, to torts, and to crime. The creation of a special trust served to buttress the prevailing notion that women were powerless. 33

Establishing a trust was complex and expensive, and only the rich could afford the legal talent or had enough property to make the process worthwhile. Women of modest means suffered the rigors of the common law. Creating a trust was a matter of economics and was, as far as the position of women was concerned, short on ideology. Equity was simply doing its job. 34

A popular theory holds that equity arose as a method of legal reform, that is, as a set of pliant rules to remedy the defects of the common law. 35 Milsom argues that during the Middle Ages, when equity emerged, there was no substantive body of law with obvious defects. He remarks that the idea that the common law was unjust would have been abhorrent to English jurisprudents. All failures of the common law, argues Milsom, were mechanical. They stemmed from a court's lack of jurisdiction or from a competent court's lack of proof. 36

Within this context, equity's role in the creation of a special trust for women is understood. As Milsom notes, the common law had not been "set in some almost salvage mould" while the growth of equity was "a symptom
of advancing civilisation."

Following good juristic principle, he observes, an equity court "obscured its vision of much human unhappiness." Not until the nineteenth century did changes occur in which all English women with property interests benefited. With ideological overtones, these changes attempted to eliminate the sources of "much human unhappiness."

When the English settled in the New World they brought as part of their legal baggage the principles of common law and of equity. But conditions in America differed significantly from those in England. These challenged hidebound ideas and institutions had tangibly affected the status of women. A sparse population and a sex ratio where men outnumbered women placed a premium on women. Communities needed women's resources for survival.

Women performed equally with men in contributing to the economic welfare of their families. They helped their husbands in trading or in farming or managed plantations or businesses with them. Some became substantial property holders. With the shortage of skills and of labor in general, with the abundance of land, and with the long absences of seafaring husbands, colonial American women were freer than their English counterparts. Need brought a rough form of social equality between men and women. Colonial laws, specifically marital property laws,
were generally unyielding in the face of social change.\textsuperscript{41}

Undoubtedly, as Emma Haddock writes, these settlers "received the impress of their surroundings."\textsuperscript{42} But their reverence for their laws and customs had far from what Haddock believes "melted in the clear sunshine of this new world."\textsuperscript{43} There were things that were simply not "better than the old."\textsuperscript{44} Such described colonial attitudes toward the legal position of married women.

Like the laws of the mother country, colonial laws recognized a wife's dower and guarded her personal items from her husband's claims. A wife could not contract except if her husband disappeared; the law treated her as a single woman and permitted her to contract, to sue, and to be sued. Her husband could squander her inheritance and could dispose of her personal earnings, and in the case of divorce, he received sole guardianship of the children. If he abused his powers, the family was helpless.\textsuperscript{45}

Unlike the English law, colonial laws upheld pre-marital contracts between a husband and a wife with respect to her property.\textsuperscript{46} After the Revolutionary War, states abolished primogeniture, and all of the children of a family regardless of sex secured a portion of the family estate.\textsuperscript{47} With this link in the feudal chain broken, women moved toward achieving legal equality with men. Colonial laws compared to the stern common law were soft.\textsuperscript{48} Colonial lawyers oftentimes did not understand the
complexities of the English law, and when they did not, they resorted to what suited the new conditions. The result was a relaxation of the common law.

American colonial laws governing married women were a mix of old and new elements. The laws varied from place to place, but the doctrine of coverture remained central to all of them. The doctrine of coverture was a feudal relic. In a sense so were colonial perceptions of women, and the laws faithfully reflected that tradition. Anglo-American laws of marital property recognized a husband as the head of the family on the assumption that he was the preserver and defender of his family and estate. The intersecting of new conditions with traditional values strained legal orthodoxy and placed women in an anomalous situation.

Although American colonial women, compared to their English contemporaries, enjoyed relative freedom, their legal positions were determined largely by their husbands', and the laws reflected this auxiliary role. Any seeming expansion of the property rights of married women represented expediency and not profound change in social perceptions of women. Given the central position which property occupied in America in relationship to family survival, the interests of women in it were scrutinized meticulously. As Nancy F. Cott remarked, "in a property-conscious society, which colonial communities certainly
were, a woman's power over property was at least compelling as the possibility of her soul's election to grace."

Equity was not available to all colonial women because not all colonial jurisdictions instituted it. Some jurisdictions abolished chancery courts, or the courts themselves withered away. Where such courts existed their jurisdiction was limited. Many places gave equity jurisdiction to the same courts that handled suits at common law. Simply, judges switched hats. Where the courts were distinct, different judges presided.

In colonial America as in England, trusts for married women were luxuries of the rich, such as prosperous Southern planters, wealthy merchants, and baronial farmers of New York. Although access to chancery courts were restricted in terms of personal wealth and of locality, the demise of primogeniture and the recognition of premarital contracts in jurisdictions lacking courts of equity reduced the need of women and their families for special trusts. These substitutes offered women with limited assets ways to protect their property. All women with property could capitalize on the improvisations of judges where legal precedent was unclear.

In general, the impact of the American Revolution on marital property laws was negligible. Many states abolished primogeniture. In 1787, Massachusetts acknowledged that "'sometimes... husbands absent themselves from
this Commonwealth, and abandon their wives...who may be thereby reduced to great distress" and enacted a law which gave deserted wives authority to petition the court for the right to sell land as if they were single.\textsuperscript{55}

Whether these changes were propelled by Revolutionary ideology is questionable. Evidence suggests that such changes continued pre-Revolutionary reforms that were sporadic, intensely local, and instituted for practical reasons.

After the Revolution as before, the doctrine of coverture remained firmly fixed in American family law and largely defined it. In Massachusetts, in the instance of a joint promise, where a party guaranteed to another a payment of money, the parties had to execute it together.\textsuperscript{56} In the case of a husband and wife where an outside party made a promise with the wife, the law did not recognize her position.\textsuperscript{57} Her legal existence merged with her husband's; he did not have to join her in the agreement because she was "'neither privy to the Contract nor the person to whom the Money [was] to be paid'."\textsuperscript{58} If that joint promise involved the husband, the wife had to join him regardless that she was a free white and he was a black slave.\textsuperscript{59}

Separation offered little reprieve from the harsh doctrine. Commenting on Massachusetts law, William E. Nelson noted that separated women who had acted singly,
who had entered business arrangements alone, or whose husbands had been gone for years and would probably not return, had no more liberties under the law than women living with their husbands. He observed that from 1780 to approximately 1830 women often turned to the courts to obtain freedoms commensurate to those enjoyed by single women. In Massachusetts, concluded Nelson, they were mildly successful. At times, the courts followed English law; other times they discarded it. Among the factors influencing their actions was the degree to which they grasped the complexities of English law and to which that law satisfied provincial needs.  

Marital property laws lagged behind social change, reflecting inaccurately the social position that married women actually occupied. Movement toward reform was perhaps acerbated by the nature of marital property laws themselves. Describing the status of married women as one of the "most difficult of all the problems of private law," Holdsworth observes that the law hesitated to "pry too closely into the relationship of husband and wife," which he terms "privileged." He believes that property laws were necessary where husband and wife owned property and when the marriage dissolved. These laws, he assures, were influenced largely by prevailing opinions of the family. The construction of such laws was, according to Holdsworth, fragile business. As he sees it, the
problem was,

...to draw the line in such a way as to preserve something for the wife and family without unduly fettering the powers of the husband; to protect the wife, and yet not give her and her property so ample a protection that third parties will be prejudiced.\textsuperscript{65}

Holdsworth speaks of England, but his analysis applies to America. Holdsworth describes the need to assign rights and responsibilities between husband and wife as a mechanism for protecting family property interests.\textsuperscript{66} The common law was deficient, and statutory law became the meager supplement. Specification of family obligations by statute strengthened the theory that a sense of mutual obligation among family members was neither natural nor normal.\textsuperscript{67}

As the economic and political forces of sixteenth- and seventeenth-century England unhinged traditional means of family support, producing the Elizabethan Poor Laws, economic and political changes in nineteenth-century America illuminated the inadequacies of the law in assisting families, stimulating a legion of statutes, the so-called Married Women's Property Acts, which attempted to define family relationships. The shifting political and economic sands of nineteenth-century America--growing regionalism, territorial expansion, urbanization, and industrialization--gave rise to laws seeking to protect families against the caprices of a highly fluid society.
Continuing a tradition firmly grounded in English precedent, these laws were the century's response to the need for a "social welfare policy" and constituted part of the rawest beginnings of the concept of "government assistance."68

Offering families mechanical solidarity, these laws emphasized the relationship of married women to property. Through these laws women became the pawns of a society confronted with pressures that tested timeless notions of the family and of the role of women. Lawmakers were caught between the push of new forces and the pull of traditional values, and the laws reflected the dilemma. The desire to accommodate change and at the same time to preserve conventional patterns precipitated half-baked solutions which perpetuated a class of citizens vested with an unconsummated body of civil rights.
FOOTNOTES – CHAPTER I


7 Ibid.


9 Ibid., p. 52. If the heirs challenged her claim she had to find someone to support her cause or to defend her rights in a duel.

10 Ibid., pp. 52-53.

11 Ibid., pp. 55-56.

12 Ibid.


15 Buckstaff, "Married Women's Property," p. 61. Buckstaff contends that French and German laws were never as severe as the English. Those laws, she adds, eliminated feudal disabilities after a relatively short time. England, she notes, did not alter its laws until the nineteenth century. Ibid., pp. 53-54; van Caenegem, Birth, pp. 96-97. Holdsworth believes that commoners, who owned mostly moveables, adhered to the principles of community property where husband and wife each owned half the property. But feudalism supplanted those practices. Despite the predominance of feudalism, commercial boroughs, as a matter of local custom, clung to the practices of community property. In those centers, married women, who were merchants, owned property and contracted. Holdsworth,
History, III, pp. 524-25. See also, Morris, Studies, p. 128.


20 Ibid.


22 Ibid.


24 Morris, Studies, p. 135.


27. Ibid.


34. Friedman, History, p. 185; O'Faolain, Not in God's Image, p. 229; Morris, Studies, p. 135.

35. A classic statement is presented by Friedman: "In the Middle Ages, equity courts had been a source of law reform. Equity boasted a flexible collection of remedies; hence it had often prodded and pushed the more lethargic common law toward rationality." Friedman,
History, p. 130. Holdsworth perceives equity as the antagonistic rather than the supplemental half of the common law. Equity, he argues, "developed in a spirit of direct antagonism to common law rules; and therefore the law...came to consist of two halves more than usually divergent." Holdsworth, History, III, 533.

36 Milsom, Historical Foundations, pp. 77-78. According to Milsom, not until after the political turmoil of the seventeenth century did equity assume "its modern aspect as an intellectually coherent system." Ibid., pp. 86-87.

37 Ibid.

38 Ibid.

39 Reference is to the marital property statutes that expanded the property rights of married women, mitigating some of the harsh effects of the common law. For background on these laws a good beginning is Lee Holcombe's "Victorian Wives and Property: Reform of the Married Women's Property Law, 1857-1882," in A Widening Sphere: Changing Roles of Victorian Women, ed. by Martha Vicinus (Bloomington: Indiana University Press, 1977).


41 Sinclair, Better Half, p. 84; Cobbledick, "Property Rights," p. 115.

43 Ibid.

44 Ibid.


46 Ibid.


49 Sinclair, Better Half, p. 83.


51 Nancy F. Cott, ed., Root of Bitterness; Documents of the Social History of American Women (New York: E. P. Dutton and Company, Inc., 1972), p. 7. In his article on widowhood in eighteenth-century Massachusetts, Alexander Keyssar lends support to the argument that economic expediency rather than ideology fostered the liberalization of the property rights of married and widowed women. Keyssar argues that the solutions to the problems of widowhood broadened the property rights of women, thereby offering independence and equality to women. Economic pressures gave widows control of property. In Massachusetts, women became important property holders and various kinds of property became increasingly meaningful. Keyssar observes that eighteenth-century Massachusetts contained a considerable number of widows who lacked control of property upon which they depended for sustenance. Since traditional means of supporting widows, such as remarriage or dower lands, were not readily available in this locale, widows resorted to other methods. These included taking over their spouses' business or having specific legal restrictions lifted. Alexander Keyssar, "Widowhood in Eighteenth-Century Massachusetts: A Problem in the History of the Family," in Perspectives in American History, ed. by Donald Fleming and Bernard Bailyn, VIII (Cambridge: Charles Warren

52 Friedman, History, p. 185; Kanowitz, Women and the Law, p. 39.

53 Friedman, History, pp. 220-22; Morris, Studies, p. 135.


55 Friedman, History, p. 185.

56 Nelson, Americanization, p. 75.

57 Ibid.

58 Ibid.

59 Ibid.

60 Ibid., pp. 8, 10, 103-4.


62 Ibid.

63 Ibid.

64 Ibid.

65 Ibid.

Eckhardt, "Family Responsibility," pp. 105-9. Though much of the law governing marital property rights was rooted in the common law, evidence supports the "deficiency theory." In a number of instances, statutes and charters filled in where the common law was inadequate. Statutory law regulated dower to a considerable degree. If a woman deserted her husband and lived in adultery, she lost her dower "'unless her husband be voluntarily reconciled to her'." 13 Edw. 1, ch. 34. Blackstone, Commentaries, Book II, Ch. 8, p. 130. Statute barred the widows of traitors from dower. 5 & 6 Edw. 6, ch. 11. Blackstone, Commentaries, Book II, Ch. 8, p. 131. Widows of felons retained their right to dower. 5 Eliz. 1, ch. 11; 18 Eliz. 1, ch. 1; 8 & 9 Wm. 3, ch. 26; 15 & 16 Geo. 2, ch. 28. Blackstone, Commentaries, Book II, Ch. 8, p. 131. By charter Henry I introduced a law that guaranteed a childless widow her dower and a widow with children her dower "'only so long as she live[d] chastely'." Cart. Hen. I, A.D. 1001. Blackstone, Commentaries, Book II, Ch. 8, p. 133. In 1217 and 1224 statute provided that a widow was entitled to her dower for one third of all the lands that her husband held during his lifetime. Hen. 3, ch. 7. Blackstone, Commentaries, Book II, Ch. 8, p. 134. Under Henry IV statute denied a woman dower in her husband's goods and chattels. P. 7 Hen. 4, chs. 13, 14. Blackstone, Commentaries, Book II, Ch. 8, p. 134. A charter under Henry I declared that a widow pay nothing for her marriage and that if she chose to remain unmarried, she would not be "'distrained to marry afresh'." She could not marry against the will of her feudal lord. To receive her dower, a widow had to remain in her husband's "'capital mansion for forty days after his death'." Blackstone, Commentaries, Book II, Ch. 8, p. 135. If a widow alienated her dower lands she automatically forfeited them. By suit the rightful heir could regain them. 6 Ed. 1, ch. 7. Blackstone, Commentaries, Book II, Ch. 8, p. 136.

Seventeenth and eighteenth century America followed the pattern. Different from dower, a wife's right to inherit her husband's personal property was, according to Morris, "universally defined by statute." He adds that the Parliamentary statute of 1671 provided that a wife have one third of her husband's personal property at his death or one half if there were no children. This law, he observes, was the model for colonial American statutes. Unlike dower, this legal contraption was a right of inheritance which operated on the husband's estate only after the payment of his debts or after the fulfillment of his bequests. Morris, Studies, p. 173. A 1787 Massachusetts statute empowered deserted wives to petition the court for the right to sell land, as if they were single, to prevent
impoverishment. Friedman, *History*, p. 185. Bloomfield notes that each colony had statutes authorizing married women to manage businesses or lands for the benefit of themselves or for their absent or infirm husbands as if they were single women. These sole-trader statutes allowed them to contract, to sue, and to be sued on behalf of the business. Bloomfield, *American Lawyers*, p. 96. A number of colonies, observes Bloomfield, copied the pattern established by the Elizabethan Poor Law of 1601 in constructing their family assistance statutes. Some, adds Bloomfield, went beyond English precedent. Massachusetts, New York, and others, included grandchildren in the list of relatives who were legally obligated to assume the costs of maintaining the unemployable poor. *Ibid.*, pp. 101-3.

68 The Elizabethan Poor Laws in a sense functioned in the same way that the statutes governing the property rights of husband and wife did. Both fulfilled social needs that the common law failed to meet; both attended to family rights and responsibilities. The poor laws not only established family responsibilities within the family but supplemented family obligations to support with external or public assistance. Both constituted "public assistance" measures. As Eckhardt cogently argues, the English Poor Laws responded to the failure of the common law to assign family duties, the very duties that the statutes governing marital property attempted to establish. For a discussion of the Elizabethan Poor Laws, see Eckhardt, "Family Responsibility," pp. 105-9. For the American versions, see Bloomfield, *American Lawyers*, pp. 99-105.
CHAPTER II

THE MARRIED WOMEN'S PROPERTY ACTS

Disturbed by a trend in the laws governing married women, Joel Prentiss Bishop in 1873 wrote in his legal treatise a commentary.

Into the unwritten mass [of common law]. . . there has been dropped down, now and then, a tiny island; and, of late years, islands have rained in groups, and almost in continents. The result has been, that unthinking persons. . . have come to consider the present law of married women as mainly statutory.¹

He referred to the Married Women's Property Acts, which were primarily an antebellum phenomenon that embodied not only changes in form but in substance. By expanding the property rights of married women, these statutes weakened the grip that the common law had on the ability of wives to own, administer, and control their property.²

Until the 1830's, various jurisdictions, either through court orders or through statutes, offered married women control of family property. These grants of power were narrow in scope and usually addressed highly select situations, such as when a husband deserted his family or when he was at sea for long periods. Seventeenth- and eighteenth-century legal precedent prepared the way for broader and more comprehensive laws governing the property
rights of married women.\textsuperscript{3} An introduction to these larger reforms began as early as 1809. Connecticut enacted a law which allowed married women to will their property.\textsuperscript{4} Ohio followed in 1835.\textsuperscript{5} Mississippi was the first state to produce a more inclusive statute.\textsuperscript{6} On February 15, 1839, the Mississippi legislature passed a measure "for the protection and preservation of the rights and property of Married Women."\textsuperscript{7} A married woman could own property in her own name provided she did not receive the property from her husband after marriage.\textsuperscript{8}

If she owned slaves prior to marriage, the slaves and their offspring remained her property and were exempt from liability for the debts of her husband. The husband controlled and managed her slaves and received the fruits of their labor. Suits to recover the wife's slaves had to be in the names of both husband and wife. If the wife died, the slaves went to her children. If she had no children, they went to her husband or to his heirs. A wife could sell her slaves provided her husband joined her in the deed. The deed was subject to the laws governing the transfer of real property by married women.\textsuperscript{9}

Agitation for a similar law in New York began in 1836. The bill remained locked in committee until 1848 when it became law. Like the Mississippi act, the New York law exempted a wife's property from liability for her
husband's debts. With the exception of giving the wages of a wife to her husband, the New York law was more liberal than that of Mississippi. New York afforded married women full control of their property and in 1860 expanded their freedoms further. That act vested married women with an absolute right to property without control or interference by their husbands. Married women gained exclusive rights to their earnings, equal control of their children, the right to sue and to be sued, and the same rights to property on the death of their husbands as their husbands gained on their death.¹⁰

In 1841, Maryland declared that the real property of married women was immune from their husbands' creditors. Following the Mississippi pattern, the Maryland legislature, a year later, extended to married women the right to own property in their own name. The act allowed them to make a will provided they made it with their husbands' consent and on examination sixty days before their death. The act allowed married women to hold as their property all that property valued to a thousand dollars which they earned through their own labor.¹¹

Maryland provided constitutional safeguards. Its 1851 document empowered the legislature to make all laws necessary to harbor the property of married women from their husbands' creditors and to guarantee the same for their children upon their death. Following the
constitutional mandate, the legislature in 1853 enacted a measure which stipulated that all property belonging to a woman at the time of her marriage and all property which she acquired after marriage was exempt from liability for her husband's debts. To secure this protection, the act guaranteed all her remedies at law and at equity. It declared unnecessary the creation of trusts to ensure married women the sole and separate use of their property. 12

Codifying its laws in 1860, Maryland reaffirmed its commitment to protect the property of married women from their husbands' debts. Until then, married women had sole use of their real property only; the code added the sole use of their personal possessions which they acquired before and after their marriage. Husbands lost all right to control and administer their wives' property and to take its rents and profits. The Maryland law allowed married women to will their property as if they were single. 13

Comparatively conservative, the 1843 Alabama statute permitted married women only to will their property. 14 A year later Maine lawmakers passed a bill securing a wife's property from her husband's creditors and empowering a married woman to hold any property as her own. 15 In 1847, they extended the law to women married prior to its passage. 16 Michigan's 1844 act exempted a
wife's earned or inherited property from the claims of her husband's creditors. Six years later married women of Michigan could execute wills. Legislative action giving them absolute ownership and control of their property occurred in 1855.

Florida enacted similar measures in 1845. Two years later Vermont sheltered the property of married women from the creditors of their spouses. Pennsylvania in 1848 vested married women with the right to own and control property and with the right to create wills. Like Alabama, Virginia in 1849 allowed married women only to bequeath their property. An 1857 Ohio law forbade husbands from disposing of any of their wives' personal property without their wives' consent. By 1865, twenty-nine states had statutes that either exempted the property of married women from their husbands' debts, expanded their rights as a form of protection, or both. The remaining states adopted similar measures after the Civil War when Southern states revamped their constitutions and statutes and when Western states wrote their first laws.

Postwar revisions were overdue reforms, as a continuum of the antebellum years, reforms that proceeded through the rest of the century and into the present. Reconstruction constitutions guaranteed married women the right to own property in their own names and barred their husbands from selling their property without their consent.
States combined constitutional protections with statutory guarantees to secure doubly the property of married women.\textsuperscript{27}

During the final year of the war Missouri passed a measure which exempted the rents and other profits of a wife's real property from claims for her husband's debts.\textsuperscript{28} Her husband's creditors could demand the property for debts which the husband incurred for the improvement or cultivation of his wife's property.\textsuperscript{29} Maryland in its 1867 constitution similarly sheltered the property of married women from their husbands' obligations.\textsuperscript{30} Georgia, North Carolina, and South Carolina constructed similar laws.\textsuperscript{31}

An 1866 Georgia statute declared that married women could own property in their own names and that their husbands could not sell it without their consent. Additionally, it guarded that property against their husbands' debts. Two years later Georgia clamped these safeguards into its constitution. That same year North Carolina's constitution embraced provisions akin to Georgia's, and in 1872, its legislature offered married women freedom to engage in commerce as if they were single. They had to obtain the consent of their husbands. Once obtained, they could request the proper officials to lift the common law barriers to trade. Contract rights extended to the limits of their separate property. Not
until 1911 would married women of North Carolina achieve a semblance of freedom to contract, notwithstanding the constitutional requirement that they had to have their husbands join them in the sale of their property.\textsuperscript{32}

Beginning in 1855, South Carolina lawmakers deliberated over how to safeguard the property of married women from irresponsible husbands. Efforts failed, and not until after the war did the issue resurface. The 1868 constitution embodied guarantees for propertied women who were married to spendthrift husbands. Clarification of those guarantees followed in 1870. That year the legislature empowered married women to will, transfer or purchase property, to contract and to execute deeds and mortgages as if they were single. They were responsible for their debts. If they created them to maintain themselves, their husbands were liable for payment.\textsuperscript{33}

For reasons unknown, the legislature in 1882 pruned the 1870 law when it rescinded the contractual powers of married women. A decade later they forbade married women from assuming the debts of another person. At the 1895 constitutional convention, however, the lawmakers removed all obstacles to the contractual capacity of a married woman and with respect to her property, proclaimed that she would have all the rights to "'which an unmarried woman or a man [was] entitled'."\textsuperscript{34}

Other Southern states which had instituted
protective measures prior to the war proceeded to adjust or refine those laws after the war. As part of a married woman's property, Mississippi in an 1871 statute included her wages, and in 1888 swept away all remnants of the debilitating common law. Protection through the investment of power was sanctioned when the 1890 constitution prohibited the legislature from making any laws that differentiated property rights between men and women. Arkansas expanded the property rights of married women in 1873, but Alabama left the matter to the courts. Florida gave wives control of their earnings in 1891, and Virginia followed in 1899.

What prompted this proliferation of statutory law defining marital property rights is subject to speculation. Explanations range in form from anecdotes to larger contexts. According to one author, the New York bill was introduced by a legislator who had married a wealthy woman and who wanted to remove her property from the reaches of his creditors. From that time until the time the bill became law, the story goes, the legislator had gained the support of wealthy, Dutch families, who likewise wished to preserve family properties.

A similar story explains the Mississippi law. According to one source, a legislator wanted to marry a woman of means, but he was in debt and feared that his creditors would claim her property. He would be left
supporting an expensive bride. Supposedly the woman owned
a boardinghouse frequented by the legislators and ordered
them to support the bill or to leave the premises. They
voted the bill law, and the legislator married the woman.\footnote{41}

Other writers elevate such stories to the larger
issue of creditors' rights.\footnote{42} They argue that the con-
trolling force behind such legislation was the desire to
rationalize commercial transactions so that creditors
could more efficiently collect their dues.\footnote{43} These writers
argue that the acts were attempts by lawmakers to peel
away the cumbersome trappings of a law rooted in feudal
customs, that is, to remove impediments to the flow of
land transactions.\footnote{44} The process was, as one writer terms
it, a "defeudalization" of the law of property.\footnote{45} Given
the paucity of sources on the acts, another writer argues
that any efforts to explain the origins of the statutes
are foolish.\footnote{46}

A sure explanation for the acts remains unattain-
able. Though offering no distinct reason for the acts,
the expressed opinions, attitudes, and perceptions of
contemporary writers suggested motives. They indicated
that the acts did have an impact on contemporary thinking.
The responses demonstrated that if, as one writer indi-
cates, the married women's property acts signified a
revolution, it was in one sense by no means, as this same
writer remarks, "silent."\footnote{47}
To contemporary observers, the acts were linked intimately to family stability. Addressing what she thought prompted lawmakers to reform marital property laws, a Mrs. A. J. Graves in 1844 inquired, somewhat theatrically:

How many females have seen their own hard earnings, upon which their children depended for bread, seized upon by an intemperate husband, to be squandered in brutal excesses, without the power or the right to withhold them from his grasp?  

A year later, in one of the earliest American treatises on the legal rights of women, Edward D. Mansfield embraced the logical conclusion to Graves' appeal. Though the acts, he explained, relaxed the common law, they neither weakened family ties nor encouraged independence among its members. Rather, he believed, the laws strengthened family relationships specifically by protecting families from financial liquidation.  

Thirty years later, J. C. Wells in his treatise on the separate property of married women insisted that the acts intended solely to protect women from wasteful spouses, nothing more or less. Others agreed. Agitation for stretching the acts beyond their original intent threatened family security. To some the mere recognition of the separate legal existence of married women was in itself revolutionary.  

Ironically, the arguments against affording a wife economic independence through the expansion of her
property rights were the same arguments used in opposing the concentration of power over family property in the husband. Suppose a wife was derelict or dissolute? What legal protections did a family have? As contemporaries observed, the new laws gave married women all the privileges of property ownership but none of the corresponding responsibilities. Bishop hypothesized:

If she chooses, she may employ her time with domestic cares; or if she chooses, she may leave her babes for him to look after and nurse, and her meals for him to prepare with his own, while she engages in business on her separate account, and accumulates money not a cent of which... is she required to appropriate to the support of her family or even of herself—all must be borne by the husband.

He feared that these liberties would drive husbands to cheat to support their families. For married women, the acts embodied, in Bishop's view, the benefits of both "matrimony and single bliss." If abuse by either spouse was inescapable, Bishop preferred to entrust it with the husband because the benefits of coverture outweighed the drawbacks. In marriage, "the power of umpire must be placed in the hands of one or the other."

If, as Henry Hitchcock believed, like Bishop, the new laws served to "relieve the tedium of the domestic partnership by a business alliance with some shrewd capitalist" thereby encouraging married women to shirk family obligations, there was always, advocated others,
the affections of women for their families. This was sufficient to guarantee that they would use their property to defend their families. The assumption was that family affection was natural to women but not to men.

Others thought that the acts were not broad enough. Married women remained at the mercy of "drunken and deadbeat husbands" because though the legislatures removed a number of common law disabilities, they failed to remove the procedural disabilities to effectuate the new rights. Lawmakers provided rights but no remedies. In many states, married women could own and control property, but they could not contract, sue, or be sued without joining their husbands. The fear was that husbands would use these debilitating remnants of the common law to extort properties from their wives.

Whatever propelled the creation of the married women's property acts, their effects upon the family were, from contemporary perspectives, the central concern. Some thought the new laws would enrich family relationships and strengthen family unity. Others believed they would provoke dissension and threaten family stability. However perceived, a family's welfare was ostensibly an objective of the acts. The acts were responses to some general need that the law correspond to reality.

By expanding the property rights of married women, by exempting their property from their husbands' debts or
by providing both mechanisms, the acts offered families financial protection. By divesting a husband of some of his powers over his wife's property and by investing the wife with such, a wife had a measure of protection and support for herself and for her children, if her husband was irresponsible. The laws secured her from financial ruin by sheltering her property from her husband's creditors. Like the old common law and equity's provisions for the creation of trusts, the property acts were "dynastic." 67

To certain observers, conceding even limited property rights to married women encouraged uncaring wives or mothers to abdicate their domestic obligations because it offered them financial independence. To these writers, the acts were licenses for family destruction. Like the common law that assumed a benevolent husband, the acts, presumed a loving and loyal wife. Unlike the common law's treatment of the husband, the acts granted married women no such wholesale freedom with family property.

These were halfway statutes that were manifestations of an apparent dilemma: denying married women property rights threatened family security as did affording them plenary powers over their property. Lawmakers engaged in a sensitive balancing act to give married women sufficient freedom with their property to sustain themselves but not so much as to rend family relationships. As if to
compensate for the compromised solution, the lawmakers exempted the property of married women from their husbands' creditors. As one commentator explained, the acts purported to give married women not absolute freedom but freedom that was "consistent with family life and public welfare," that is, freedom that was "a convenient approximation to justice." 68

As Anna Garlin Spencer wrote, the acts were deceptively sweeping because they sought to protect wives against their husbands rather than to grant them freedom. 69 The laws, she argued, were concerned "not with the rights of any individual inside the family, but with the development and defense of the family itself." 70 How, Spencer inquired, could the laws secure family stability and simultaneously achieve independence for women within the family? 71

If these laws intended to facilitate debt collection, as Lawrence M. Friedman and Maxwell Bloomfield suggest, they were inadequate. 72 From contemporary assessments, the acts, to the contrary, aggravated and confused debtor-creditor relationships. 73 The construction of the acts was shoddy; they were overly broad and less than comprehensive. 74 The legislators failed to define terms, such as "the right to convey," "the right to contract," etc., and left unattended questions which became grist for the judicial mill. 75
To contemporaries the acts hindered debt collecting and enticed disreputable dealers. To this last, a Mississippi legislator opposing the married women's property bill, replied, that "'the credit of Mississippi was...low enough already'". Only to the extent that the acts fixed the liability status of a wife's property with respect to her husband's debts could the acts be considered a creditor's bill of rights or more accurately, a bill of wrongs.

To the argument that the acts served to free capital by rationalizing feudalistic land laws belongs the response that the acts only partially freed married women to participate in the market. Many states continued to deny married women the right to contract, to sue, to be sued, or to control their earnings. Where the statutes were excessively general, the courts, particularly during the antebellum period, tended to construe them narrowly. As Bloomfield remarks, in the instance of a wife's earnings, at least until 1875, women lost out to their husbands with "monotonous regularity."

The reasons for such constraints were apparent. In an 1858 Maryland case of a married woman who attempted unsuccessfully to gain control of her property from her husband, the court heeded the admonishments of her spouse's advocate.
'The right sought to be established by this proceeding is an extraordinary one, and goes far beyond anything that has yet been conceded to the cause of woman's rights... our legislation for the protection of married women, is of a most liberal character, even to the extent of doubtful propriety; but that it has gone the length of cutting the cords that bind society together, and of virtually destroying the moral and social efficacy of the marriage institution, is a notion not to be entertained for a moment... For let it once be understood that a wife, whenever she may become tired of her husband, or moved by any whim or caprice, may leave him, and take with her the whole property that she ever owned, and enjoy it exclusively, and thus become independent of that superiority and controlling power which the law has always wisely recognized in the husband, what incentive would there be for such a wife ever to reconcile differences with her husband, to act in submission to his wishes, and perform the many onerous duties pertaining to her sphere? Would not every wife, with property enough to sustain herself independently of her husband, when becoming impatient of his restraint and control, however necessarily exercised over her, take the refuge such a law would give her, and abandon her husband and her home?'

Lawmakers recognized the role of women in the marketplace when they enacted sole trader measures. These acts permitted married women to buy, sell, contract, sue, and be sued for mercantile purposes, as if they were single. The intent of the lawmakers was clear. The separate enactment of these measures undermines the argument that the property acts served the same purpose. There was no indication from the acts that the legislators designed them to supersede sole trader laws. In a number of jurisdictions, such laws operated alongside marital
property laws. To charge that the acts singularly sought to free women in the marketplace renders the sole trader laws superfluous. The marital property acts encompassed a larger scheme.

Wild land speculation and a series of panics marred the antebellum period and conceivably prompted lawmakers to adopt measures to protect families against financial ruin. The overwhelming number of states that adopted measures to remove a wife's property from the reaches of her husband's creditors indicated widespread indebtedness. Lawmakers realized the mischief that the property acts could create for creditors. Husbands could use their wives as debt shelters. Thus Mississippi refused to recognize as a wife's property any property transferred to her by her husband after marriage.

As one writer suggests, perhaps legislators were plagued with a number of relief bills or petitions by individual married women for rights to hold and control property as if they were single. The petitions resembled those presented to early American courts and legislatures by married women whose husbands were absent or had deserted them. The acts served to eliminate individual petitioning and to discard a piecemeal approach to a general socioeconomic problem. The statutes afforded all propertied women, regardless of means, the benefits
of "equity." Like equity, the property acts protected a wife's property against spendthrift and dissolute husbands. From these perspectives, the acts codified and expanded colonial precedent.

In a larger context, the marital property acts offered families in the narrowest and crudest way "public assistance." These acts, as public laws, provided cushions for families threatened by financial liquidation. If a wife had a measure of control over her property and if her property was immune from liability for her husband's debts, she and her family could sustain themselves in the face of a greedy or negligent husband or father. The core to family unity was property. It was a unity which was contrived and distinct from a unity founded on mutuality, kinship, and moral obligation.

It was precisely that emotional and moral void to which the acts responded. The common law, which protected the property of married women by denial, that is, by withholding from them ownership and control of property, entrusted husbands with virtually plenary control over the family property. The presumption was that husbands were innately loving and caring. The acts converted protection by negation into protection based on positive grants of power, thereby rendering a wife responsible for her own protection. Where those grants of power were inadequate, the acts extended protection to a wife's
property through such mechanisms as exempting that property from payment for her husband's debts. The acts cynically but realistically adjusted the law to meet social needs.  

A derivative of feudal law, the common law emphasized property rather than personal relationships. Its central machinery sought to preserve family property. The common law had not recognized the family as such or developed fully duties or responsibilities corresponding to respective family roles. Since property preservation was the main objective of the ancient law, an inordinate degree of control of the family property went to the male members. A husband's obligations to his wife were moral rather than legal.  

Problems arose when he shirked these responsibilities. His wife, acting as his agent, could have his express or implied consent, use his credit to purchase necessities for the family. He could retract his consent. A wife could not sue her husband because legally they were one person. Thus she had no way to enforce her claims for support.  

The common law insufficiently defined family responsibilities according to family roles. Ironically, the objective of the common law in disabling a wife from dealing with the family property was to keep the family economically glued. To remedy the deficiencies of the
common law, the married women's property acts divested husbands of some of their powers to insure wives, who were the victims of "misplaced confidence," a measure of protection and support. Parallel to the common law's perceptions of a husband, the acts assumed a benevolent and loyal wife and mother. Not all jurisdictions obligated a wife to support her husband or children. Thomas M. Cooley, jurisprudent from Michigan, remarked that the right of married women to own and control property was no more inconsistent with the concept of marital unity than of married men.

The acts perceived families as economic units. They confirmed the fact that the moral duty to care for needy family members, characteristic of a conjugal family, was outmoded. Affection among family members was mere happenstance. Thus the acts attempted to provide for families in the instance of uncaring husbands or fathers upon whom the families' economic welfare depended. The acts tried to define more fully rights and obligations among family members. Rather than create a new set of values, the acts in attempting to keep families economically solid, reaffirmed the old.

The expansion of the property rights of married women was a product of socioeconomic expediency. The expansion was less than complete because, as Morton Keller suggests, the projected social consequences of
investing married women with unabridged civil rights plagued nineteenth-century lawmakers. Socioeconomic necessity clashed with traditionalisms and precipitated ambiguous public policies. What precluded a cold rationalization of marital property relationships were timeless notions concerning the role of women inside and outside the family. 100

As Keller observes, the fluidity of nineteenth-century American society pressed political institutions to regulate areas traditionally reserved to individual prerogatives. 101 Family relationships, considered strictly private affairs, fell under legislative and judicial scrutiny because society itself increasingly solicited these political bodies to intervene. 102 As a manifestation of that intervention, the married women's property acts, by purporting to serve society-at-large, bore the trademark of a public welfare policy. They constituted in the most fundamental way part of the beginnings of collective solutions.

As political responses to socioeconomic exigencies, the acts belonged to an era that expressed an abiding faith in the capacity of the individual. Yet society instituted, although incipiently, the process of resolving social conflicts through collective actions. Assessed in the context of a frontier culture, such as
Texas where the demands on individual resources were intense, the paradox is particularly glaring.
FOOTNOTES - CHAPTER II

1 Joel Prentiss Bishop, Commentaries on the Law of Married Women, Under the Statutes of the Several States and at Common Law and in Equity, I (Boston: Little, Brown and Company, 1873), 16.


Thurman presents as a typical act, the Massachusetts act of 1855:

'Section 1: The property of both real and personal which any married woman now owns as her sole and separate property, and that which comes to her by descent, devise, bequest, gift or grant, that which she acquires by her trade,
business, labor, or services, carried on or performed on her sole and separate account, or received by her for releasing her dower by a deed executed subsequently to the conveyance of her husband, that which a woman married in this state owns at the time of her marriage, be and remain her sole and separate property, and may be used, collected, and invested by her in her own name, and shall not be subject to the interference or control of her husband, or liable for his debts.

Section 3: A married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole.

Section 9: A married woman may make a will of her real and separate personal estate in the same manner as if she were sole, but such will shall not operate to deprive her husband of more than one-half of her personal property, without his consent in writing.

Section 10: Nothing contained in the preceding sections shall invalidate any marriage settlement or contract, or authorize the husband to convey or give property to his wife, or destroy or impair his rights as tenant by the courtesy, or enable a married woman to destroy or impair the same by any will or conveyance without his written assent. Thurman, "The Married Women's Property Acts," pp. 4-5.1


4 Willystine Goodsell, A History of the Family as A Social and Educational Institution (New York: Macmillan


Ibid.

Ibid. The provision governing the sale of a wife's slaves was incongruous with laws governing transactions of slaves in general. The property act subjected the sale of a married woman's slaves to the laws governing the transfer of real property. Mississippi, however, considered slaves as personal property. In 1843, Chancellor Buckner of the Mississippi Superior Court of Chancery declared: 'As a general rule...where the personal property of a third person is seized under an execution, he will be left to his remedy at law. But the importance which has been attached to slave property, in the slave-holding states, has induced the establishment of a different rule in regard to that species of personal property, even without any allegation of peculiar... value. ...'. Sevier v. Ross, Fr. Miss. Ch. 519, 531 (1843) (John D. Freeman, Reports of Cases Decided in the Superior Court of Chancery of the State of Mississippi). Helen Tunncliff Catterall, ed., Cases from the Courts of Georgia, Florida, Alabama, Mississippi, and Louisiana, Vol. III of Judicial Cases Concerning American Slavery


Willis E. Myers, ed., Syllabus of the Hon. Henry D. Harlan's Lectures on Law of Domestic Relations (Baltimore: Press of King Brothers, 1898), pp. 49, 51. Harlan was Chief Judge of the Supreme Bench of Baltimore City. His lectures were to the Law School of the University of Maryland. See the Preface of Myers' work.

Ibid., pp. 49-50.

Ibid., pp. 51-52.


"Property Rights of Married Women," p. 46.


Ibid.

Ibid.
21 "Property Rights of Married Women," p. 44.
30 Myers, *Syllabus*, pp. 53-54.
31 Lebsock, "Radical Reconstruction," pp. 193-216


42 Thurman suggests that though the lawmakers showed concern with the effects of the statutes on husband and wife, the pattern of reported litigation indicated that the effect was "more profound." The modification of the respective legal positions of husband and wife was, asserts Thurman, "self-executing" and required no real changes. The alteration was, concludes Thurman, a mere affirmation of a consensual arrangement. Thurman believes that the alteration of marital rights affected the position of creditors to the extent that she wonders whether the acts were more properly a part of the law of creditors' rights than of the law of domestic relations. Thurman, "Married Women's Property Acts," pp. 25, 28-29. In general the courts threw on the creditor the onus of proving that the property in contention belonged to the husband and not to the wife. Friedman, *A History of American Law*, p. 186; Thurman, "Married Women's Property Acts," p. 28. Lebsock offers that the delegates to the Reconstruction constitutional conventions regarded the acts as matters of "debtor's rights" and concludes that "apparently, no one worried that the granting of property ownership to wives would trigger 'secession in families'," Lebsock, *Radical Reconstruction," p. 207.

43 Bloomfield, *American Lawyers*, pp. 112-13; Friedman, *A History of American Law*, p. 186. "For the sake of free enterprise, if for no other reason, the law presumed that adults were fully capable of buying, selling, behaving in the market. Married women's property laws were extended, broadened, generalized. No doubt some men felt that these laws went too far. . . . But the market and creditors' rights won out over these faintly archaic sentiments." Friedman, *A History of American Law*, pp. 434-35.

Friedman explains that in England only wealthy landowners tolerated the cumbersome system because there were institutions which mitigated its troublesome effects. Southern planters utilized the system of trusts and settlements, but, argues Friedman, these proved too complex for the average person, even when assisted by a lawyer. Friedman asserts that the married women's property acts introduced major reforms in American land law. Friedman, *A History of American Law*, p. 186. Morton J. Horwitz notes that nineteenth-century Massachusetts excised dower from its laws because it clogged the transfer of estates. He concedes that free alienation of land was also an objective of eighteenth-century Americans. Morton J. Horwitz, *The Transformation of American Law, 1780-1860* (Cambridge: Harvard University Press, 1977), p. 3.


47 Rabkin, "The Silent Feminist Revolution," p. 186; Friedman, *A History of American Law*, p. 186. These writers compare the relative ease of the passage of the property measures to the noisy struggle of the suffrage movement. Thurman surmises that this was so because the acts "more clearly defined and ratified rather than created the values they embodied." They confirmed rather than generated change. Thurman, "Married Women's Property Acts," pp. 7, 50.

Some writers attempt to explain why the acts emerged when they did; others try to explain why the acts occurred at all. Thurman believes that the "Jacksonian viewpoint" with its emphasis on individual rights offered fertile grounds for the liberalization of marital property laws. Thurman, "Married Women's Property Acts," p. 12. Charles M. Haar sees the acts as manifestations of efforts by lawmakers to simplify the law by transforming "judge-made" law into statutory law. He cites New York's codification movement of the late 1820's. Charles M. Haar, "Departures in the Law of Property," in *The Golden Age of American Law*, ed. by Charles M. Haar (New


52 Wells, A Treatise, pp. 324-25.


56 Bishop, Commentaries on the Law of Married Women, I, 683-84.


58 Bishop, Commentaries on the Law of Married Women, I, 678.

59 Ibid.


Ibid.

Ibid.


Thurman, "Married Women's Property Acts," pp. 30-31. Thurman suggests that industrialization strained the family, adding impetus to the institution of the property acts. Ibid., pp. 16-17. Thurman offers links between the campaign for the acts and the temperance movement; inebriated husbands threatened family cohesion. Ibid., p. 15.

England had similar social needs. It enacted measures expanding the property rights of married women. According to Lee Holcombe, the acts responded to a society that was changing from one premised on an aristocratic, landed culture to one based on a modern industrialized community, increasingly secular, rational, and democratic. Lee Holcombe, "Victorian Wives and Property; Reform of the Married Women's Property Law, 1857-1882," in A Widening Sphere: Changing Roles of Victorian Women, ed. by Martha Vicinus (Bloomington: Indiana University Press, 1977), pp. 3-4. Holcombe states that the common law inflicted hardships on women. Ibid., p. 3. The movement to mitigate the harsh effects of the law, which began around 1856, occurred in an atmosphere of legal reform and became an issue for the feminists. Ibid., pp. 3, 10. Like American lawmakers, English lawmakers were concerned with husbands wasting their wives' property at "a gin-palace." Ibid., p. 10. Unlike the American acts, the English laws received extensive press coverage. The 1870 Married Women's Property Act applied the principles of equity to the property of all married women. Ibid., p. 20. Paulette J. Balogh, "The Married Women's Property Acts of 1870 and 1882 and Their Effect Upon the Legal and Social Status of English Women" (unpublished M.A. thesis, Ohio University, 1969), pp. 13-14, 16. Besides retaining their own earnings, English married women retained the ownership of money in savings, stocks, and insurance, and with qualification received the right to inherit property. Holcombe, "Victorian Wives," p. 20; Balogh, "Married
Women's Property Acts," pp. 33-37. This law protected those married women whose property was not real estate. Balogh, "Married Women's Property Acts," pp. 33-37. Married women could not sue or be sued and could inherit only a certain amount of property. Ibid. Confusion over liability ensued, and in 1874 Parliament amended the 1870 law to remedy the problem. Ibid., pp. 49-51. Under the 1870 law a husband was free from liability for his wife's premarital debts though he acquired all her property upon marriage. Holcombe, "Victorian Wives," p. 21. The 1874 amendment made a husband liable for those debts to the amount of property he acquired from his wife upon marriage. Ibid., p. 22. Not until 1882 did married women of England gain the right to own and control property, to contract, and to sue and to be sued. They were subject to bankruptcy laws if they owned businesses apart from their husbands. They had the same rights as single women; they retained ownership of all property they acquired before marriage and ownership of all that acquired after. Unlike the American acts, the English acts made married women liable for the support of their husbands, their children, and their grandchildren. Balogh, "Married Women's Property Acts," p. 69; Holcombe, "Victorian Wives," p. 25. Holcombe emphasizes that the prime concern of lawmakers was the protection of a wife's money from an irresponsible husband. Holcombe, "Victorian Wives," p. 27. Feminists were victorious because they were in step with contemporary thinking. Ibid., p. 26. If women could have voted, Holcombe contends, their win would have come sooner. Ibid. Holcombe assumes that the liberalization of the marital property laws was an issue of the feminists and that the old laws did in fact create hardships for married women. Scholars of the American laws argue that the vote would not have made much difference. Feminism and the expansion of property rights were tentatively connected. Informal arrangements between husband and wife with respect to family property circumvented the strictures of the common law. Thurman, "Married Women's Property Acts," pp. 25, 28-29.


70 Ibid., pp. 644-45.

71 Ibid., pp. 651-52.

72 Bloomfield, American Lawyers, pp. 112-13; Friedman, A History of American Law, p. 186.


75 Thurman, "Married Women's Property Acts," pp. 39-40. Thurman argues that the acts typified legislative performance. Lawmakers sought to replace the common law or "judge-made" law with statutory law but were tempted by English precedent. Legislators left a portion of lawmaking to the courts. Ibid., p. 37. Horwitz extends Thurman's thesis. During the antebellum period, states Horwitz, the courts viewed questions of private law as matters of social policy. Rather than "discovering law" as judges had done traditionally, they made law and considered the social consequences of their rulings. Horwitz, Transformation, p. 2. Horwitz terms this an "instrumental concept of law." Ibid., p. 29. Law was no longer a set of fixed principles but a set of rules relative to what was socially desirable. Ibid., p. 30.


79 Bloomfield, American Lawyers, pp. 114-17; Bergold, "Changing Legal Status," p. 207; Rabkin, "Silent Feminist Revolution," pp. 252-53. Thurman admits that the courts' failure to read contractual powers into the acts was anomalous given the trend toward freedom of contract "in the interests of an expanded market." Thurman, "Married Women's Property Acts," pp. 45-46. Thurman
surmises that the narrow interpretations given to the acts were rooted in the judiciary's perception of its role. Rather than make law judges stayed within the confines of the statutes, limiting their role solely to the adjudication of cases. *Ibid.*, pp. 48-49. With the shabby construction of the statutes, judges clung to the familiar common law. *Ibid.*, pp. 47-48. Bishop remarks that "since the confusion of tongues at the Tower of Babel, there has been nothing more noteworthy... than the discordant and ever-shifting utterances of the judicial mind" on the topic of married women's property rights. Bishop, *Commentaries*, I, 644-45. W. A. Coutts writes that "probably at the present time no field of legal decisions is more prolific of inconsistencies than that relating to the status of married women, since the adoption of what are generally known as the Married Women's Statutes," W. A. Coutts, "Can Husband and Wife be Partners?," *American Law Review*, XXXIII (January-February, 1899), 215.

80 Bloomfield, *American Lawyers*, p. 114. Not until 1961 did Georgia give married women the right to control their own earnings. Ga. Code Ann. sec. 53-512. Bergold, "Changing Legal Status," p. 207. Wisconsin enacted marital property measures in 1850 but did not grant married women the right to control their earnings until 1872. In 1863 the high court of Wisconsin remarked: "'It is somewhat remarkable among the many beneficial changes recently effected by legislation for the welfare and protection of married women, that the legislature should have omitted to secure to the wife the rewards of her individual skill and labor. This seems contrary to the spirit of modern legislation upon the subject. If the property and its profits deserve protection from the acts or incapacity of the husband or his creditors, the earnings of the indigent but frugal and industrious wife and mother would seem to deserve it still more...'." Elliott v. Bently, 17 Wis. 591, 594-95 (1863). Thurman, "Married Women's Property Acts," p. 20.


married woman may bargain, sell, and convey her separate real and personal property, enter into any contracts in reference to the same, carry on any trade or business, and perform any labor or services on her sole and separate account, and sue and be sued in all matters having relation to her separate property, business, trade, services, labor, and earnings, in the same manner as if she were sole'." Thurman, "Married Women's Property Acts," p. 5. Pennsylvania's act of that same year provided for the same. It incorporated within the act the February 22, 1718, sole trader law. The early law allowed a wife of a man away at sea to operate as a *femme sole* trader. The May 4, 1855 act declared: "'Whosoever any husband, from drunkenness, profligacy or other cause shall neglect or refuse to provide for his wife, or shall desert her she shall have all the rights and privileges secured to a *femme sole* trader, under the act of the 22nd of February, 1718. . . .and her property, real and personal, howsoever acquired, shall be subject to her free and absolute disposal during life, or by will. . .'." Ibid., p. 61. California's 1852 act allowed a married woman to conduct business as a "sole trader." Ibid., pp. 15-16.


85 Mississippi legislators argued that a husband would have it "'in his power to defraud his creditors, by selling his property and putting the money into the hands of a friend to buy a plantation and negroes to be given to his wife. The injury to be inflicted by this bill, upon creditors is incalculable. . .'." Brown, "Husband and Wife," p. 14. Lebsock argues that "a debtor might make an eleventh-hour transfer of property to his wife in order to defraud his creditors of their just claims to that property." Lebsock, "Radical Reconstruction," p. 201. The 1868 South Carolina constitution allowed a married woman to do what she wished with her property and exempted it from her husband's debts provided "'that no gift or grant from the husband to the wife shall be detrimental to the just claims of his creditors'." Ibid.
Ibid.


Bloomfield, American Lawyers, p. 113. Rabkin states that the 1848 New York act codified equity principles. Rabkin, "Silent Feminist Revolution," p. 34. With the chancery courts gone, the acts filled a void. Ibid., p. 207; Thurman, "Married Women's Property Acts," pp. 10-11. In New York supporters of a married women's property act urged that the trust device, used virtually by the rich alone, "'be made general--so that the children of the ignorant or the careless may have the benefit of it.'" Thurman, "Married Women's Property Acts," p. 12. One writes that the chancery courts long recognized the very principles that the states embodied in their married women's property acts. These acts were "but legislative declarations of these doctrines and obviate[d] inconsistencies between the courts of law and those of equity." "The Property Rights of Married Women," North American Review, XCIX (1864), 63. Cord argues that the acts did not supersede the equitable rights of married women. Those acts regulated their rights according to the principles of equity, contemplating "a concurrent jurisdiction in enforcing the new rights. . . ." Cord, Legal Rights, p. 360. Wells agrees. The laws gave married women the same rights and remedies as those offered by settlement. Concludes Wells, "the unity of man and woman in the marriage relation is no more broken up by giving her a statutory ownership and control of property, than it would have been before the statute by such family settlement as should give her the like ownership and control." Wells, A Treatise, p. 78.

Bloomfield, American Lawyers, p. 113.


Ibid.

Bloomfield, American Lawyers, pp. 94-95.


Ibid., p. 127.

Exceptions distinguished the acts from the common law. The new laws attempted to link rights with responsibilities according to family roles. The 1852 California sole trader law allowed married women to conduct trade as if single provided they "'shall be responsible for the maintenance of their children'." Thurman, "Married Women's Property Acts," pp. 15-16, 24-25. A Mississippi court believed that the acts intended to guarantee support and education for the children as well as to provide support for the wife. "'However ample the fortune which the wife, upon the marriage, brought to the husband, the law made no provision out of it for her support, or the maintenance and education of the children of the marriage. These were the evils which the legislature, by the enactment of the statute, designed to provide against...'." Cameron v. Cameron, 29 Miss. 112 (1855). Thurman, "Married Women's Property Acts," pp. 15-16. Under a number of statutes, regardless of the husband's contribution, a wife's property was liable for debts that the husband incurred for family necessities. In constructing Missouri's 1875 act, the court declared that the legislators intended legally to obligate a wife to contribute to the support of her family. Bedworth v. Bowman, 104 Mo. 44, 48, 15 S.W. 990, 993 (1890). Thurman, "Married Women's Property Acts," p. 17.

One thinks the acts changed nothing. Cooley argues that none of the statutes "'purport[ed] to operate upon the family relations; none of them [took] from the husband his marital rights, except as they pertain[ed] to property, and none of them reliev[ed] him from responsibilities, except as they relat[ed] to the wife's contracts and debts. He [was] still under the common-law obligation to support the wife; and the services of the wife, which at common law were regarded as the consideration for this support, [were] still supposed to be performed in his behalf, and in his interest, except where they [were] given to her individual estate or separate business. The wife [had] a right to receive her support at the husband's domicile, unless she...lost it by misbehaviour; and the husband and wife together [had] a joint interest in and control of the children, which they [could] not of right sever, and which [were] not, even in contemplation of law, regarded as distinct, though the courts [were] sometimes compelled to treat them as if they were so, when difficulties [arose] which [made] legal intervention
essential to the protection and welfare of the children'.
Wells, A Treatise, pp. 77-78.

98 Wells, A Treatise, p. 78; Cord, Legal Rights, p. 357, quoting Cooley, "'At the common law the power of independent action and judgment was in the husband alone, now it is in her, also for many purposes, but the authority in her to own and convey property, and to sue and be sued, is no more inconsistent with the marital unity than the corresponding authority in him. She is still his agent to provide for his household, and he is not deprived of the rights, or relieved of the obligations of the head of the household, except as by their dealings and intentions are indicated'."

99 Berthoff and Thurman agree that a new conception of the family as an economic unit arose. Berthoff observes that the moral duty of a family to maintain its aged and indigent members was obsolete. To prevent these from becoming public burdens, argues Berthoff, the states created laws to exempt a certain amount of property from payments for debt. In law, claims Berthoff, the family occupied only a vestigial function in the political community." He accuses legal and political reforms, such as white manhood suffrage, of chipping away at the concept of the family as a political unit represented by one head. So complete was the conjugal family separated from the "old order," argues Berthoff, that no one remembered how extensive a public role the family had. The family had become "a species of private enterprise." Berthoff, An Unsettled People, pp. 204-6. See also Thurman, "Married Women's Property Acts," pp. 17, 30.


101 Ibid., p. 439.

102 Ibid., pp. 461-62.
CHAPTER III

MARITAL PROPERTY ACT OF TEXAS, 1840

Codifying or putting into statute the property rights of married women extended beyond the common law states east of the Mississippi. The emergence of married women's property acts was equally a phenomenon of those states carved from the civil law fringe. Unlike states originally governed by the English common law, the states which were products of a region once controlled by France and Spain had been subject to the continental or civil law. Despite their exotic legal heritage, these states' marital property laws exhibited characteristics strikingly similar to those of the common law states. The fact that these resemblances characterized indigenous bodies of law reinforces the theory that the married women's property acts reflected some general though inarticulate socioeconomic need. Texas, formerly part of the Spanish domain, simulated the national pattern.¹

From the early sixteenth century, France until 1803 and Spain until 1848, established along the Mississippi River and its tributaries, spheres-of-influence which stretched from New Orleans to the river town of St. Louis, Missouri, to as far north as the Kaskaskia River in
Illinois.² From these riparian points, French and Spanish control fanned out into the Floridas and into Texas.³ With the territorial conquest came the institution of continental laws and customs. The eventual migration of Anglo-Americans to these imperial enclaves created what George Dargo described in his study of Louisiana a "Kulturkampf between the ancienne population and the Anglo-Americans," a conflict that manifested itself most sharply in the clash of legal traditions.⁴

As these territories fell under United States sovereignty, the conflict intensified. Judges and lawyers trained in the common law replaced those trained in the continental tradition. In some areas, in the face of a multitude of Anglo-American emigrants, the civil law was doomed. This was especially true where the original population was sparse, as in Florida. There, for example, in 1821 President Andrew Jackson by proclamation instituted common law procedure in criminal cases. What remained in Florida were mere traces of the Spanish civil law. Though the United States favored nationalizing the laws and customs of its acquisitions, portions of the civil law remained.⁵

St. Louis incorporated both the French and the Spanish law into its legal system. With continental customs entrenched in some regions, the United States interlaced the old laws with the new. As the Anglo-
American population multiplied, the United States became less tolerant and pursued a more forceful nationalization policy. Aimed toward the Missouri Territory, an 1807 United States statute revoked the civil law on wills and inheritances and replaced it with the common law. A decade later American jurists successfully advocated basing all law in the Missouri Territory on the common law. When Missouri entered the Union, what remained, observed Lawrence M. Friedman, were "some tangled land titles, and a passion for procedural simplicity." 6

Within this environment, laws governing marital property took root and shaped the laws of at least eight states cut from the civil law block. 7 European imperialists, in their territorial conquests, imposed the laws of property as they understood them. Prior to United States annexation, a number of provinces were thoroughly steeped in the private law of the continentalists. Laws governing wills and inheritances, for instance, virtually assured these territories links to their continental past because such laws entangled them in a bramble of established land titles. 8 These laws were troublesome legacies. Well after United States annexation of these provinces, United States courts struggled with the complexities of foreign property laws. 9 Included in the bailiwick of private law was the regulation of marital property. In governing that property, France and Spain
adhered to the principles of community ownership.\textsuperscript{10}

Community property was property which husband and wife owned equally. What constituted community property varied among Europeans. The general or universal community which characterized the Roman-Dutch law consisted of all property owned by each spouse at the time of marriage and of all property acquired by each thereafter. The French and Spanish definition of community embraced that property acquired by husband and wife during the marriage. With some exceptions, property which each owned before marriage remained separate. It was this system that the French and Spanish transplanted to the New World and that prevailed in various form among some states.\textsuperscript{11}

Origins of community property are hazy. Apparently it existed at different times and places and arose as a spontaneous response to local conditions.\textsuperscript{12} It was popular among nomadic tribes where husband and wife worked together, sharing the hardships and dangers of migratory living.\textsuperscript{13} Logically they shared its fruits. The variety of community property by which the continentalists, particularly the Spanish, governed their American colonial possessions was Germanic.\textsuperscript{14}

Around 415 A.D. the Visigoths invaded southwestern France and Spain where they practiced the custom of community property.\textsuperscript{15} In 693 A.D. the first Spanish written formulation of community property laws appeared
in the Visigothic Code, the Fuero Juzgo or the Book of Judges. This was Spain's first national code. It defined community property according to what each spouse proportionately contributed to the marriage. Despite the Muslim invasion in 711 A.D. the laws of community property survived. During the thirteenth century King Ferdinand III ordered the code, originally in Latin, translated into Castilian, affirming the rise and eventual supremacy of that kingdom, whose laws later became the laws for all of Spain.

Subsequent codes divided the community property between the spouses equally rather than proportionately. Husband and wife owned the community property equally regardless of the amount that each brought to the marriage. A 1505 compilation and revision of the laws, the Laws of Toro, provided explicitly for division by halves. Why the Spanish altered the definition is unclear. Perhaps determining precisely what each spouse donated to the marriage proved difficult. The underlying principle of the Spanish system was that husband and wife gave equally to the welfare of the marriage.

Not all property acquired during marriage became community. Since the Spanish system emphasized that property which a married couple acquired through their joint efforts, it excluded from the community property acquired by gift or by inheritance, save that which the
donor stipulated as community. Similarly excluded from the community was property that each spouse gave to the other, property purchased with the proceeds from the sale of their separate property, property owned by each spouse before marriage, and the natural appreciation of each spouse's property. 26

Property so mixed that a husband and wife could not distinguish their separate property became community. The fruits or profits of each spouse's separate property whether acquired before or during the marriage belonged to the community. The law assumed that though husband and wife owned the property separately each had at heart the welfare of the marriage. The intrinsic increase in the value of the separate property or the improvements that the owner made on it remained part of the separate estate. If the improvements resulted from the joint labors of husband and wife, the value of the improvements became community property. 27

Spanish law recognized property owned solely by the wife. The dote or dowry was a payment made directly by a wife or her father to her husband either before or after marriage. Though this was her separate property its profits belonged to the community. A wife's bienes parafernales, extra dotales, or paraphernalia was that property which she had in addition to her dower and which she owned before marriage. Unlike the profits from her
dowry, the fruits from her paraphernalia belonged to her alone. 28

Ownership and control of property were distinct concepts under Spanish law. Though husband and wife owned the community property together, the husband alone disposed of it. He could sell his wife's share without her consent and even make moderate donations. He managed the community property and could transfer the property in his name only. His contracts bound the community property, which became subject to seizure for his debts. He was the only necessary party to a suit involving the community. A wife had control of the community property provided her husband consented. Her debts did not bind the community, and she could not transfer her share. The husband's control of the community property was virtually exclusive. 29

Death, divorce, separation, or adultery by the wife ended the community. For a wife dissolution of the marriage was not necessarily a salvation. If after the death of her husband the adulterous wife continued to live scandalously, she lost her share of the community property to her husband's heirs. If she conducted her life with propriety, she acquired complete and absolute control of her share of the estate and could do what she wished with it without regard to the rights of her children. 30

During marriage if a husband refused or neglected
to provide his wife with essentials or if he disappeared or was absent for long periods, his wife could petition a court for powers to contract for such necessities. If a wife held a public office or operated a business, she could contract in relationship to those activities only, without the consent of her husband. With respect to the community, she could contract, but she needed her husband's approval. Should her husband fail to protect the community property, she could. As owner of half the community, she was liable for debts incurred for the property. The law presumed that the husband's control was for the benefit of both. Any violation of that trust gave rise to relief for the wife.31

A husband's control of the family property extended to segments of his wife's property. Though he could not freely dispose of her dowry, he controlled it. He had to administer it solely for the benefit of the marriage. When the marriage ended, the dower returned to the wife or went to her heirs. A wife managed her paraphernalia, but she could not dispose of it or defend it in court without her husband's or a court's consent. Her husband could control her paraphernalia, but he needed her written consent. If he sold the property without her permission, she could sue for it.32

She had a claim on his property if he mismanaged hers. Though a wife had a measure of control of her
property, her contractual powers were limited. Contracts involving her separate property needed her husband's approval. If he refused, she went to court for authorization. But if the contract purported to benefit her, it was valid regardless that he refused to approve it. 33

A husband's disposition of the community property did not affect his wife's ownership. 34 When a husband exchanged the community property for money, goods, or other property, his wife became automatically owner of half the receipts. 35 Her ownership was full and complete. 36

In giving a husband overriding control of the family property, the Spanish law resembled the English common law. Akin to the common law, the Spanish law forbade women from participating in warfare. 37 Similarly, it favored male heirs over female. 38 The law assumed that men as heads of families were more experienced and knowledgeable in managing property and better judges of their families' needs than their wives. 39 Necessarily, they became responsible for those needs.

As Spanish-American jurist José Maria Ots Capdequi observed:

In Spanish law. . . only in exceptional situations, does the woman enjoy full civil rights. . . . The single woman is always submissive to paternal authority. . . . The married. . . . inside the orbit of a new power as acusado as the first.
Only the state of widowhood permits the woman to earn her full civil rights.  
Like the common law, which classified married women with infants and idiots, the Spanish law considered married women *imbecilitas sexus*—imbeciles by nature.  
Castilian law, in particular, categorized them with children, invalids, and delinquents.

In recognizing married women as property owners, the Spanish law differed strikingly from the common law which melded a woman's identity into that of her husband. 
Why Spanish law offered married women a distinct legal identity while England did not was lodged in their separate courses of development. The Spanish law restricted a married woman's proprietary capacities for the same reasons that the common law did. By centralizing control of the family property in the husband, both legal systems purported to solidify the family against economic ruin. Property rights served family rather than individual interests. Accordingly, the inferior legal status of Spanish married women reflected social needs. 

Why some American states adopted or retained the community property system while others did not lies in the distinctiveness of each locale. Some scholars suggest that those states that adhered to the community system reproduced the environment that originally gave rise to community property. Particularly in the Western
states, women toiled alongside their husbands for the benefit of the whole family and deserved a share of the harvests. Scholars hold that certain states embraced the community property system because residents who were accustomed to the civil law successfully advocated its retention. Observers think that adoption of the "liberal" foreign system operated to attract women to the barren West. 45

Attempting to answer why some states abandoned community property law, scholars cite the lack of understanding of the civil law, the scarcity of Spanish legal sources, and the sheer number of Anglo-Americans that lobbied for the adoption of the more familiar common law. The states that opted for community property did not do so uncritically. The inadequate understanding of the foreign practice and the desire to tailor the law according to local demands precluded states from accepting the system wholesale. What emerged as marital property laws for the various community property states were parochial responses to a national need. 46

Texas' legal heritage was part of this curious American development. Texas was a Spanish fief until 1821 when Mexico overthrew Spanish rule, whereupon the Texas territory became part of the Mexican state of Coahuila and Texas. 47 Mexico had barely achieved independence from Spain when Anglo-Americans began migrating
into Texas territory under the promotional efforts of Moses Austin and his son Stephen F. 48 Late in 1821 young Austin along with three hundred families arrived in Texas to begin the colony his father initiated. 49 Spanish-Mexican failure to settle the territory and a shaky American economy inspired Americans to follow Austin's group to the borderlands. 50

Many of the colonists came from states west of the Alleghenies and were deeply in debt, victims of an economic slump that dotted the years from 1820 to 1850. 51 Fear of imprisonment for debt and sundry other reasons pushed Americans to new lands while the lenient laws and generous land policies of Mexico pulled them. 52 In Texas ample acreage was available for a trifle. 53 Coincidentally, the 1819 panic and the ensuing depression occurred when the withering Spanish regime encouraged Americans to its sparsely populated provinces. 54 The timing was propitious. In the United States banks reduced loans and withdrew currency to compensate for over-extending themselves. 55 Banks folded and savings disappeared. 56 Approximately twenty years later another panic plunged Americans into a depression which lasted for nearly a decade. 57 Again, Texas became a debtor's sanctuary. 58

Whatever prompted Americans to live under a foreign government was compelling. 59 These trekkers were an
assortment of small farmers, traders, speculators, Indian hunters, and slaveholding "nabobs." Like other western communities, Texas became a hodgepodge of cultures—Yankees, Southern planters, yeomen farmers, and Europeans. Despite the cultural mix, a common denominator was indebtedness. Rather than being the more ambitious elements of their former communities, most of these "pioneers" were more likely the ne'er-do-wells. Personal discontentment, overpopulation and high land prices in the East, and motley other reasons drove them to Texas. As Mark E. Nackman concludes, "a few would become empire-builders, but in reality, a great many more were misfits." By 1836 when Texas proclaimed its independence from Mexico, the population of this colorful assemblage numbered over 30,000.

Language barriers, a distant government, and slow communications between Texas and Mexico alienated the Texas colonists from the central authorities. Mexican officials until 1830 neglected Texas affairs. Texas became independent by default. The allegedly despotic government of Antonio Lopez de Santa Anna in the late 1830's accelerated the growing alienation between Texas and Mexico, which flared into military rebellion and ceased with Texas independence in 1836.

The removal of Mexican authority yielded a legal vacuum. Spanish laws, modified by the Laws of the
Indies, had governed the Texas-Mexico region. When Texas became a part of Mexico the legal changes that followed were political in kind, that is concerned with the arrangement of governmental powers. Private law underwent few changes. When Texas disgorged Mexican authority, what remained was a collage of cultures, each accustomed to the laws of their parent country. Anglo-Americans wore the impress of the common law, while the old French and Spanish inhabitants knew only the ways of the civilians. Rather than choose one system over the other, the young republic culled from each those laws that best suited its needs. Where neither system served their interests, Texans improvised, fusing elements from diverse sources.

As early as 1835, in its bid for independence, Texas indicated that it would construct its legal system through hybridization and improvisation. Until this time, the civil law, except as modified by the decrees of Mexico and of the State of Coahuila and Texas, prevailed. On November 13, 1835, the Provisional Government of Texas, in its Plans and Powers, declared the English common law in force with respect to crimes and misdemeanors and the civil law of Louisiana in force with respect to writs of sequestration, attachment, and arrest. It proclaimed that all trials would be by jury and that the English common law would regulate criminal
proceedings. 77

On January 14, 1836, Acting Governor James W. Robinson recommended that the provisional government organize the courts according to the English common law. 78 He argued that the common law was "not only the best system of jurisprudence extant, but as being more extensively known, and better adapted to the wants and customs of the citizens." 79 Heeding Robinson's advice, the provisional government declared that the English common law govern the courts in the prosecution of crimes and misdemeanors. 80 On that same day, January 16, 1836, the provisional government declared that the Louisiana laws control all proceedings regarding successions, probate matters, and the like. 81

A proclivity to anglicize the law as much as practicable dominated the Texas approach. In the final draft of a constitution, the Texas constitutional convention on March 1, 1836, ordered that the Congress of the Republic of Texas

. . .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 decision. 82

To guarantee a smooth transition, the framers included a section which retained portions of the civil law.
That no inconvenience may arise from the adoption of this constitution, it is declared by this convention that all laws now in force in Texas, and not inconsistent with this constitution, shall remain in full force until declared void, repealed, altered, or expire by their own limitation. 83

Confusion was certain, as President of the Republic Mirabeau B. Lamar confirmed in 1838:

Unfortunately for the country, we have now in force many portions of two systems different in their origin, discordant in their provisions, and calculated to lead to the most conflicting decisions. 84

Meanwhile, the Texas legislature commissioned William H. Jack and D. S. Kaufman "to compile and report to congress...a general systematic code of laws, for the future regulation and administration of justice..." 85 The task proved too arduous. In a report to the legislature in 1839, Kaufman stated that he and Jack needed a translation of the laws that governed the former state of Coahuila and Texas and that no such translation existed. 86 The legislature failed to instruct them as to which system of law they should base their work on, and they hesitated to proceed further because of the intense differences of opinion surrounding the two systems. 87

With the project aborted, Texas lawmakers resumed selecting from each system what they thought satisfied the needs of their polity. Among the aspects of Spanish law retained were the method of pleading by petition and answer, which obliterated the distinction between law and
equity, and the homestead exemptions. During these seminal years Texas formulated its first marital property law. Reflective of Texas' approach to a legal system, the lineage of that law was mixed. Elements of the English common law and of the French and Spanish civil law textured the act. The ancestry of the act is unclear. Apparently it is a fusion of sources, the origins of which remain obscure.

The marital property provisions were parts of an act to fulfill the constitutional mandate for the legislature to adopt the English common law. On January 20, 1840, the Texas legislature enacted a measure which adopted the common law of England, repealed specific Mexican laws, and defined marital property rights. In the final House draft the Texas legislature pronounced the common law of England and the acts of the Texas Congress as "the rule of decision" to the extent that the common law was compatible with the Texas constitution and legislation. It added that such legislation operated until the Congress altered or repealed it. With some exception, the bill repealed all laws in force prior to the adoption of the constitution.

Without adopting any specific body of law, the bill proceeded to define marital property rights. Upon marriage, a wife retained as her separate property the lands and slaves which she owned at the time of marriage
and the lands and slaves and their progeny which she acquired during marriage by gift or inheritance. She retained possession of her paraphernalia, as defined by the English common law, which she owned at the time of marriage or which she received as a gift or inheritance during marriage. These properties, the bill declared, were her separate property. 97

During marriage, the bill stated, her husband solely managed her lands and slaves. The extent of his powers were finite. Neither he nor his wife nor he and his wife together could during marriage sell, trade, or donate any of her lands and slaves without the written consent of her father and a decree by a court. If the father was dead or living outside the country, husband and wife had to consent jointly. The court banned the sale of any of the wife's lands or slaves unless satisfied that the sale was in the wife's interest. 98

Except for the lands and slaves which husband and wife each owned before marriage, the community property consisted in part of the property that each spouse brought to the marriage. It included all property acquired during marriage save the lands and slaves and their progeny that each spouse procured through gift or inheritance and the wife's paraphernalia obtained similarly during marriage. Only the husband could sell or otherwise dispose of the community property during
Community property was liable for the debts contracted by the husband and for those incurred by the wife for necessities during marriage. When marriage ended, specifically by death, after the payment of all debts, the remaining community property went to the surviving spouse if the deceased had no descendants. If either spouse had children, the surviving spouse received half the community property, while the children split the other half.

A couple intending marriage could enter into whatever stipulations they wished, provided such an arrangement was "not contrary to good morals or to some rule of law." The bill forbade them from making any agreement which altered the legal order of descent with respect to themselves or to their children and which interfered with the legal rights of a husband over his wife or children. Once married husband and wife could not alter the agreement. When a wife entered into a pre-marital contract with her husband, the bill offered safeguards. If she reserved for herself "more property . . . than she would be entitled to by law" her husband had to acknowledge the agreement or someone had to witness it, and she then had to record it with a municipal court for it to be valid against her husband's creditors.
A husband could sue either alone or jointly with his wife for the recovery of her property. If he failed or neglected to sue, she could through court authorization. Though the bill designated the husband as sole manager of his wife's lands and slaves, it gave the wife a measure of control. She could divide her lands and slaves among her children, but she had to reserve a share to support the marriage. Should the husband refuse or fail to support his wife from the proceeds of her lands and slaves or to educate her children "as the fortune of the wife would justify," she could appeal to a court, which could order him to give her the proceeds to support herself and her children.\(^\text{102}\)

The bill declared that when anyone sold a married woman's lands or slaves illegally, any running of a law of limitation halted during the marriage at which time a wife could recover her property. As a widow she could sue for the property, and should she die before the expiration of the limitations law, the operation of that law ceased until all her children arrived at the age of majority or those underage married. Her heirs received the remaining time to recover the property. If a wife died before her husband, the limitations law ceased running until her children became of age or until the minors married.\(^\text{103}\)

Property which husband and wife each brought into the marriage was liable for the debts that each incurred
prior to marriage. If that property insufficiently covered the debts, the community property was seized. Proffering protection of a wife's interest in the community, the bill declared that should a husband sell or dispose of the community with an intent to defraud his wife, she or her heirs could recover her half of the disposed property from him or from his heirs. What comprised community property when a marriage dissolved was what the bill designated as those things which husband and wife owned "reciprocally."\(^{104}\)

Pared by the Senate, the House bill became law. The final draft was less vigilant of a husband's control of his wife's property and of the community property than the House version. The Senate scrapped those sections which prescribed procedures for disposing of a wife's lands and slaves, which empowered a wife to divide her lands and slaves among her children, which allowed her heirs to recover her property from her husband or from his heirs, and which established the liability for premarital debts.\(^{105}\)

The Senate bill eroded the limited control of property that the House gave to married women. The House bill permitted a wife through a court order to take the profits from her lands and slaves to support herself and her children if her husband welshed. The Senate modified that provision by giving the court rather than the wife
the discretion to decide how much of the profits were needed for the family's support. The court became a surrogate parent. Why the Senate diluted the House bill with regard to a wife's proprietary capacities is unclear. Subsequent laws attempted to redress the imbalance.106

On January 28, 1840, President Lamar approved a bill which allowed married women to make wills.107 Every person of twenty-one years of age or older and of sound mind could "at his or her will and pleasure" bequeath any of their property.108 Approximately a year later the legislature enacted a measure "prescribing the mode in which married persons might dispose of their separate property."109 What began as a measure to regulate the disposal of property by each spouse concluded as a law addressed to wives only.

On December 8, 1840, the Senate introduced the bill. It established procedures for validating a written instrument by a husband and wife purporting to convey the wife's property. To effect such a transfer, the wife had to appear in court where the judge, after questioning her apart from her husband, determined whether she freely and willingly agreed to the disposal. The bill required the judge to show and to explain the instrument to her and to ask her if she wished to retract.110

If the judge decided that she agreed voluntarily
to the transfer, the court certified the instrument. Any certificate that satisfied the requirements validated the transfer. With respect to the husband, the bill declared that during marriage he could sell or transfer any or all of the community property including that portion which belonged to his wife.¹¹¹

On January 7, 1841, the Senate Judiciary Committee recommended passage of the measure but stipulated that the Senate excise the segment dealing with a husband's powers over the community property. Why the Senate reduced the bill remains a riddle. Conceivably lawmakers believed that that clause, in relation to the 1840 act, was redundant. That act designated the husband as sole administrator of the community property. Inherent in that position, the Senate might have thought, was the power to sell or to transfer any or all of the community.¹¹²

In constructing its marital property laws, Texas borrowed from a variety of sources, assembling a package of provisions that was a product of extemporization. From the 1840 text, appropriation and application of elements of the English common law and of the Spanish civil law were plain. Texas defined a wife's paraphernalia according to the English common law and embraced the Spanish principles of community property. Texas conceivably reproduced parts of Louisiana and of
Mississippi law. It possibly drew from the laws of a number of common law states. Since Texans most likely knew only the rudiments of the various legal systems, they employed humble versions of those laws. What emerged in 1840 and in 1841 was customized law. 

Texans were less methodical in their approach to a legal system than was apparent. Questions of public rather than of private law absorbed them. In general Texans retained or adopted those laws that best suited their conditions. Despite the infiltration of Anglo-Americans, the Spanish influence on marital property had, according to Joseph W. McKnight, "remarkable staying power." Retaining elements of Spanish marital property law served some vital social function.

When Texas enacted its first marital property measures in 1840, its economy as well as that of the United States was in flux. In Texas, real estate values dipped, business slowed, bartering grew, and slaveholding became the chief measure of wealth. Prior to 1840, the nation itself had suffered from a cyclical economy, and the residual indebtedness, particularly in Texas, threatened social stability. An index to that stability was the solidarity of the family unit. Representatives of the concern for solidity were the 1840 and 1841 acts, which were compromises between procuring for married women protection of their property against dissolute
husbands and retaining their husbands as heads of households. 121

Like the acts of other states the Texas acts of 1840 and 1841 were parochial responses to national exigencies. The Texas laws like the laws of other states attempted to define the rights, responsibilities, and remedies of husband and wife to protect families against economic ruin. Texas gave husbands dominant control of the family property by giving them exclusive management of the community property and by giving them control of their wives' lands and slaves.

Like other states, Texas provided cushions against irresponsible husbands. The 1840 law allowed married women through premarital agreements to reserve property against their husbands' creditors. If a husband failed to support his wife she could obtain court authorization to contract for family necessities. If a husband failed to sue for his wife's property, she could sue for it. If he neglected to support his wife and children from the profits of her lands and slaves, she could ask a court to order him to do so. The law protected her if her husband sold her lands illegally, while the 1841 law monitored the disposition of her property. Like other states' laws, the Texas laws were solicitous of the wife.

Rather than protect a married woman's property through the expansion of her rights, Texas' laws
protected her property by restricting her husband's actions. Under Texas law a married woman could not freely contract, sue, or be sued. Though husband and wife owned the community property together, he controlled it. Only the dissolution of marriage activated her full proprietary powers. Marriage abbreviated a significant portion of a woman's civil rights because her family's interests defined hers.

In clarifying the property rights of married women, Texas' legal development intersected with the American experience in general. The community property states and the common law states offered married women a legal identity and some form of protection for their property against irresponsible husbands. The adoption or retention of the community property system aroused the same diffidence that the liberalization of the common law did. In offering married women a legal identity and in recognizing their ownership of property, the community property system stirred fears of giving married women excessive control of property to the detriment of their families.

One California legislator in 1849 in opposition to the civil law system orated:

'. . .there is no provision so beautiful in the common law, so admirable and beneficial, as that which regulates this sacred contract between man and wife. . .the God of nature
made woman frail, lovely, and dependent; and such the common law pronounces her. Nature did what the common law had done—put her under the protection of man; and it is the object of this clause to withdraw her from that protection, and put her under the protection of the law. . . . the husband will take better care of the wife, provide for her better and protect her better, than the law. . . . When she trusts him with her happiness she may well trust him with her gold.'122

In Texas as elsewhere socioeconomic realities impelled a definition of the rights and responsibilities of family members. The tendency of the states to put these into statutory form only partially explains the emergence of the married women's property acts.123 That movement was not merely a cosmetic reform but an effort to make the law correspond more closely to reality. In a sense, Texas had less to reform because it retained that aspect of the Spanish system that recognized the legal individuality of married women and their right to own property. As Friedman observed, what looked like reforms were actually civil law remnants.124

As in other states, married women in Texas possessed something less than complete civil rights. Similar to the states' laws, Texas' laws tried to balance the protection of a wife's property with the retention of her husband as head of the family. This configuration of rights and responsibilities purported to protect families against financial demise. The institution of
homestead laws around this time in Texas and in other states demonstrated further the need for public assistance where individual or private efforts were inadequate.\textsuperscript{125}

In guarding married women against negligent husbands, the Texas law partially filled a moral void. In a most fundamental way the married women's property acts of Texas represented the collective solutions of a frontier community. The 1840 and 1841 acts were the groundwork. Such public responses vitiated the Anglo-European idea that an individual was responsible for his or her own calamities.\textsuperscript{126} Paradoxically, the institution of such laws drew from a deeply rooted Anglo-European legal culture. Without some public measures, in Texas as elsewhere, impoverished married women or widows loomed as public burdens and as assaults on established family patterns.\textsuperscript{127}

The protection of married women's property was sufficiently critical to Texas that it placed securities within its organic law.


3 Ibid.


6 Ibid.


9 Ibid. In 1828 the United States Supreme Court declared that according to custom the laws of a ceded territory, except those political in kind, remained in force until changed by the new government. American Insurance Co. v. Canter, 1 Pet. (U.S.), 511 (1828); deFuniak and Vaughn, *Principles*, p. 56.


11 Ibid., p. 1. For the specific states, see note 7.

12 Ibid., pp. 15-16; Harriet Spiller Daggett, *Legal*


16 Defuniak and Vaughn, Principles, pp. 3-4.

17 Householder, "Sources," pp. 22-23.


19 DeFuniak and Vaughn, Principles, p. 46. For the effects of the Muslim invasion and the Spanish reconquest on the legal status of women, see Dillard, "Women in Reconquest Castile."


21 DeFuniak and Vaughn, Principles, pp. 142-43; Daggett, Legal Essays, p. 104.

22 DeFuniak and Vaughn, Principles, pp. 142-43.

23 Householder, "Sources," pp. 55-56. The Laws of Toro were more elaborate on women's rights than the Book of Judges. Householder contends that the former was more lenient with married women than the latter. The Book of Judges barred married women from suing but allowed them to plead in court. A husband sued on behalf of his wife only if she asked him to. The Laws of Toro prohibited married women from suing but empowered husbands to grant their wives a general license to contract. If a husband refused his wife that freedom or was absent or was incapacitated, she could appeal to a court, which could force the husband to give his wife that power, or could grant her the power itself. If a wife attempted to contract without her husband's permission, the agreement was not void but voidable at the discretion of her husband. Householder, "Sources," pp. 52-56.

24 DeFuniak and Vaughn, Principles, p. 29.


29 DeFuniak and Vaughn, Principles, pp. 234, 250, 292-93, 297; Kanowitz, Women and the Law, pp. 64-65; Daggett, Legal Essays, pp. 106-7; McKay, Treatise, pp. 739-40; Householder, "Sources," p. 50. The law forbade excessive donations by the husband and those by the husband which defrauded his wife. Householder, "Sources," p. 50.

However apparently neat the division between ownership and control of community property, the nature of a wife's interest in that property is a point of contention among scholars. To justify seemingly contradictory principles, legal scholars variously describe the nature of a wife's interest as a trust, an ownership by the husband with the wife as an expectant heir, a partnership with the husband as a managing partner, or as an interest that is peculiar unto itself.

DeFuniak and Vaughn argue that a wife's responsibilities for debts indicated her real ownership of the community property. They think it is senseless to vest her with powers that could "hinder and impede [her husband] when, in entire good faith and for the purpose of benefiting the conjugal partnership, he attempt[ed] to enter into some transaction concerning the community property." Admitting that a wife had an inactive role in managing the community property while her husband "administer[ed] wisely," they explain that her rights were "revealed with energy when [he] compromis[ed] her interest by fraudulent or unwise actions." DeFuniak and Vaughn conclude that the rights of husband and wife were "perfectly equivalent" save that during the marriage her rights were "passive" while his were "active." The husband was what deFuniak and Vaughn term a "managing partner." DeFuniak and Vaughn, Principles, pp. 237, 252, 254-55, 266.

McKay writes that a wife's interest in community property constituted a class in itself. He thinks the term "community" was a misnomer because husband and wife shared the property at the dissolution of the marriage rather than during it. During marriage, the wife, he contends, had "no present proprietary interest." He
criticizes the incongruity of a system that allowed a person to own property but not to control it. To McKay the community property system revolved around a wife's disabilities. Rather than an equal owner of half the property, a wife, he argues, was more accurately a "forced heir," where the law guaranteed her a right to her share at the end of the partnership. McKay describes a wife as her husband's "creditor." Her rights rested on his obligations. George McKay, A Commentary on the Law of Community Property (Denver: W. H. Courtwright, 1910), pp. 17-19, 40-42, 46-47, 724, 760, 763.

Daggett observes that American critics of the Spanish system confuse the issue because they have colored their assessments with their common law biases. Given the conflicting and complex sources, she adds that Spanish students of the system likewise disagree. Concluding that "anything and nothing [might] be proved about as elusive a thing as the wife's interest in [the] community," she notes that the issue was "rendered more obscure by the heavy attempts of commentators to explain." Daggett, Legal Essays, pp. 106, 109; Daggett, Community Property System, p. 164.

In 1911, United States Supreme Court Justice Oliver Wendell Holmes confirmed the running debate among jurisprudents. The case involved the property rights of married women according to civil law:

'It is not necessary to go very deeply into the precise nature of the wife's interest during marriage. The discussion has fed the flame of juridical controversy for many years.'


30 Householder, "Sources," pp. 50-51.


Ibid.

Ibid.


Ibid.

DeFuniak and Vaughn, *Principles*, pp. 76, 270. Married women under the Spanish law were as circumscribed as those under the English common law. According to the *Laws of Toro* married women could not accept or reject an inheritance without the approval of their husbands. Their proprietary capacities had to serve their families' interests. That constricting condition was, asserts Ann M. Pescatello, a result of changes in the sixteenth century in the family structure itself. In medieval Europe, explains Pescatello, extended families performed essentially all social functions. They provided havens for dependent persons, such as the aged, widows, and unmarried daughters. By the sixteenth century, observes Pescatello, families began to cast off some of their social functions. What emerged was the so-called nuclear family, a unit based on parents and children only. By the eighteenth century, concludes Pescatello, "the family had gradually shed its public character and donned the cloak of privacy." At this juncture, families dwelled on their children, the powers of husbands expanded, and the role of women, Pescatello claims, narrowed. Ann M. Pescatello, *Power and Pawn: The Female in Iberian Families, Societies, and Cultures* (Westport, Conn.: Greenwood Press, 1976), pp. 11-13, 73. See also, Dillard, "Women in Reconquest Castile," p. 88.

Pescatello, *Power and Pawn*, p. 176. A strict translation of acusado means "accused." Once a widow remarried, she relinquished her rights to custody of her minor children and her rights to manage their property. Ibid., p. 142.

Ibid., p. 141.

Ibid.

44 DeFuniak and Vaughn contend that married women of English noble families contributed to marriages in a way different from the married women of peasant stock. Patrician women were valued for the lands they brought to their marriage and for the male heirs they would bear. Common women possessed nothing comparable. To the marriage, they donated their labor. DeFuniak and Vaughn, Principles, pp. 21-22.

Though Angles and Saxons transported the community property practice to England, the island spurned it. DeFuniak and Vaughn subscribe to the theories of the English legal scholars, Sir Frederick Pollock and Frederic William Maitland. Pollock and Maitland surmise that since the laws of the peerage became the law for all, the community property custom disappeared. Feudal law pre-dominated. On the continent where feudalism likewise reigned community property practices persisted. The explanation for the divergence lies in England's insular experience. DeFuniak and Vaughn, Principles, pp. 21-22.

45 DeFuniak and Vaughn, Principles, p. 25. The sexual imbalance on the frontier is vividly described by Catherine Ester Beecher in 1846:

The next cause which bears severely on the welfare of our sex, is the excess of female population in the older states from the disproportionate emigration of the other sex. By the censuses we find in only three of the small older states, twenty thousand more women than men, and a similar disproportion is found in other states. The consequence is, that all branches of female employment in the older states are thronged, while in our new states, domestics, seamstresses, mantuamakers, and female teachers are in great demand. In consequence of this, women at the East become operatives in shops and mills, and at the West, men become teachers of little children, thus exchanging the appropriate labors of the sexes, in a manner injurious to all concerned.

Thurman notes that an 1850 Oregon law allowed married women to hold as much as half of their husbands' homestead property as their separate property exempt from their spouses' debts. In California a lawmaker advocated the recognition of a wife's right to property reasoning that

"Having some hopes that some time or other I may be wedded... I shall advocate this section... and I would call upon all the bachelors... to vote for it. I do not think we can offer a greater inducement for women of fortune to come to California. It is the very best provision to get us wives that we can introduce..."

Thurman, " Married Women's Property Acts," pp. 14, 25. Degler agrees with Thurman. He observes that the sex ratio in the West largely explained that region's generosity toward women. Citing the 1850 Oregon law, Degler states that that provision was significant because it granted land to married women as well as to single. Cari N. Degler, "Revolution Without Ideology," p. 193.

With respect to Texas, Stephen F. Austin's colony, according to an 1830 census, contained mostly single men. Mark E. Nackman, "Anglo-American Migrants to the West: Men of Broken Fortunes?" the Case of Texas, 1821-46," Western Historical Quarterly, V (October, 1974), 445-46.


46 Ibid., pp. 3, 25.


48 Austin received permission to create a settlement immediately prior to Mexican independence. According to Smith, Austin, a former Virginian and a resident of Missouri, lost his fortune in the 1819 panic. Apparently he prospered in Missouri while Spain governed that territory but went broke when the United States
acquired the region. Smith surmises that Austin went to Spanish Texas to attempt to recoup his losses. Austin died in June 1821, four months after Mexico gained its independence from Spain. Smith, *Marriage*, pp. 1-2.

49 The "Old Three Hundred" families who joined young Austin numbered approximately twelve hundred persons. Smith, *Marriage*, p. 2.


51 Ibid.; Gerald Ashford, "Jacksonian Liberalism and Spanish Law in Early Texas," *Southwestern Historical Quarterly*, LVII (July, 1953), 2. Nackman calculates that during the 1820's about ten thousand Americans entered the Texas territory. Most, he observes, came from Tennessee, Missouri, Arkansas, Alabama, Mississippi, and Louisiana. These states, notes Nackman, were most affected "by the belt-tightening of the 'monster' bank and the collapse of the wildcat banks." Nackman believes that the United States' economy bottomed out about 1822; a slow recovery followed. A recession occurred in 1833, which Nackman argues, resulted from the contraction of credit by the United States bank after the removal of government deposits to Andrew Jackson's "pet" banks. Clement Eaton adds that the South Atlantic states from 1820 to about 1850 were on an economic slide. Nackman, "Anglo-American Migrants," p. 448; Clement Eaton, "Social Structure and Social Mobility in the Old Southwest," in *The Americanization of the Gulf Coast, 1803-1850*, ed. by Lucius F. Ellsworth (Pensacola: Department of State Historic Pensacola Preservation Board), p. 53.


54 Ibid.

55 Ibid.

56 Ibid.

57 Ibid., pp. 449-50.
58 Ibid.

59 Samuel Harman Lowrie, *Culture Conflict in Texas, 1821-35* (New York: Columbia University Press, 1932), pp. 7-8, 65. Ashford cites a reported conversation in 1806 between Moses Austin, living in Missouri, and a friend in the East to the effect that the United States aroused widespread discontentment when it refused to recognize land grants made by Spanish authorities just prior to the Louisiana cession. Ashford, "Jacksonian Liberalism," p. 2.


62 Nackman concedes that historians cannot provide a rigorous socioeconomic analysis of the Texas population for want of census data. Nackman adds that impressions lead scholars "to believe that the debtor-fugitive element of Texas was substantially higher than that of mature communities." He notes Eastern newspapers which referred to Texas as a refuge for debtors. He adds that when Texans in the 1840's debated whether to join the Union, the anti-annexation press warned that should annexation materialize, those who fled from the states from indebtedness would be liable for those debts. Nackman, " Anglo-American Migrants," pp. 453-54. Ashford believes that there was substantial evidence which indicated that Texans were a relatively deprived lot. He remarks that large slaveholders were in debt. To demonstrate that indebtedness was prevalent in Texas, Ashford argues that notes signed by Texans before their exodus were popular items among speculators. Ashford, "Jacksonian Liberalism," pp. 8-9. Lowrie agrees that most of the colonists had been economically unsuccessful or simply unlucky. Misfortune and failure were, he offers, "potent factors in selecting from the American population those who were to come to Texas." Lowrie, *Culture Conflict*, p. 47. For more on the indebtedness of large slaveholders, see Eaton, "Social Structure," pp. 56-57.


64 Ibid.
Ibid., p. 444.

Ibid., p. 449.

Smith, *Marriage*, pp. 2-4. In its "Declaration of the People of Texas in General Convention Assembled," the colonists, on October 16, 1835, declared that

. . .whereas, General Antonio Lopez de Santa Anna, and other military chieftains, have, by force of arms, overthrown the federal institutions of Mexico, and dissolved the social compact which existed between Texas and the other members of the Mexican confederacy; now the good people of Texas, availing themselves of their natural rights, solemnly declare . . . that they have taken up arms in defense of their rights and liberties, which were threatened by the encroachments of military despots, and in defense of the republican principles of the federal constitution of Mexico. . .


DeFuniak and Vaughn, *Principles*, pp. 52-53; Householder, "Sources," pp. 3-4, 58. The *Laws of the Indies* were a compilation of royal orders and laws promulgated under King Philip IV of Spain to govern Spain's expanding colonial empire in the New World. These laws addressed political, military, and administrative affairs. Though the compilation contained no laws governing marital property, it declared that where there were no provisions, the laws of Castile applied. From 1680 on, laws governing Spain's possessions in the Americas proliferated. In 1777, Spain attempted unsuccessfully to codify these laws. A comprehensive code materialized in 1805, the *Novisima Recopilacion de las Leyes de Espana* or the *Latest Compilation of the Laws of Spain*. This contained marital property provisions. From this compilation came the *Novisima Sala Mexicana*, or the *Law of Mexico*, which addressed the governors of the East and West Indies. That law, according to deFuniak and Vaughn, contained the basic rules of community property, which became the law for Spain's American colonies, and operated as the primary principle for the "community


71 See the introduction to Lucius F. Ellsworth, ed., The Americanization of the Gulf Coast, 1803-1850 (Pensacola: Department of State Historic Pensacola Preservation Board, 1972); Lowrie, Culture Conflict, p. 119; Eaton, "Social Structure," p. 54.

72 Ellsworth, Americanization, introduction; Eaton, "Social Structure," p. 54; Lowrie, Culture Conflict, pp. 119, 177.


75 John Sayles and Henry Sayles, Early Laws of Texas, I (St. Louis: Gilbert Book Company, 1888), 151.


79 Ibid.

80 An Ordinance and Decree; Entitled an Ordinance and Decree for Opening the Several Courts of Justice, Appointing Clerks, Prosecuting Attorneys, and Defining their Duties, &c., Gammel, Laws of Texas, I, 1039. After Texas proclaimed its independence, it continued to apply the common law to criminal procedure. On December 20, 1836, the Texas legislature adapted the common law to juries and to evidence. The following day the legislature enacted a measure which punished according to the English common law all offenses known to that law. Oliver Cromwell Hartley, A Digest of the Laws of Texas (Philadelphia: Thomas, Cowperthwait, 1850), p. 120.

81 The common law prevailed in the appointment of administrators and guardians. An Ordinance and Decree; Entitled an Ordinance and Decree for Opening the Several Courts of Justice, Appointing Clerks, Prosecuting Attorneys, and Defining their Duties, &c., Gammel, Laws of Texas, I, 1040.

82 Texas, Constitution (1836), art. 4, sec. 13; Gammel, Laws of Texas, I, 1074. Texans unanimously adopted the constitution on March 17, 1836. Hartley, Digest, pp. 42-43.

83 Texas, Constitution (1836), schedule, sec. 1; Gammel, Laws of Texas, I, 1077.

84 Rosalee Morris Curtis, John Hemphill; First Chief Justice of the State of Texas (Austin: Jenkins Company,


88 Lowrie, Culture Conflict, pp. 178-79. Homestead laws exempted a specific amount of land and other family possessions from seizure for debt. The object of the exemption was to protect families from impoverishment and to prevent them from becoming public charges. By withholding a portion of property from a creditor's reach, the law afforded debtors a chance to recoup their losses. Friedman, History of American Law, pp. 214-15; Lena London, "The Initial Homestead Exemption in Texas," Southwestern Historical Quarterly, LVII (April, 1954), 433. Unknown in the common law, homestead exemptions in Texas continued a Spanish-Mexican tradition. Curtis, John Hemphill, pp. 64-65; Lowrie, Culture Conflict, pp. 177-78. To foster settlement, the Mexican government in 1829 promulgated measures exempting land from payment for debt. London, "Initial Homestead Exemption," pp. 438-39; Sayles and Sayles, Early Laws, I, 77. In Texas homestead laws were not, contrary to Friedman, an "American innovation." Friedman, History of American Law, pp. 214-15. London noted that property exemptions from creditors' claims were not wholly foreign to American colonists in Texas. A number of states, she explains, had chattel exemption laws and stay laws in the instance of realty. London, "Initial Homestead Exemption," pp. 437-42.

Homestead exemptions suited Texas' needs. According to London, the Panic of 1837 and the ensuing depression spurred Texans to provide economic security to families. London emphasizes that the plummeting economy devastated a number of Texas families. London, "Initial Homestead Exemption," pp. 435-36. In 1839, Texas enacted its first homestead measure. This act exempted from seizure for debt, fifty acres of land or one town lot and improvements not exceeding five hundred dollars,

... all house hold and kitchen furniture
(provided it does not exceed in value two hundred dollars), all implements of husbandry (provided they shall not exceed fifty dollars in value), all tools, apparatus, and books belonging to the trade or profession of any citizen, five milch cows, one yoke of work oxen or one horse, twenty hogs, and one year's provisions. . .


In 1845, Texas became the first state to ensconce homestead exemptions into a constitution:

The Legislature shall have power to protect by law from forced sale, a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land (not included in a town or city) or any town or city lot or lots, in value not to exceed two thousand dollars, shall not be subject to forced sale for any debts thereafter contracted; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the Legislature may hereafter point out.

Texas, Constitution (1845), art. 8, sec. 22; Gammel, Laws of Texas, II, 1294; London, "Initial Homestead Exemption," p. 446. Nackman argues that the institution of homestead laws reinforced the idea that Texas was a haven for debtors. Nackman, "Anglo-American Migrants," p. 454.


90 McKnight, "Texas Community Property Law," p. 119.

91 Ibid.

92 Ibid.

Texas, Congress, House, A Bill to be Entitled An Act to Adopt the Common Law of England; to Repeal Certain Mexican Laws and to Regulate the Marital Rights of Persons, Bill No. 168, 4th Cong., 1840. The definition of "rule of decision" is fuzzy. In light of the 1836 constitutional directive to the legislature, the phrase apparently referred to court rulings. Edward Lee Markham notes that the early Texas courts were "willing to accept the substantive rules of the common law, where the statutes of the republic and State had not provided for rules in some specific instance." Edward Lee Markham, Jr., "The Reception of the Common Law of England in Texas and the Judicial Attitude Toward that Reception, 1840-1859," Texas Law Review, XXIX (October, 1951), 925. In 1850, California lifted from the Texas law and adopted the common law of England as its "rule of decision" in its courts. Kanowitz, Women and the Law, p. 63. For the development of California's marital property laws, see Florence M. Bischoff, "Development of the Law; Married Women's Property Rights" (unpublished LL.M. thesis, University of Southern California, 1923) and John Norton Pomeroy, "Community Property," West Coast Reporter, IV (November, 1884), 305-10.

Friedman and Butte agree that Texas did not adopt the English common law unadulterated. Friedman believes that the Republic adopted "a Texas subdialect of the American version of it." Friedman, History of American Law, p. 150. Butte thinks that Texas' intent was unclear; it vaguely adopted the common law without reference to time. George C. Butte, "Early Development of Law and Equity in Texas," Yale Law Journal, XXVI (June, 1917), 705.


Ibid. It left in force those portions of the common law that Texas adopted and those laws that related to colonial land grants in the former state of Coahuila and Texas. It kept in force those laws that pertained to reservations of lands, salt lakes, licks, springs, and of mines and minerals, and those laws of the former provisional government which provided for auditing
accounts against the government.

97 Ibid.

98 Ibid.

99 Ibid. The actual text referred to "community property" as "common property." McKnight suggests that that phrase was an anglicization of the Spanish term Louisiana, he observes, used the word "community" as an adaptation of the French term. McKnight, "Texas Community Property," pp. 121-22.

100 Ibid.

101 Ibid. Minors capable of entering into marriage had to obtain the written consent of their parents to make an agreement. If one parent was dead, the consent of the surviving parent was sufficient. If both parents were dead, the minors had to obtain the consent of their guardians.

102 Ibid.

103 Ibid.

104 Ibid. The final section of the bill declared that the provisions operated prospectively. They applied to those who married after the passage of the measures including those who married in another country and who owned property in the Republic. Those who married before the enactment of the provisions including those married in foreign countries were subject to the law as it stood prior to enactment.

105 Texas, Congress, Senate, Amendments Made by the Senate to the Bill to be Entitled An Act to Adopt the Common Law of England; to Repeal Certain Mexican Laws and to Regulate the Marital Rights of Persons, Bill No. 168, 4th Cong., 1840.

106 Ibid.

107 An Act Concerning Wills, Gammel, Laws of Texas, II, 177.
An Act Prescribing the Mode in Which Married Persons May Dispose of Their Separate Property, Gammel, Laws of Texas, II, 608.

Texas, Congress, Senate, An Act Prescribing the Mode in Which Married Persons May Dispose of Their Separate Property, Bill Nos. 1875, 2131, 5th Cong., 1841.


Texas, Congress, Senate, Judiciary Committee, Report of the Committee on the Judiciary on the Bill to be Entitled An Act Prescribing the Mode in Which Married Persons May Dispose of Their Separate Property, Doc. No. 1841, 5th Cong., 1841.

McKnight, "Texas Community Property Law," pp. 117-122. McKnight notes that Texas' definition of a married woman's property resembled that of Mississippi and that under the Texas law the provisions allowing a married woman to act independently were similar to those of Louisiana. Ibid. See also Ericson and Winston, "Civil Law," p. 30. It is unclear just what bodies of law Texans resorted to. Householder, "Sources," pp. 3-4, 7.

The scarcity of sources continued to plague Texans for at least another decade. In 1851, Gustavus Schmidt wrote of his attempt to set down the laws of Spain and Mexico:

. . . the difficulty of ascertaining how much of the old laws have been modified, amended or repealed by subsequent enactments, renders it often embarrassing to determine the legislation on any given subject.

In the preface to his volume he stated that lawyers in Texas and in Louisiana urged him to publish his work. Gustavus Schmidt, The Civil Law of Spain and Mexico (New

114 **Butte, "Early Development,"** pp. 700-1.

115 **Ibid.** Butte cites the issues of independence, slavery, and public lands.


117 **McKnight, "Texas Community Property Law,"** p. 117. See also, Householder, "Sources," p. 1.

118 **Friedman, *History of American Law*,** p. 151. Friedman suggests that the fluctuating state of the common law in the United States affected the selection process.


120 **Ibid.**

121 As Nackman remarks, "Finding steady employment restrictive, these drifters might have proven unreliable husbands and irresponsible fathers." Nackman, "Anglo-American Migrants," p. 444.

McKnight surmises that the architects of the 1840 law were "thinking basically in terms of a rule of succession rather than of present property ownership." McKnight, "Texas Community Property Law," pp. 120-21. Contrary to McKnight's interpretation, the act stressed the present interests of married women. The designation of their separate property, the management of that property and of the community, and the remedies available
to married women in the event that their husbands abused
their powers or neglected their families' interests
strongly suggest the emphasis.

Similar to the common law states, the community property
states referred to the women's rights movement in debating
marital property legislation. Another California law-
maker opposed to community property retorted that the
feminist doctrine was the 'doctrine of those mental
hermaphrodites Abby Folson, Fanny Wright and the rest of
tribe'. DeFuniaq and Vaughn, Principles, p. 25.

123 Ashford asserts that during the Anglo-American
settlement of Texas the panic of 1819 and the recessions
that ensued "created a new mood of radicalism," of which
a modest outcome was the remolding of the common law
through statutory procedure. Ashford, "Jacksonian
Liberalism," p. 4.

Dargo argues that the civil law gave control of
property to the living while the common law clung to the
static ways of feudalism. By 1800, he states, the civil
law offered complete ownership of and title to land
while the common law continued to recognize only an
"interest" or an "estate" in reality. Concludes Dargo,
by recognizing an active and present ownership, the civil
law fostered commercialism. Dargo, Jefferson's
Louisiana, pp. 13-14. Scholars insist that the married
women's property acts arose from a desire to facilitate
commerce. See Lebsock's article, "Radical Reconstruction,"

Dargo presents the civil law as a keeper of the
family unit. He notes that that law recognized the rule
of "forced heirship," which limited the testamentary
powers of a parent to one fifth of his or her property.
The law established narrow grounds upon which a parent
could disinherit his or her children. Forced heirship
was, proclaims Dargo, "a pillar of family relationships."
The common law, on the contrary, he holds, permitted men
to dispose of their property as they wished. The law
guarded heirs against disinheritance only if the intent
of the testator appeared dubious. Vigorously inditing
the common law for its "individualism and its tendency to
locate decision-making power in the mature, reasoning
adult," he praises the civil law which preserved the
family and the "claims of family members when willful
parental action might defeat them." Dargo, Jefferson's
Louisiana, p. 13. But the marital property arrangements
of the civil law afforded a husband powers that like the common law assumed a "mature, reasoning adult."


125 Texas' law apparently became the prototype for the homestead laws of other states, such as Alabama, Florida, Georgia, and Mississippi. In 1848, Connecticut, Michigan, and Wisconsin joined. By the Civil War, notes Friedman, all but a few states had homestead provisions. Friedman, History of American Law, pp. 214-15; London, "Initial Homestead Exemption," p. 443. Similar to the debate surrounding the married women's property acts, those who opposed homestead laws claimed that such laws hindered debt collecting and encouraged cheating. Advocates of the laws argued that such measures facilitated debt collecting because by allowing debtors to retain a portion of their property, the laws permitted them to earn money to pay off their debts. London, "Initial Homestead Exemption," pp. 447-50.


127 Ibid.
CHAPTER IV

THE 1845 CONSTITUTION AND LEGISLATIVE ADJUSTMENTS

Referring to the 1845 Texas constitution which guaranteed married women property rights, an 1846 New York publication urged delegates to that state's constitutional convention to follow Texas' lead.¹

'The following provisions are unknown in any other American Constitution, and contain principles of exceeding importance and value. We hope that in some form, they may find their way into the fundamental law of the whole confederacy.'²

Other jurisdictions debated the merits of this constitutional innovation. A delegate to the Wisconsin constitutional convention exclaimed:

'Each of the propositions contained in this article is novel. Nothing similar to them can be found in the constitution of any state except Texas, and surely we will not go to that noted asylum for all the desperadoes in the country for examples of public morals and correct laws on the collection of debts.'³

But a colleague retorted:

'...when Texas does a correct or a good thing Wisconsin should have the sufficient sense of justice to give her credit for it, and not pass condemnation upon correct principles merely because they had their origin in Texas...from the very highest Democratic authority the principles contained in the Texas constitution upon the
subject of protecting the rights of married women...are strongly recommended and highly approved...the age in which we live is an age of improvement as much for Wisconsin as any other state in the Union.\textsuperscript{4}

Annexation of Texas to the United States in 1845 did not in itself alter marital property laws.\textsuperscript{5} But the constitution of the new state redefined the separate property of married women and directed the legislature to clarify the rights of married women to that property and to the community and to provide for the registration of their separate property.\textsuperscript{6} Texas' first state constitution signaled a basic change in that state's marital property laws.

The mode in which Texas effected change as well as the change itself precipitated controversy. Securing property rights for married women within a state's organic laws was novel.\textsuperscript{7} For Texas, that constitutional guarantee and subsequent enactments transformed that society from a loose assemblage of self-sufficient individuals into a frontier commonwealth.\textsuperscript{8}

On July 12, 1845, at Texas' first state constitutional convention, Nicholas H. Darnell of San Augustine County proposed that the constitution vest in a woman upon marriage all or half the property she owned, half the property her husband owned, and half the property acquired during marriage after the payment of all debts.
Darnell recommended that a married woman have full control of the profits from her property. Except for this last suggestion, the convention accepted Darnell's proposals.9

The Committee on the Bill of Rights and General Provisions which scrutinized proposals and resolutions instead recommended that the constitution direct the legislature to provide as early as possible "laws defining the rights of married women, upon the principle of a community of property between husband and wife, having a due regard to the rights of heirs and creditors."10 The dialogue that ensued revealed the conflict between those who advocated the civil law and those who favored the common law. What laws Texans adopted hinged on whether those arrangements served their needs rather than on whether they adhered punctiliously to some legal principle.11

Gustavus A. Everts of Fannin County proposed to delete the entire section from the document. He acknowledged that Texans were partial to community property, but he preferred the common law, as interpreted by the states, to govern married women's property rights. That law, he argued, better defined the rights of widows and children and better secured them than any other law. He objected to legislating on the subject because such action transgressed constitutional bounds
and yoked future legislators. The convention routed the proposal to the Judiciary Committee, which John Hemphill, Washington County delegate and advocate of and reputed expert on Spanish law, chaired. 12

From the one section, the committee carved three. Following the recommendations of the Committee on General Provisions, the Judiciary Committee ordered the legislature to clarify marital property rights with special regard for a surviving spouse and the children of the deceased where the parent died rich. Antithetic to the common law, the provision forbade the legislature from vesting a husband, by virtue of marriage, with his wife's property and from divesting her of her share of the community. It barred the legislature from holding the property of either spouse liable for the debts of the other incurred before marriage. The last section, extending additional protection to a married woman's property, commanded the legislature to establish procedures for recording a wife's property within one year of marriage or of the acquisition of the property. 13

A minority of the Judiciary Committee filed a separate report. The minority's proposal defined a wife's property as that which she owned at the time of marriage, that which she acquired by gift or inheritance, and as one third of that property which her husband owned at the time of his death, including the homestead. The
minority recommended that the legislature formulate registration laws for a wife's property. ¹⁴

Compared to the law in force, the minority's proposal expanded the definition of a wife's separate property to include all property she owned before marriage and all that she gained during marriage through gift or inheritance, rather than just her lands, slaves, and paraphernalia. Shades of the common law were evident. That part of the minority's report which guaranteed married women one third of their husbands' property at their husbands' death resembled the common law principle of dower. The minority's tendency toward the common law was evidenced further by their failure to recognize community property.

John Armstrong of Robertson County, one of the minority, proclaimed that the minority's proposals secured the rights of married women "beyond all possibility of doubt." ¹⁵ They, he argued, guarded all of a wife's property before, during, and after marriage. The current law, he continued, shielded only her lands and slaves. He opposed the majority's ideas because they duplicated the homestead proposals. "If all this is not sufficient to secure the rights of woman," he concluded, "I am not able to tell what is, unless we attempt to legislate upon the subject in detail." ¹⁶

Hemphill cautioned that adoption of the minority's
suggestions represented a basic shift in marital property rights. Those proposals, he explained, by expanding the definition of a married woman's separate property returned to the pre-1840 definition. The recommended substitutes omitted community property. Hemphill noted that although the minority presented a broad definition of a wife's property, similar to the Spanish law, it neglected to earmark portions of each spouse's property, as the continental law had done, to support the marriage. 17

Hemphill supported the majority because it preserved community property as established in the 1840 law, which he remarked, without elaboration, had fundamentally altered marital property arrangements. He favored modifying the law provided that the change recognized community property. This attitude partially explained why Hemphill supported the 1840 law though that law did not adhere rigorously to Spanish principles. Like the 1840 act, added Hemphill, the majority's proposals guarded a husband's interest while assuring the wife's rights. Comparing the common law to the civil, Hemphill praised the latter for recognizing husband and wife as separate persons and not as a single unit. 18

Hemphill explained that when Texas accepted the Spanish-Mexican law of separate identities, it swept away various marital property provisions. He failed to
specify, but he pointed out that the majority's plan sought to fill these gaps by enjoining the legislature to define more precisely the rights, duties, and obligations of husband and wife with regard to their property. A husband's powers over his wife's property, urged Hemphill, needed tangibility. 19

Although a husband was bound to support his wife and children from the proceeds of her lands and slaves which he controlled, where the community property supported and educated his family, he could use the profits from his wife's lands or slaves to enhance his property or to enjoy them any way he wished. The law, he advised, should monitor the disposition of such property more closely. Otherwise, he warned, the husband could "seriously injure or destroy the estate of the wife by wasteful expenditure or fraudulent mismanagement." 20 He suggested that in certain instances the wife ought to control her property or have the power to appoint a trustee to control it for her. 21

Another benefit of the Spanish-Mexican law which Hemphill thought "perished amidst the wreck of the old system" and for which there was yet no compensation, was that law which aided widows in dire circumstances. 22 Spanish law, he stated, assured propertyless widows one fourth of their husbands' estates. By directing the legislature to provide relief for widows, the majority's
recommendations, declared Hemphill, protected widows without means. To Hemphill, the current laws protected married women better than the minority's plan.23

Under the first, married women received half of the community property during and after marriage, while under the last, they received only a third of their husbands' holdings, and then only for the duration of widowhood. Without legal protection, he gathered, the fear of poverty would discourage widows from remarriage. Hemphill sought to protect women from "tyrannical husbands" who, by leaving their wives meagre portions in their wills, extended "their capricious despotism beyond the grave."24

Since the existing laws provided a base from which the legislature could construct laws protecting married women and since these laws were crucial, Hemphill urged the delegates to place such laws under the constitutional umbrella, "beyond the... caprice, and... mutability of opinion."25 He added that marital property laws should be simple for the benefit of creditors and other business people.26

Hemphill's chief concern was the protection of married women from despotic husbands. He feared the consequences of adopting the common law. Everything, he exclaimed, that a wife owned, save her lands and slaves, at the time of marriage and everything that she acquired during it belonged to her husband. His ownership, he
stressed, was sole and absolute. 27

The whole may be absorbed in the payment of his debts before marriage; may be lost in speculations or at the gaming table, may be wasted and entirely destroyed, or may be given away in the presence of his deserted and beggared wife, to the most unworthy wretches, with...complete impunity... and without remedy afforded by law. 28

Through parliamentary maneuvering, the convention returned to the "main question" of whether to adopt the section on marital property rights as the Judiciary Committee submitted originally. That proposal simply ordered the legislature to premise marital property rights on the principle of community property with special regard to the rights of creditors and heirs. The motion to return to the main question carried, effectively brushing aside the Judiciary Committee's split report. 29

Supporters of the common law advocated recognition of that law. Everts protested defining the rights of married women according to the civil law:

...we are... emphatically a common law people. It is true the civil law was in force here in the earlier settlement of the country; but the present population was raised and educated under the common law. The laws relating to distribution and descents are generally alike throughout the Union, excepting Louisiana, where the civil law was retained on account of the first settlers being a foreign population of French and Spanish descent. I think... that some little respect should be entertained by this Convention for the opinions of those who may come to this country hereafter from the United States. 30
Abner S. Lipscomb of Washington County, destined to sit on the state's highest bench with his colleague from the same county, preferred to excise the entire section from the constitution and to leave the matter to the legislature. As that section stood, he explained, a wife's separate property was liable for her husband's debts or subject "to the consequences of his misfortune or ill conduct." Thomas J. Rusk of Nacogdoches County agreed. He thought that the homestead laws afforded families enough protection. He agreed that the common law inadequately guaranteed the rights of married women, but the civil law, he quipped, "would be doing it with a vengeance."31

Responding to Rusk, James Davis of Liberty County urged the convention not to abdicate the matter to the legislature because married women required additional protection.32 In dramatic rhetoric, he harangued the assemblage:

Why not secure to the daughter a sufficient amount of property to relieve her from the drudgery of the wash tub, to which the vices or improvidence of her husband may reduce her? The days have passed away when women were beasts of burden, and as intelligence increases they will be placed upon the high and elevated ground which rightfully belongs to them.33

Contemporary opinion, he thought, supported protecting the property of married women. He cited instances in Louisiana where married women owned "two or
three hundred negroes, while their husbands [were] in
debt to the amount of thousands of dollars." Protect-
ing a wife's property against her husband's creditors was
essential. 

For George W. Wright of Lamar County marriage was
like a business partnership. Property, he believed, should
comprise a common fund subject to all debts incurred by
either spouse. "Screening one partner where both... equally benefited" was, he declared, unjust. Responding
to Wright, Darnell, who first proposed the constitutional
amendment, reiterated that he sought to protect a married
woman's interest in the community property. He rejected
Wright's analogy between marriage and a business partner-
ship. In business the law protected each partner equally,
but in marriage a wife who "takes the male for better or
for worse... risks the consequences." As for creditors,
he thought that they should know before extending credit
to married women what the status of their property was.
Otherwise any loss by them was their folly.

He opposed relinquishing the matter to legislators.
He envisioned them "looking Shylock-like, with an eye
single to the little means they could put in their own
pockets." He cited the caprice and intrigue of the
legislature:

The Legislature at one session will pass a
law defining the rights of married women;
the next will change them again; and the next will repeal every thing in relation to the subject.41

To Darnell, the constitution served to harbor married women and their families from legislative whim. Darnell, a proponent of the civil law, rebuked the common law for placing women at the mercy of husbands who frittered away their wives' property in "midnight frolics."

42 But, retorted Armstrong, the civil law worked the same results except that it reversed the roles.43 Under the Louisiana system,

44 . . . instead of the man's making a beast of the wife, the man is the beast of the woman; for he cannot buy himself a shirt without the order of the wife; and he is a beggar on his own plantation.

The convention shuffled the proposal off to a special committee. The committee's proposal enjoined the legislature to define the property rights of married women with respect to their separate and community property. Civil law advocates won. The convention finalized the proviso with an amendment by A. C. Horton of Matagorda County which directed the legislators to make rules for the registration of a wife's property.45

Since the objective of homestead laws related to that of the married women's property laws, the convention's discussion of homestead rights with special reference to married women illuminated further the issue of married women's property rights. Like the statutory
law, the proposed constitutional section forbade a husband from selling the homestead without the consent of his wife. As John M. Lewis of Montgomery County reasoned, under American law, though a wife "wended her way here through the mud and mire, with a view to secure a portion of land, yet when her husband [died], her land [was] swept from her. . .we should provide for her here." 46

Lipscomb agreed. Such a measure immunized families from financial ruin and gave creditors prior notice. 47

We have often witnessed a drunken husband rolling in the gutter, or reeling through the streets, while his patient wife and little ones supported him and themselves by their industry. 48

Unless the constitution contained safeguards, he warned, families would resort to fraud to secure their property; married women would "cover it up and conceal it under petticoats, if you please." 49

Suppose a wife was derelict, asked James Love of Galveston County, who resisted giving married women control of the homestead? The convention, he charged, assumed an evil husband. He thought that giving married women control of the homestead threatened to divide families because it separated the interests of husbands and wives. Positing that women were subject to men, he contended that husbands should be the sole managers of family property. 50
Rusk reminded Love that the homestead provisions intended merely to reproduce the objectives of the English law of dower, which assured a woman a portion of her husband's property upon his death. Proponents of the homestead law triumphed. A husband could not sell or otherwise dispose of the homestead without his wife's approval. With the married women's property measures, that law became part of the fundamental law of Texas because the maintenance of the existing social structure was bound up intrinsically with the general welfare of that state. 51

The constitutional definition of a wife's separate property diverged from the 1840 statutory definition. Compared to the 1840 law, the 1845 measure enlarged the scope of a wife's separate property. The first limited her property to her lands, slaves, and paraphernalia which she brought to the marriage and which she acquired after by gift or inheritance. The rest belonged to the community. The constitution expanded the wife's domain by designating all that property she owned before marriage and all that property she gained during marriage by gift or inheritance her separate property. Implicitly, the boundaries of community property shrunk by that much. 52

Since the constitution omitted a redefinition of a husband's separate property, theoretically only his
lands and slaves which he owned before marriage and
which he acquired during marriage by gift or inheritance
continued to comprise that property. Accordingly, more
of his property became community than his wife's.

Though the constitution altered the perimeters of
a married woman's property, it overlooked the husband's
control of it. The 1840 act granted him control of his
wife's lands and slaves. Since the 1845 redetermination
of a wife's property did not expand the husband's control,
his powers remained confined to her lands and slaves and
to less community property. With her base of ownership
broadened, a married woman controlled more property, ex-
cept her lands and slaves. For married women the change
in the demarcation of marital property was significant.
But their husbands continued to control key types of
property. In 1848 when Texas legislators realigned the
statutory definition of a married woman's property with
the constitutional definition of it, they removed that
margin of control that married women had won by default.

Before the legislature synchronized the law, it
essayed to comply with the constitution's call for
registration laws for a wife's property. To simplify
marital property laws, as the constitution summoned, the
legislature enacted measures to prescribe the manner in
which married women could transfer property in which
they had an interest. On April 29, 1846, a bill governing
the registration of the separate property of married women became law. In cookbook fashion it outlined procedures for recording a wife's property, which the act declared was conclusive against a husband's creditors.\footnote{53}

Adhering to the constitutional definition of a wife's separate property, the law declared that married women could in the county in which they resided register in the ordained manner all property owned by them at the time of marriage and all property acquired by them during marriage by gift or inheritance. To register, a married woman presented to an authorized official a description of her property and acknowledged to that official that the property described was hers. The official certified that fact and registered the certificate.\footnote{54}

On April 30, the legislature dictated the method in which married women could transfer their property.\footnote{55} Conveyances were conduits of control; hence the law carefully checked property transactions of married women, seemingly for their benefit. The original bill, introduced by the Senate, declared that any conveyance of property by husband and wife was valid provided both husband and wife signed, sealed, and delivered the deed with a statement by the wife that she acted independently of her husband.\footnote{56} A judge or notary public witnessed and confirmed that declaration.\footnote{57}

The Judiciary Committee opposed passage.\footnote{58} It
concluded that the existing laws on the subject were sufficient. Most probable the committee believed that the measures duplicated the February 3, 1841, act, which established procedures by which married persons disposed of their property. The Senate persisted. It amended the bill by repealing all prior law that dictated the way in which married women conveyed their property. The Select Committee assessed the bill but advised passage without the repealer. The House presented a substitute, and the Senate concurred.

More amplified than the Senate bill, the House measure referred to the disposition of a married woman's separate property rather than of that property in which a married woman had an "interest." The House rendition appeared narrower than the Senate version. This last conceivably included as a married woman's property interests her stakes in the community and homestead properties. Why the House opted for the more limited construction is uncertain.

According to the new law when a married couple transferred any of the wife's separate property, including the homestead, a judge or notary public had to question the wife apart from her husband to validate the transfer. If she declared that she freely and willingly signed the deed which the official showed and explained to her and that she chose not to retract, the official certified the
transfer. The House bill included a repealer which
voided all prior laws on the subject, such as the 1841 act. 63

Not until 1848 did the legislature resume its work
in clarifying married women's property rights. 64 On
March 13, 1848, the legislature rectified the statutory
law to agree with the constitutional provisions. 65 It
revamped the 1840 act. Since the constitution failed to
define a husband's separate property, the new statute did.
It defined the property of each spouse identically. All
property owned by each spouse before marriage and
acquired by each after by gift or inheritance, including
the profits from their individual lands and the progeny
of their respective slaves, was their separate property. 66

The 1848 act expanded a husband's powers over his
wife's property by extending them to the borders of that
property. According to the statute, a husband controlled
all of his wife's separate property instead of only her
lands and slaves. He, alone, the law declared, was
during marriage manager of all her separate property.
The act pronounced the husband as sole administrator of
the community property, which it determined as all that
property procured by each spouse during marriage minus
that property defined as separate. Only the husband,
the act stated, could dispose of the community. 67

Accordingly, the 1848 measure established the
liability limits of the community property. That property was subject to the debts of a husband and of his wife in the instance of family essentials. When the marriage ceased with death, the community property went to the surviving spouse if the deceased had no children. If the deceased had children, the surviving spouse collected half of the property while the children obtained the other half. 68

The act declared that together husband and wife were subject to suit for all debts incurred by the wife for necessities for herself, for her children, or for the benefit of her separate property. In the event of a suit, if the court decided that the debts were justified, it could order payment for the expenses from either the community property or from the property of the wife, whichever source the creditor preferred. The 1848 law repealed categorically those sections of the 1840 act which conflicted with it. Those sections defined the separate property of husband and wife and defined the community property and its liabilities. 69

Before the Civil War and Reconstruction absorbed the attention of Texas' policymakers, closing a comparatively lively period in the development of Texas family law, the state's legislators amended the 1848 act. 70 On August 26, 1856, the legislature pushed the scope of the prior law beyond a family's immediate
interests. It recast the law to address the debts pending at the dissolution of a marriage and the relationship of the debts to the community. 71

Except where the law specified, community property was liable for all debts contracted during marriage. In the settlement of a community estate, the act enjoined the survivor or the administrator of the estate to keep an account of all debts paid from the community. A husband had exclusive control of the community property upon his wife's death, but the 1856 enactment set limits. 72

If his wife had children, he had to file in the county court an inventory and evaluation of the community property. He had to maintain records of any transactions involving the property. Upon partition of the property, he had to include his wife's heirs. He was subject to suit for the amount of the heirs' portions. 73

If he neglected or refused to file the report, the act empowered interested parties to sue. A county court could force the husband to file, or it could grant the administration of the property to another. If the court thought that the husband was unreliable, it could require bond from him to protect the interests of his wife's heirs or creditors. If he failed to supply bond, the court could award the management of the property to someone else. The court could request the husband to post bond or could
award control to another if the wife's heirs proved to that body that the husband was squandering or mismanaging the property or was intending to remove the community from the state or to dispose of it to their disadvantage. 74

As each of the wife's heirs reached majority, the law decreed that the husband reserve from the community what he considered their fair share. He had to put his decision in writing. The heirs could contest his judgment, and in that event, a court could determine a just settlement. Likewise, when a husband died, his widow received exclusive control of the community property, until she remarried. When she remarried, her powers over the estate ceased, and the administration reverted to the rules governing the property of deceased persons in general. 75

With respect to the spouses' separate property, the 1856 law permitted husband and wife to bestow by will to each other the power to keep his or her property intact until the heirs became of age to receive their allotment. These managerial powers were subject to the act and to the restrictions in the will. Accordingly, the 1856 act voided all conflicting laws. 76

Texas laws were more vigilant of a husband's powers over family property at the cessation of marriage than during it. The 1856 law intended to protect a wife's interests in the community by protecting her heirs and
her creditors. Married women derived better protection for their property while widowed or dead than while actively wedded. No one except Darnell, who tried to give married women control of the proceeds from their property, equated protection of a wife's property with her control of it. Rather the lawmakers disabled her, implied that the disability was a privilege and called it protection.

In the case of Texas, lawmakers perceived broadening property ownership for married women as a form of security because it isolated that much more of their possessions from their husbands' lenders. The institution of registration laws and of the 1856 proscriptions confirmed that Texas lawmakers subscribed to guarding the property of married women by posing as sentinels of their interests rather than by allowing them to determine their own welfare. They became surrogate fathers.

McKnight interpreted the modifications in the definitions of community and separate property as responses to "a much broader knowledge of Spanish law in Texas than there had been in 1840." More likely the policymakers reacted to public exigencies rather than to some obsession to cleave to the pure principles of Spanish law. The motives were coldly practical instead of academic.

Redefining a married woman's property rights and
according those rights constitutional protection filled some vital need for Texans. A married woman's welfare was indistinguishable from her family's. Protecting her property from her husband's creditors and from legislative tinkering served to stabilize and to preserve the family. Increasingly, a family's private affairs fell under public scrutiny and into the realm of public law. In a way, families were again "extended."

Together the laws guaranteeing marital property and homestead rights operated to minimize the risks of living in a fluid and fragile society and comprised in a most basic way a public support scheme for a pioneer community. The laws constituted the groundwork for subsequent policy-making. The ominous political circumstances that characterized the decade preceding the domestic rebellion, and the war and its aftermath, preoccupied Texas' as well as other states' lawmakers. In the development of Texas' marital property law, the years spanning the 1840's and 1850's were formative. What followed was an era of adjustment and consolidation.
FOOTNOTES - CHAPTER IV


4Ibid., p. 77.

5To promote a smooth transition in its political status, Texas, in its first state constitution, retained all laws that were in force during the Republic except those that contradicted the United States Constitution, the annexation resolutions, and the state constitution itself. These remained in force until the legislature altered or repealed them or until they expired independently.

All laws and parts of laws now in force in the Republic of Texas, which are not repugnant to the Constitution of the United States, the Joint resolutions for annexing Texas to the United States, or to the provisions of this Constitution, shall continue and remain in force, as the laws of this state, until they expire by their own limitation, or shall be altered or repealed by the Legislature thereof.

Texas, Constitution (1845), art. 13, sec. 3; Gammel, Laws of Texas, II, 1299.

The state document guaranteed property rights secured under the laws of the old Republic.

The rights of property and of action, which have been acquired under the Constitution and laws of the Republic of Texas, shall not be divested; nor shall any rights or actions,
which have been divested, barred, or declared null and void, by the Constitution and laws of the Republic of Texas, be re-invested, revised or reinstated by this Constitution; but the same shall remain precisely in the situation which they were before the adoption of this Constitution.

Texas, Constitution (1845), art. 7, sec. 20; Gammel, Laws of Texas, II, 1293–94.

6 Texas, Constitution (1845), art. 7, sec. 19; Gammel, Laws of Texas, II, 1293.

All property both real and personal of the wife, owned or claimed by her before marriage, and that acquired afterwards by gift, devise, or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property, as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.


8 The phrase, "frontier commonwealth," was adapted from Hogan's, The Texas Republic, p. 295.

9 William F. Weeks, Debates of the Texas Convention (Houston: J. W. Cruger, 1846), pp. 52–53. Weeks was the official reporter of the convention.

10 Ibid., p. 277.

11 McKnight suggests that the changes that the 1845 constitution effected were responses to a greater knowledge of the Spanish law by Texans. He states that the new law signaled a return to the law prior to 1840. McKnight, "Texas Community Property," pp. 122–23.

12 Weeks, Debates, p. 360. Scholars agree that Hemphill was proficient in Spanish and knowledgeable in and partial to the Spanish law. He was learned in the areas of land grants, marital rights, and descents and distributions and was acquainted with Louisiana law. Though he assumed various public offices, he gained

13 Ibid., pp. 504-5.
14 Ibid., p. 505.
15 Ibid., p. 594.
16 Ibid.
17 Ibid., pp. 594-95.
18 Ibid., p. 595.
19 Ibid., pp. 595-96.
20 Ibid., p. 596.
21 Ibid.
22 Ibid.
23 Ibid.
24 Ibid., pp. 596-97.
25 Ibid., p. 597.
26 Ibid.
27 Ibid.
28 Ibid.

29 Ibid., pp. 597-98.

30 Ibid., p. 599.


32 Weeks, Debates, p. 599.

33 Ibid., pp. 599-600.

34 Ibid., p. 600.

35 Ibid.

36 Ibid.

37 Ibid.

38 Ibid., pp. 600-1.

39 Ibid.

40 Ibid., p. 601.

41 Ibid.

42 Ibid.

43 Ibid.

44 Ibid., p. 602.


46 Ibid., pp. 422-23.
47 Ibid., p. 423.

48 Ibid.

49 Ibid.

50 Ibid., pp. 423-24.


The Legislature shall have power to protect by law from forced sale a certain portion of the property of all heads of families. The homestead of a family not to exceed two hundred acres of land (not included in a town or city) or any town or city lot or lots in value not to exceed two thousand dollars, shall not be subject to forced sale for any debts hereafter contracted; nor shall the owner, if a married man, be at liberty to alienate the same, unless by the consent of the wife, in such manner as the Legislature may hereafter point out.

Texas, Constitution (1845), art. 7, sec. 22; Gammel, Laws of Texas, II, 1294.

52 McKnight, "Texas Community Property Law," p. 123; William O. Huie, "The Texas Constitutional Definition of the Wife's Separate Property," Texas Law Review, XXXV (October, 1957), 1054-55. Huie states that it was logical that Texas lawmakers sought to stabilize marital property rights by clamping them into the constitution. He notes however that if stability had been the single goal of lawmakers, they would have also addressed the husband's property rights. Since the convention attended to only the wife's interests in property, Huie suggests that it aimed to protect married women against male lawmakers, specifically against the adoption of the common law which would benefit men. Huie states that "at that time there would have been good reason to fear that the husbands in the legislature might decide to switch to the common law, under which the husband not only retained sole ownership of his acquisitions but also acquired ownership of the wife's personality and the use of her land." Huie, "Texas Constitutional Definition," p. 1055.
An Act to Provide for the Registration of the Separate Property of Married Women, Gammel, Laws of Texas, II, 1459.

Ibid.

An Act Defining the Mode of Conveying Property in Which the Wife Has an Interest, Gammel, Laws of Texas, II, 1462.

Texas, Legislature, Senate, An Act Defining the Mode of Conveying Property in Which the Wife Has an Interest, Bill No. 55, 1st Leg., 1846.

Ibid.

Texas, Legislature, Senate, Journal, 1st Leg., March 24, 1846.

Ibid.

Ibid., March 26, 1846.

Ibid., March 28, 1846; Texas, Legislature, Senate, Select Committee, Committee Reports, Doc. No. 1, 1st Leg., 1846.

Texas, Legislature, Senate, Journal, 1st Leg., April 25, 1846.

Texas, Legislature, House, Journal, 1st Leg., 1846, pp. 207, 339-40, 374-75, 470, 479, 492, 499, 506, 511, 528, 537, 555; An Act Defining the Mode of Conveying Property in Which the Wife Has an Interest, Gammel, Laws of Texas, II, 1462. The act recognized conveyances made outside the state but within the United States and its territories, provided husband and wife followed established procedures. The same conditions applied to conveyances made outside United States proper. The person who officiated was either a chargé d'affaires or a United States consul.

On January 22, 1848, the Senate introduced a bill to permit married women to devise their separate property. Seemingly redundant in light of the
January 28, 1840 measure, the proposal attempted to tack responsibility onto power. The 1840 act allowed married women to devise their separate property freely, but made their husbands' property liable for supporting children born after the husbands made their wills. Such was not incumbent upon wives. Perhaps, lawmakers in 1848 believed that married women should assume responsibility for supporting their children. In 1848 the Senate proposed that married women devise their property freely provided they did not have children. The Senate approved the measure, but further documentation of the bill is extinct. Texas, Legislature, Senate, An Act to Permit Married Women to Devise Their Separate Property, Bill No. 125, 2d Leg., 1848; Texas, Legislature, Senate, Journal, 2d Leg., 1848, pp. 190, 196, 249, 271-73.


66 Ibid. The act declared that every female under twenty-one who married became of full age and had all the rights and privileges to which the law entitled them had they been of full age at the time of marriage.

67 Ibid.

68 Ibid.

69 Ibid.


72 Ibid.

73 Ibid.
74 Ibid.
75 Ibid.
76 Ibid.
79 Ibid., p. 124.
80 McKnight referred to this period as "an era of little innovative activity." McKnight, "Texas Community Property Law," p. 124.
CHAPTER V

COMPROMISE AND CONSOLIDATION,
1861 - 1913

On March 8, 1866, Flake's Bulletin, a Galveston newspaper, commented on the 1866 Texas constitutional convention:

The Convention are taking care of the interests of married women. This is gallant in the old fellows who are looking after the property interests of femme coverts with a singleness of heart that does them honor.¹

However attentive the lawmakers were to the property rights of married women, they did not alter the constitutional arrangement regulating marital property rights. The 1866 constitution like the 1861 document retained the 1845 constitutional guarantees.²

For Texas, the Civil War and Reconstruction generated no substantive changes in the law of marital property.³ Following the flurry of constitutional and legislative activity of the 1840s and 1850s, Texas marital property law fell into doldrums.⁴ At least until the first decade of the next century, refinement and consolidation rather than fundamental change characterized the statutory and constitutional law.

Undoubtedly the war and its aftermath altered

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informal arrangements between husband and wife with respect to family property. While men were at war, women managed and controlled family estates and businesses regardless of legal proscription. Indeed, the war left many women permanent managers of family property. The formal law failed to reflect the social shift. From the close of the war through the next half century the law remained relatively static despite the socioeconomic changes that affected Texas during that period. The constitutions of 1861, 1866, and the current constitution of 1876 preserved the 1845 constitutional definition of marital property rights, while statutory law until 1913 embodied minor changes.  

The absorbing and profound issues of the Civil War and Reconstruction displaced less imperative matters in the lawmaking chambers. Later, economic expansion and a myriad of social, political, and economic reforms consumed Texas. Industrialization, urbanization, the spread of the railroad, the growth of west Texas, the rise of a cattle kingdom, and the discovery of oil highlighted the post-Reconstruction years to 1913 and rendered order to a seemingly incoherent period in Texas' development.  

More controlling than the reordering of priorities in the development of Texas' marital property laws were established constitutionalisms of lawmakers that limited the intrusion of government into family matters.
Antebellum lawmakers in Texas staked out constitutional bounds within which succeeding lawmaking was contained. Not until 1913 did a comparatively major change in marital property rights emerge, inaugurating a new phase in the maturation of Texas' marital property law. That year, married women received partial control of their separate property and control of a segment of the community property.

What lent continuity between the antebellum and postbellum periods was an objective that gave rise to the early marital property laws. Like the early laws, the later laws guaranteed families a measure of economic security where a comprehensive public assistance program was inconceivable. Paradoxically, the war perhaps impelled lawmakers to maintain minimum assurances.

As the Galveston newspaper indicated, wartime lawmakers did not ignore wholly the matter of marital property rights. On November 20, 1861, the Texas House Judiciary Committee responded to a resolution which asked the committee to "inquire into the expediency and propriety of more effectively protecting the rights of married women." According to the committee's report, under Texas law a married woman was "not entitled to the increase of any of her separate personal property except the increase of slaves." It concluded that the law was unjust and recommended that "all property...
upon the same footing as entitled to equal protection." Without disclosing the contents of its proposal, the committee offered to amend the 1848 act. This immodest plan never materialized.

Plausibly, the committee intended to give married women ownership of the revenues of their personal property, which the 1848 act designated as community. With respect to the revenues from the property of married women, the act offered married women sole ownership only of the profits from their lands and the increase of their slaves. The income from the remainder of their property was community. The same rule applied to their husbands' property, but husbands controlled their wives' property, the community property, and their own. As part of the community property the profits from the personal property of married women was subject to their husbands' debts. Conceivably, by extending sole ownership of that property to married women, the committee sought to shield it from irresponsible or extravagant husbands.

The committee took a conservative approach in protecting the property of married women. It chose to guard that property by constructing barriers against the creditors of husbands rather than by giving married women sole control of their property with responsibility for their actions. For the lawmakers, ownership instead of control was the solution to effective protection.
If the committee's plan materialized, more of a husband's property would comprise the community than his wife's. In terms of control, this arrangement was insignificant because the husband controlled the community property. But with respect to liability, the discrepancy was considerable. More of the husband's property was subject to community debts than his wife's. Reasonably, the legislators figured that this scheme was fair precisely because the husband had virtually exclusive control of the community.

During Reconstruction, Texas lawmakers contemplated giving married women some freedom with their property. A delegate to the 1868 constitutional convention proposed vesting married women with the right to will their property as if they were single and reiterated that the legislature was responsible for regulating the registration of a married woman's separate property. Adhering to settled policy, the proposal stipulated that when registered, a wife's property was immune from her husband's debts. The Judiciary Committee pondered the suggestions; nothing more is known except that the proposals did not become law.

Without any discernible reason the 1869 constitution diverged from the customary constitutional definition of marital property rights. The new provision pledged merely to protect "the rights of married
women to their separate property, real and personal, and the increase of the same. . . ."18 An additional clause lumped married women with infants and insane persons in guarding their property against adverse possession or the running of limitation laws.19 Unlike the old law, the new law failed to define the separate property of married women and omitted any reference to community property or to registration laws. Like the prior law, the 1869 measure confirmed the vulnerable position of married women.

A revision of the constitution in 1876 returned to the earlier definition of marital property rights.20 During the debates a proposal emerged which subjected a wife's property to forced sale for the payment of her husband's debts which he incurred after marriage.21 The reasons for the proposal are unclear. The sponsor of the measure presumed that the debts contracted by a husband after marriage were for the benefit of both spouses. A wife should be liable for the expenses of the partnership. By aiding the debtor husband, the proposal protected his family. It helped prevent his imprisonment for debt, assuring his family a breadwinner.

Another proposal offered a married woman sole control of her property by declaring that "she may exchange, buy or sell in her own right, but her property shall be liable for all contracts she makes."22 The
proposal barred the forced sale of her property unless
the sale yielded two-thirds of the property's value.23
A married woman received expanded proprietary freedoms
while realizing the benefits of a protected position.

Despite the qualifier attached to the sale of a
married woman's property, the Committee on General Pro-
visions declined to broaden the property rights of married
women. It brushed aside both proposals and adopted the
more familiar constitutional arrangement of marital
property guarantees. That scheme defined the separate
property of a married woman, called for a clarification of
the law regulating that property as well as that govern-
ing a married woman's interest in the community, and en-
joined the legislature to provide rules for the regis-
tration of her property.24

Unlike the previous constitutional design, the
new plan included as a wife's separate property the
revenues from that property.25 An amendment to that plan
declared that the revenues from a husband's separate
property belonged to him.26 Protecting a husband's
property interests through constitutional amendment broke
tradition; until then Texas' constitution defined marital
property rights strictly in terms of the wife.27 But the
convention refused to alter the customary construction
of marital property rights even by that much. It
returned to the routine pattern of definition, a replica
of the 1845, 1861, and 1866 texts, and pigeonholed the vexing issue of the status of the profits from a spouse's separate property. 28

Once Texas adopted the new constitution, the legislature became the forum for changes in marital property rights. On April 28, 1876, the question of the status of the revenues of a spouse's separate property resurfaced. That day the Senate proposed to modify the 1848 act by designating the profits from each spouse's property as the sole property of each. The husband alone, however, was administrator of those fruits. Evidently the legislators intended to protect a married woman's property by insulating it from her husband's creditors rather than by tendering her control of it. 29

Upon assessing the bill, the Senate Judiciary Committee produced a divided report. Without elaboration, the majority opposed passage, whereas the minority supported the bill in a relatively detailed report. 30

We think the object of the bill a good one. It proposes to change the existing law so as to secure to the wife the income of her separate property. The Supreme Court has construed the existing law so as to subject all the income of the wife's separate property to the debts of the husband, that is to say the crops produced on the wife's farm with labor, implements and teams paid for with her own money, the rent of her lands and buildings, the increase of her cattle, horses, sheep, and other live stock (interest on her money, dividends on her stock in incorporated companies), and all other incomes whatsoever, are by the interpretation given by the Supreme
Court to the existing law made community property, and responsible for all debts contracted by the husband before or after marriage.

The minority think that such a law is unjust in principle and oppressive to the rights of the wife and her children, as well as contrary to the liberal and enlightened ideas of our civilization.

If the corpus of her property is her separate estate why is not its income? If the rents and revenues of the wife's property is not to be hers, and can be appropriated and squandered without her consent what guarantee has she for the support of herself and children, against the reckless acts of an improvident and otherwise unfortunate husband.

The bill considered by your committee supplies this great defect in the existing law by securing to the wife the income of her separate property, and therefore your minority recommend its passage.31

The Senate delayed discussion of the bill, a move which killed the measure.32

A House bill duplicated the Senate bill but included a proviso by the House Judiciary Committee which declared the "increase, rents, revenues and profits of the wife's separate property. . .liable for debts contracted by either husband or wife for necessaries furnished the family."33 A minority of the committee protested the rider and promised to elaborate on its position at another time.34 Like the Senate bill, the House measure languished.

Evidently the committee incorporated the clause to assure that a wife shared with her husband support of
the family. Under the 1848 act, the fruits of a spouse's separate property, as part of the community, were vulnerable to a husband's debts and to the debts of the wife when created for family subsistence. By extending the borders of a wife's separate property to encompass its profits and by subjecting that property to only those debts incurred by either spouse for family needs, the amended bill sheltered a wife's property from payment for her husband's debts as well.

With the revenues issue tabled, the legislature proceeded to modify the law governing the transfer of property by married women. No major changes emerged. On July 28, 1876, the Texas legislature enacted a measure to validate certificates of acknowledgment of married women in actions involving their property, such as transfers, deeds, or powers of attorney, though the certificates were "wanting in any word, or words, necessary to be contained in such certificates of acknowledgment," provided the instrument showed that an officer examined married women apart from their husbands.35

A modest liberalization of the law of married women occurred on August 9, 1876, in an act regulating the estates of deceased persons. That law gave widows the same rights to community property that it gave husbands upon the deaths of their wives. Upon the death of either spouse, the surviving partner gained full control
of the community property. Reform was sparing; if a widow remarried she relinquished control of the property. In this instance, marriage did not prefigure economic security.  

Two general revisions of the state's laws, approximately fifteen years apart, produced no changes in Texas' marital property laws. To give order and logic to its laws in general, the state systematically rearranged and packaged sections of the old laws under common headings. In 1879, Texas overhauled its civil and criminal statutes. Architects of the changes reported that under the title "Husband and Wife" the law was "substantially a reproduction of the old...", a conclusion applicable to the 1895 revision.  

In 1897, the Senate resurrected the profits question. It proposed that each spouse's separate property include the proceeds from such property. Unlike similar proposals of the past, the Senate's proposal added to a spouse's separate property all property acquired by each while living apart or while abandoned by the other. To the wife's property, the legislators added any remuneration she received as a result of "an injury to her person, reputation or property." Unless a husband deserted his wife, stipulated the measure, he alone controlled her property.  

If a husband was a convicted felon or was serving
time, the wife assumed sole control of her separate
property as if she was single. He regained control when
he rejoined his wife. Though the Judiciary Committee
supported the measures with some reservations, the bill
perished in that chamber. 42

Meanwhile, the House, in an intrepid move, offered
married women sweeping powers over their property and over
the community. It announced that "all married women as
to their property, or in which they have a common
interest with their husbands, shall have and enjoy the
same right as if they were femme sole." 43 But the
Judiciary Committee dashed the idea when it recommended
against passage. 44 For the moment, the action by the
House signaled a shift in the protection of a married
woman's property from restricting the liability of that
property to strengthening her control of it.

During that session the House suggested that when
a husband failed or refused to sue for the recovery of
his wife's property, she could without first obtaining
court approval. 45 Resolving to protect a wife's property,
the House recommended standards of conduct for the husband
in the management of his wife's property. 46 Though the
proposal retained the husband as the administrator of
his wife's property, it directed him to manage it "with
care, prudence and economy" for the benefit of his
family. 47
If a husband failed to do so, the measure instructed his wife "to take charge and control of all such property either in person or by agent." This transfer of power from husband to wife was not automatic. A wife had to appeal to a county probate court with a statement of her grievances and a description of the relief demanded. If the court chose someone rather than the wife to administer the property, that individual had to post bond in the amount sufficient "for the faithful protection of the property, and performance of...duty to the wife and minor children."  

Perhaps in an attempt to strengthen support for the proposal, the sponsors attached to the bill a summary of other states' marital property laws. An overwhelming majority of states granted married women sole control of their property. The efforts were futile. The Judiciary Committee quashed the proposal as well as the bill extending married women full control of their property.  

Two other bills dealing with a married woman's powers over her property languished in the Judiciary Committee. One bill sought to modify the law governing the transfer of a wife's property. The House measure provided for a married woman's acknowledgment of the transfer of her property "in the ordinary form." The bill repealed that part of the 1895 law which required that married women apart from their husbands affirm before an
official that they willingly signed the instruments transferring their property. Instead, it required that married women observe the law that applied to adults in general in the transfer of their property. Namely, married women would attest to an official that they signed the instrument transferring their property according to the purposes enumerated in the document.⁵⁵

The other House bill allowed a married woman to "consult and employ counsel and sue in her own name..." for the benefit of her real estate.⁵⁶ The fate of the measure followed that of past efforts to expand a married woman's control of her property. It foundered in the Judiciary Committee.⁵⁷ Likewise, despite approval by the Judiciary Committee, a House bill designating the profits of separate property as part of that property failed to become law.⁵⁸ Not for nearly two decades more, would supplemental protection of the property of married women materialize.

A presage to a more liberal law governing married women's property occurred in 1911.⁵⁹ In an effort to standardize commercial transactions as an aid to creditors, the Texas legislature declared married women single for mercantile purposes.⁶⁰ Their position remained compromised. The new law retained them under the guardianship of their husbands.

To obtain a license to engage in trade, a married
woman needed her husband's approval. Once her husband agreed, he had to join her in an application to a court to remove the legal disability of marriage and to declare her a single woman for business purposes. If the court thought that allowing her freedom to trade was in her interest, it empowered her to "contract, and be con-
tracted with, sue and be sued." According to the committee, the intent was to give married women proprietary freedoms in business dealings. The committee advised that the bill leave in-
tact the law which prohibited married women from trans-
ferring their real estate without their husbands' joinders. The final bill emerged with a declaration that married women could not dispose of their real property "except as . . . provided by law." Accor-

Though the number of women who owned businesses in Texas was relatively small, the new act facilitated transactions between them and their creditors. It fixed the liability of a married female merchant's property to encourage creditors to deal with them. It offered lenders certainty. Additionally, the act brought
the law in line with reality and with states which had already instituted sole trader laws. The 1911 act was more appropriately a matter of "creditors' rights" than of family law because it addressed the role of women outside their homes in the interests of creditors. But by forbidding married women from disposing of their real property except in the capacity as merchants, the act in a negative way bore the characteristics of family law. In law a married woman's role outside her family was never completely distinct from her role inside it.

A bolder, more comprehensive law attending to the property rights of married women materialized two years later. As a revision of the 1911 Texas code, the 1913 act effected changes in a married woman's control of her separate property, of the community property, and in the liability of those properties with regard to her contracts. Signaling a solid reform in the law of married women, the 1913 act introduced a new phase in the development of Texas family law. Despite the comparatively liberal changes, the legal position of married women with respect to their property remained compromised.

Though the act awarded a married woman the "sole management, control and disposition of her separate property," it required her husband's joinder in the transfer of her real estate, stocks, and bonds. If he refused to consent, she could appeal to the courts. If
the courts thought that the transfer of property was "advantageous to the interest of the wife," she could proceed with her husband's approval. Where the law once gave husbands absolute control of their wives' property, the new arrangement presented a halfway solution. It offered married women control of their property while retaining their husbands as head custodians of their families' interests.

An equally significant departure from established law occurred in the management of community property. The act kept a husband as sole administrator of the community property but excluded from his reaches his wife's personal earnings, the rents from her real property, and the interest on her stocks and bonds. These portions of the community fell under her exclusive control. While retaining the old community-separate property division, the 1913 law created a peculiar species of property; it carved from the community a chunk of property which derived from the wife's separate property and gave her control of it. The new law offered married women partial control of the community.

Neither a wife's separate property nor that slice of the community which she managed was subject to her husband's debts. A husband's separate property and the rest of the community was immune from his wife's debts except if she incurred them for provisions for herself
or for her children. Accordingly, the 1913 act repealed that section of the 1911 code which authorized the courts to decree that payment for family essentials be exacted from either the community or the separate property, whichever the creditor preferred.74

A married woman's contractual powers were limited to necessities for herself or for her children and to improvements of her property. The 1913 act revoked that clause in the 1911 code which enumerated those qualified powers and in awarding married women exclusive control of their property suggested an enlarged contractual capacity. The act implied that except for the transfer of a wife's real property, she could, with respect to the rest of her separate property and to that segment of the community which she controlled, contract as freely as a single woman. That was not the case.75

Originally the measure empowered a married woman to "make any contract which she would be authorized to make but for her marriage," except those expressly forbidden.76 At the governor's urging, however, the legislature excised that line. Referring to the bill, the governor remarked:

It seems to recognize the husband as an advisor of the wife which is not a bad idea at all, according to my way of thinking, and presupposes that the husband is better acquainted with the business affairs and responsibilities than the wife, and I think
in at least 90 per cent of cases this presumption is correct.\textsuperscript{77}

Citing the Bible, he proclaimed the husband as head of the family and argued that "as long as [the husband] proves himself worthy the law should not seek to deprive him of being chief counsellor to his wife in business affairs."\textsuperscript{78} That part of the proposed law which required a husband's consent to the transfer of his wife's property, thought the governor, followed biblical guidelines. But that section which offered married women explicit powers of contract disturbed him because it clearly contradicted that part of the bill which required a husband's approval in the transfer of his wife's real estate.\textsuperscript{79}

He favored giving married women control of their property, but he was "not willing to admit that the wife [had] any better friend or advisor than her husband in at least 90 percent of cases."\textsuperscript{80} He concluded:

\ldots if we are proposing to legislate for the protection of 10 per cent of the wives whose husbands from one cause or another misuse and dissipate the property and income and wages of their wives, we should legislate so as to give the unfortunate wife the benefit of the law's protection, but be careful not to sow the seed of discord in those families who do not now require the aid of the law in discharging the proper mutual obligations toward each other in the control of property and its management.\textsuperscript{81}

As the bill stood, the governor declared it enabled married women to contract "with other men" and to
"give the management of her business to partners."\textsuperscript{82} Such ventures, he warned, might fail, "and the entire separate property of the wife...might become imperiled and be subject to execution to pay the partnership debts."\textsuperscript{83}

That aspect of the measure, he urged, was not in the best interests of married women but contradicted that part of the bill which protected married women by requiring their husbands' consent to the disposal of their real property. To protect married women, the governor advised the legislature to scuttle that part of the bill tendering married women a general power to contract.\textsuperscript{84}

He added that the proposal excused a wife's property from payment for debts created by her husband for family essentials while holding him accountable for the support of her and her children.\textsuperscript{85}

This is one-sided but in favor of the wife, and may to some extent militate against the husband's credit. But I do not especially object to this, as in 90 per cent of cases the need for this law will not be real and in the instances where it will be helpful, this provision would give the woman the preference, which to my mind is not out of harmony with the chivalrous regard which I think womankind is entitled to from the men...\textsuperscript{86}

Meeting in a Free Conference Committee, the House and Senate followed the governor's advice and removed the controversial section from the bill.\textsuperscript{87} The bill became law but not before it prompted reactions from various legislators. One thought that the measure was unfair
because it categorized the income from a wife's property as separate while leaving the income from a husband's property part of the community. Another lawmaker criticized the measure because it allowed married women to contract for purposes other than for the benefit of themselves or their children.89

One lawmaker boldly suggested that the committee devise a bill

... giving married women the absolute right of control over their separate estate and personal earnings, and that no other change in the existing laws relating to married women be made, except in so far as it may be necessary to give her such control and management over her separate estate.90

By declaring the lawmaker out of order, the Speaker of the House quashed the idea.91

Like the prior statutes on marital property rights, the 1913 reform had no discernible origins. In light of the 1911 act, the 1913 act did not purport to rationalize commercial relationships; it would have been redundant. A desire to bring Texas law in line with other states' marital property laws and the force of the women's rights movement undoubtedly provided impetus for the creation of the 1913 measure.92 The act supplied married women with additional protection for their property by expanding their powers over family property and by exempting their property from their husband's debts.

Following the earlier acts, the new statutes
protected the children of married women. It subjected a husband's property to his wife's debts if she incurred them for family necessities. Whether a husband chose to act as head of his household, the law obligated him to support his family. The 1913 act like its predecessors, in a most diffused way, aided families headed by potentially negligent husbands or fathers.

Bespeaking the inadequacy of Texas' marital property laws, the Woman's Christian Temperance Union of Denison, in 1897 petitioned the House to enact a measure requiring "the wife's consent to the sale of all property acquired by husband and wife during their married life." The proposal offered married women control of the community property, a demand that the 1913 law partially met. Plausibly, the specter of drunken husbands squandering family property prompted the advocacy of a more liberal law. The House forwarded the group's petition to the Judiciary Committee and that was the last documentation of that movement.

Links between enhancing a married woman's power over family property and the welfare of her family were demonstrated more forcefully a decade later by Mariana T. Folson, a state activist with the National American Woman's Suffrage Association:

Marriage puts a Texas woman under guardianship with more binding disabilities
than infants, idiots, lunatics, and habitual drunkards. All the rents and profits of her separate estate and her present earnings are so completely in the hands of her husband that money in bank in her name is subject to be drawn out by his check, but she can not draw it unless he is willing.

There is no law to compel a married man to provide for his wife and children. She may buy 'necessaries for herself and children' and the community property, also her separate property will be liable for payment. There the properties are liable for his debts.

Texas thinks very little of married women, but loves married men and enables them to wrap about themselves their separate property so closely that it is not liable for a bottle of milk or loaf of bread for their own babies. 95

Until 1911 the law of marital property embodied minor changes. The acts of 1911 and 1913 contained mild reforms. The legal position of married women remained compromised. Though the sole trader act permitted married women to engage in commerce as if they were single, it required them to obtain their husbands' approval before they could acquire a license to trade. Similarly, the 1913 statute made husbands necessary parties in the transfer of their wives' real estate. Husbands remained chief administrators of the community property.

These halfway settlements manifested a need to align the law with reality and a desire to preserve traditional family arrangements. Where to fix a married woman's legal position so that her interests remained
compatible with her family's lead to further shifts in the law. Piecemeal reforms in the law of married women followed the 1913 act. 96 More comprehensive changes that placed the legal position of married women on par with their husbands' became part of relatively recent events. 97

Whether the occurrences spanning the years from 1861 to 1913 shook the economic stability of families as the antebellum period had done was peripheral to the development of Texas marital property law during those years. Texas lawmakers' perceptions of their role with respect to the family stayed the hand of government in what was considered essentially a private affair. Lawmakers of the later period confined themselves largely within the boundaries established by their antebellum counterparts. They modified and solidified the law of marital property. 98 It was an approach far short of a comprehensive assistance program.

Perhaps Texas lawmakers refrained further from defining more fully the rights and responsibilities of family members because of the nature of the family itself. Involving a myriad of relationships, a family was a constitutional-legal tar baby. Each effort to regulate aspects of family life required additional clarification.

In Texas, the courts figured handily in fleshing out a body of skeletal statutory law. 99 Where the
married women's property acts failed to define explicitly a married woman's right to contract, to sue and to be sued, powers derived from property ownership, the courts engineered solutions. Like the legislature, the courts at least until 1913 construed these freedoms for married women within the constraints of their families' interests and assured them an abbreviated form of civil rights.
FOOTNOTES - CHAPTER V

1 Editorial, Flake's Bulletin, March 8, 1866, p. 4.

2 McKnight, "Texas Community Property Law," pp. 132-33; Texas, Constitution (1845), art. 7, sec. 19; Texas, Constitution (1861), art. 7, sec. 19; Texas, Constitution (1866), art. 7, sec. 19.

3 For a discussion of the effects of Reconstruction upon the property rights of married women, see Suzanne D. Lebsock's, "Radical Reconstruction and the Property Rights of Southern Women."


5 Ibid., pp. 132-33; Texas, Constitution (1845), art. 7, sec. 19; Texas, Constitution (1861), art. 7, sec. 19; Texas, Constitution (1866), art. 7, sec. 19; Texas, Constitution, art. 16, sec. 15; Texas, General Laws, ch. 32, secs. 1-2, 33d Leg., 1913, pp. 61-62.


7 McKnight, "Texas Community Property Law," p. 118.

8 Ibid., pp. 124-25.

9 Texas, Legislature, House, Judiciary Committee, Report, 9th Leg., 1861.
An earlier version was more specific. It declared that registration would protect a married woman's property, and it barred exemption of her property from liability for her husband's debts unless the record plainly showed that the property was her separate property prior to the creation of the debts. Texas, Constitutional Convention, Journal, I, 1868, 238.

The rights of married women to their separate property, real and personal, and the increase of the same, shall be protected by law; and married women, infants and insane persons, shall not be barred of their rights of property by adverse possession, or law of limitation, of less than seven years from and after the removal of each and all of their respective disabilities.

Texas, Constitution, art. 16, sec. 15. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife, in relation as well to her separate property as that held in common with her husband. Laws shall also be passed providing for the registration of the wife's separate property.
21 Texas, Constitutional Convention, Journal, 1875, p. 42.

22 Ibid., p. 241.

23 Ibid.

24 Ibid., pp. 555-56. All property, both real and personal, of the wife, owned or claimed by her before marriage, and that acquired afterward by gift, devise or descent, and the increase of the same, shall be her separate property; and laws shall be passed more clearly defining the rights of the wife in relation as well as to her separate property, as that held in common with her husband. Laws shall be passed providing for the registration of the wife's separate property.

25 Ibid.

26 Ibid., p. 690. And all property owned, claimed or acquired in like manner by the husband shall be his separate property.


28 Texas, Constitutional Convention, Journal, 1875, p. 690.

29 Texas, Legislature, Senate, A Bill to be Entitled An Act to Amend the 2nd Section of An Act Better Defining Marital Rights of Parties Passed March 13, 1848, Bill No. 60, 15th Leg., 1876.

30 Texas, Legislature, Senate, Judiciary Committee, Report, 15th Leg., 1876.

31 Ibid.


33 Texas, Legislature, House, A Bill to Be Entitled An Act to Amend the 2nd Section of An Act Entitled An Act


35 Texas, General Laws, ch. 62, sec. 1, Gammel, Laws of Texas, VIII, 897; Texas, Legislature, Senate, A Bill to Be Entitled An Act to Validate Certificates of Acknowledgment of Married Women to Deeds of Conveyance, Letters of Attorney and Other Written Instruments, Bill No. 64, 15th Leg., 1876; Texas, Legislature, Senate, Journal, 15th Leg., 1876, pp. 111, 134, 139, 238-39, 346, 394-95, 466, 597, 614; Texas, Legislature, Senate, A Bill to Be Entitled An Act to Amend Section 2 of An Act Defining the Mode of Conveying Property in Which the Wife Has an Interest, Bill No. 58, 15th Leg., 1876; Texas, Legislature, Senate, Journal, 15th Leg., 1876, p. 346; Texas, Legislature, House, Journal, 15th Leg., 1876, pp. 384, 487.


37 Texas, Revised Statutes, 16th Leg., 1887; John Sayles and Henry Sayles, Revised Civil Statutes and Laws Passed by the Sixteenth, Seventeenth, Eighteenth, Nineteenth, and Twentieth Legislatures of the State of Texas (St. Louis: Gilbert Book Co., 1888); Texas, General Laws, ch. 60, secs. 1-4, Gammel, Laws of Texas, VIII, 894-95.

38 Sayles and Sayles, Revised Civil Statutes, p. 728. For the laws governing marital property rights in the 1879 revision, see Sayles and Sayles, Revised Civil Statutes, pp. 210, 475-78, 490-91, 880-84; Texas, Revised Statutes, pp. 93-94, 411-12, 622-23, 627-28. For the 1895 revision, see John Sayles and Henry Sayles, Sayles' Annotated Civil Statutes of the State of Texas (St. Louis: Gilbert Book Company, 1897-98), pp. 256-59, 445-47, 731, 776, 1085-92, 1095, 1633-38, 1657-58, 1660; Texas, General Laws, ch. 82, secs. 1-14, Gammel, Laws of Texas, X, 840-42.
39 Texas, Legislature, Senate, A Bill to Be Entitled An Act to Amend Articles 2967 and 2968, Chapter 3, of Title LV, of the Revised Civil Statutes, as Adopted by the 24th Legislature of the State of Texas, A.D. 1895, Adding Thereto Article 2967a, to Prescribe What Shall Constitute the Separate and Community Property of the Husband and Wife, to Regulate the Management and Control of the Same, and to Empower the Wife, After Abandonment by the Husband, to Manage, Control and Dispose of Her Separate Property, Bill No. 37, 25th Leg., 1897, pp. 1-2.

40 Ibid.

41 Ibid.

42 Texas, Legislature, Senate, Judiciary Committee, Report, 25th Leg., 1897; Texas, Legislature, Senate, Journal, 25th Leg., 1897, pp. 31, 142.

43 Texas, Legislature, House, Journal, 25th Leg., 1897, p. 43; Texas, Legislature, House, A Bill to Be Entitled An Act to Amend Article 2974, Chapter 3, Title 55, of the Revised Civil Statutes of the State of Texas, Bill No. 66, 25th Leg., 1897.

44 Texas, Legislature, House, Judiciary Committee, Report, 25th Leg., 1897.


46 Texas, Legislature, House, Journal, 25th Leg., 1897, pp. 212, 266; Texas, Legislature, House, A Bill to Be Entitled An Act to Amend Article 2967, of Title 55, Chapter 3, of the Revised Statutes of the State of Texas, Bill No. 344, 25th Leg., 1897.

47 Texas, Legislature, House, A Bill to Be Entitled An Act to Amend Article 2967, of Title 55, Chapter 3, of the Revised Statutes of the State of Texas, Bill No. 344, 25th Leg., 1897.
Ibid.

Ibid.

Ibid.

Ibid. Twenty-seven states gave married women sole control of their property.


Texas, Legislature, House, An Act to Repeal Article 4621 of the Revised Civil Statutes and to Dis- pense With the Necessity of the Privy Acknowledgment of Married Women to Instruments of Conveyance and to Provide for the Taking of Such Acknowledgment in the Ordinary Form, Bill No. 15, 26th Leg., 1899.

Ibid.

Ibid. The law changed little. The legislature reimposed the requirement that an official had to question a married woman apart from her husband before she could transfer her property. Texas, General Laws, ch. 40, secs. 1-2, Gammel, Laws of Texas, X, 1095.


Ibid.

Texas, Legislature, House, A Bill to Be Entitled An Act to Amend Articles 2967 and 2968, Title 55, Chapter 3, of the Revised Civil Statutes of the State of Texas Relating to the Property of Married Persons, Bill No. 393, 25th Leg., 1897; Texas, Legislature, House, Judiciary Committee, Report, 25th Leg., 1897.

Texas, General Laws, ch. 52, secs. 1-4, 32d Leg., 1911, pp. 92-93. That year Texas revised its civil statutes, which created no changes in the marital property laws. Texas, Revised Civil Statutes, 32d Leg., 1912, pp. 943-44.

Texas, General Laws, ch. 52, secs. 1-4, 32d Leg., 1911, pp. 92-93.

Ibid.

Ibid. Texas, Legislature, House, Judiciary Committee, Report, 32d Leg., 1911.

Statistics on female merchants in Texas, single or married, are sketchy. Some data exists for the years 1909, 1914, and 1919, for persons engaged in manufacturing industries. In 1909 females constituted 1.9 per cent of the total number of persons employed as proprietors or officials involved in manufacturing; in 1914 and 1919 the figures were 2.1 per cent and 2.6 per cent, respectively. As proprietors and "firm members," females comprised 2.7 per cent of the total in 1909. In 1914 and 1919 the percentages were 3.1 and 3.7, respectively. Of the total number of salaried officers of corporations in 1909, 1.2 per cent were women. In 1914 and 1919 the figures were 1.3 and 2.4 per cent, respectively. Women made up the least percentages in the superintendents and managers category. In 1909 they composed 0.6 per cent of the total. In 1914 the percentage remained; in 1919 it rose to 1.5 per cent. U.S., Department of Commerce, Bureau of the Census, Fourteenth Census of the United States Taken in the Year 1920: Manufactures, IX, 1451.


69 Texas, General Laws, ch. 32, secs. 1-2, 33d Leg., 1913, pp. 61-63.

70 McKnight, "Texas Community Property Law," p. 124.

71 Texas, General Laws, ch. 32, secs. 1-2, 33d Leg., 1913, pp. 61-63.

72 Ibid.

73 Ibid.

74 Ibid.

75 Ibid.

76 Texas, Legislature, House, A Bill to Be Entitled An Act to Amend Articles 4621, 4622 and 4624, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, Concerning the Marital Rights of Parties, Defining Separate and Community Property of the Husband and Wife, Conferring Upon the Wife the Power to Make Contracts, Giving the Wife Control Over Her Separate Property, Placing Limitations Upon Such Control, Giving Her Control Over the Rents from Her Separate Real Estate, Interest on Bonds and Notes, and Dividends on Stock Owned by Her, and Over Her Personal Earnings, Exempting the Same from Debts Contracted by the Husband, Providing that the Joinder of the Husband Shall be Necessary to A Conveyance or Encumbrance of the Wife's Lands, Bonds and Stocks, Except that Upon the Order of the District Court She May Convey the Same Without the Joinder of Her Husband, Repealing Article 4625, Title 68, Chapter 3, of the Revised Statutes of Texas, 1911, and All Other Laws and Parts of Laws in Conflict Herewith, and Declaring an Emergency, Bill No. 22, 33d Leg., 1913.


87. Texas, Legislature, House, Journal, 33d Leg.,

88 Ibid., p. 1157.
89 Ibid., p. 1158.
90 Ibid., p. 1156.
91 Ibid.
94 Ibid.
95 Letter, Mariana T. Folsom to H. B. Blackwell, April 2, 1907, Texas State Library, Archives, Folsom Collection.
96 In 1915 the Texas legislature classified the monies for injuries to married women as their separate property. McKnight, "Texas Community Property Law," p. 125. Two years later the legislature designated the income from a spouse's separate property as his or her property. W. J. Williamson, Texas Marital Property (Houston: University of Houston, 1973), p. 8; McKnight, "Texas Community Property Law," p. 125; W. S. Simkins, "Some Phases of the Law of Community Property in Texas," Texas Law Review, III (June, 1925), 364-65. The 1917 law broke with Spanish tradition which included the revenues from a spouse's separate property as part of the community. Buie, "Texas Constitutional Definition," pp. 1057-58. Texas lawmakers refined the 1917 law in 1921 when they exempted the separate property of husband and wife from the debts of each other. Williamson, Texas Marital Property, p. 8; McKnight, "Texas Community Property Law," p. 125; Frank Bobbitt, "Is There More Than One Class of Community Property in Texas?," Texas Law Review, IV (February, 1926), 154. Ledbetter states that the 1917 and 1921 laws were attempts by lawmakers to simplify the issue of control; each spouse controlled his or her separate property, and the fruits of such
property belonged to that property. Ledbetter, Texas Family Law, p. 34.

In 1925 married women suffered what McKnight terms a "severe setback" when the Texas Supreme Court ruled the 1915, 1917, and 1921 acts unconstitutional. McKnight, "Texas Community Property Law," pp. 124-25; Arnold V. Leonard, 114 Tex. 535, 273 S.W. 799 (1925); Gohlman, Lester & Co. v. Whittle, 114 Tex. 548, 273 S.W. 808 (1925); Cauble v. Beaver-Electra Refining Co., 115 Tex. 1, 274 S.W. 120 (1925). The court held that the legislature could modify the rules governing management and liability of community property but could not alter property definitions established in the state's constitution. McKnight, "Texas Community Property Laws," pp. 125-26. The statute declaring the income from a wife's separate property as part of that property was unconstitutional. Ibid. The income reverted to the community and fell under the control of the husband except for that property which the 1913 law removed from his reaches.

Not until 121 did the legislature begin to rectify the statutory law according to the court's holding. It returned the revenues from a spouse's separate property to the community. Ibid., p. 126. Gaps between the statutory and case law remained, resulting in a confused state of affairs that lasted for at least two decades. Williamson, Texas Marital Property, pp. 8-9; Ledbetter, Texas Family Law, p. 35. In 1950 the Texas Supreme Court provided clarification when it decided that a wife could control the income from her property and that that property was not subject to her husband's liabilities. Ledbetter, Texas Family Law, p. 35; Beardon v. Knight, 149 Tex. 108, 228 S.W. 2d 837 (1950). Concludes Ledbetter, "with this decision, a special class of community property under the exclusive control of the wife was judicially recognized. No official name was given to this class, but it has commonly been called 'the special community'." Ledbetter, Texas Family Law, p. 35.

Major changes in the law of marital property began in 1967. Undoubtedly spurred on by women's rights advocates, the reforms produced a more equitable system. That year the legislature created the Matrimonial Property Act which represented a modernization of the state's marital property laws. The act sought to adapt the community property system to contemporary needs. The act's definition of community property followed the constitutional definition, but unlike that definition it defined family property in terms of husband and wife. Like the 1848 act, the 1967 statute intended to clarify
the constitutional provision. The new law enumerated the separate property and defined the community as the remainder. Community property was all that property which each spouse acquired during marriage except that which each brought into marriage, which each gained through gift or inheritance, and which each received for personal injury when compensation was based upon the diminution of earning capacity during marriage. McKnight, "Texas Community Property Law," pp. 127-45. See also M.H.J., "History of the Family Code," Texas Tech Law Review, V (1974), 267.

With respect to the management of the community, the 1967 act split the community on the basis of source. Each spouse controlled a unit of property which was exempt from the liabilities of the other. Each spouse received full control of his or her earnings and revenues from his or her separate property and controlled that property which he or she would have owned if a single person. Where husband and wife mixed the community, the act provided for joint management. McKnight, "Texas Community Property Law," pp. 127-45.

With some exceptions, liability of the community property followed management. Community property under the sole or joint management of a spouse was subject to that spouse's debts. A significant change in the liability terms occurred with respect to responsibility for family necessities. The old law defined responsibility in terms of the property liable for the debts whereas the new law defined responsibility in terms of personal duty. Ibid. This was a substantive deviation from the Anglo-European tradition.

Elements of the old law remained. Though both spouses shared equally in the support of their children, they did not share equally in the support of each other. The husband was responsible for the support of his wife, but the wife was liable for the support of her husband only 'when he [was] unable to support himself'. Ibid.


CHAPTER VI

JUDICIAL CONSTRUCTION

Chief Judge of the Texas Supreme Court, John Hemphill, noted in 1849 that with respect to the right of married women to own property, Texas had "totally expunged" the common law from its jurisprudence.¹ A married woman's right to own property, he declared, was "as complete and perfect as that of the husband."²

There is none, not the slightest difference in this particular between their civil rights and capacities. The right of the *feme covert* to hold her separate estate is as perfect as if she were a *feme sole*. She loses many of her civil rights by marriage, but her power to take and hold separate property is not impaired by the force of the coverture. It is true that the law has deemed it sound policy and beneficial to the interests of the wife that certain onerous restrictions should be imposed upon her ability to deal with her estate as a *feme sole*. But this does not affect her right to hold the property, but rather the reverse. They were designed to protect that right, and to preserve the wife from yielding to undue influences in the voluntary alienation of her property.³

Under Texas law married women could hold or own property as freely as their husbands or as single women. That law, however, distinguished a married woman's right to hold property from her right to manage or control it. Her right to own property neither dictated nor guaranteed what she could do with it. Proprietary freedoms, rights
derived from property ownership, constituted basic civil rights, the rights to contract, to sue and to be sued. For married women, these rights, construed in the context of their families, would, at least in Texas, be qualified. A family's interests transcended the individual interests of its members. For married women this arrangement meant curtailed property freedoms for them and augmented powers over family property for their husbands. Only in ex- tenuating circumstances did married women exercise full control over their property.

Texas' statutes governing the property rights of married women were sketchy, and the courts filled in the outlines. In interpreting the statutes the courts were constrained by the 1840 act which established the common law as the rule of decision provided it agreed with the state's constitution and statutes. Within this framework the courts determined the civil rights of married women. To the legislators, preservation of the family unit was the overriding concern, and the courts adhered faithfully to that objective. In the process the courts assisted the lawmakers as architects of a crude system of family support.

One of the earliest court pronouncements on the contract rights of married women occurred in 1847 in Kavanaugh v. Brown. With her husband, Mary Kavanaugh signed a $500 note to Nancy and William Brown. She
pleaded that when she and her husband signed the note she was married and therefore incapable of making a contract. Mary Kavanaugh attempted to use her protected status or legal disabilities to her advantage to negate a contractual obligation. The Washington County court thought otherwise and informed the jury that Kavanaugh's marriage did not bar the Browns from recovering their money. The Browns won, and the Kavanaughs appealed to the state supreme court charging that the court erred in its instructions. 6

Agreeing with the Kavanaughs, the high court through Judge Abner S. Lipscomb explained that those instructions hinged on some "supposed ability to contract, and liability to be sued," which the lower court, he surmised, assumed from the 1840 act. 7 That act, he insisted, did not empower married women to contract, to sue, or to be sued. The purpose of the act, he declared, was to protect the separate property of married women. To allow married women to contract, to sue or to be sued, he thought, defeated that purpose. He explained that the law removed the property of married women from their husbands' reaches, thereby rendering married women complete protection. 8

Lipscomb believed that the 1840 act, which recognized the separate property of married women, did not alter the common law regarding their contract rights. In
general married women could not. If they could not contract, they could not sue or be sued. On that premise the appellate court reversed that part of the lower court's decision that held Mary Kavanaugh responsible for the note but sustained the charge against her husband. ⁹

Though the ruling would discourage creditors from dealing with married women, by shielding married women's property from excessive claims, it guaranteed families a maintenance income. Attempting to establish liability rules that would be fair to both creditors and married women the state supreme court two years later in Callahan v. Patterson presented three "incontrovertible" propositions: a wife's property was liable for her debts before marriage, a husband was bound to support his wife, and if he was unable to support her, her property was liable for that purpose. ¹⁰ The case stemmed from a contract for the sale of land which belonged to Sarah Patterson, who in the meantime had died. Allegedly the money received for the parcel defrayed expenses for Patterson's needs before and during her marriage. ¹¹

To guarantee title to the land, the Pattersons posted bond which Sarah Patterson did not acknowledge because of poor health. The plaintiff charged the Pattersons with breach of contract in the bond agreement. Claiming that James Patterson was a pauper, the plaintiff requested Sarah Patterson's land as reparation. Though
Patterson failed to acknowledge the bond as prescribed by law, the plaintiff argued that she was anxious to sell the land and that she willingly signed the agreement. The high court upheld the decision of the lower court which had decided for the Pattersons.  

Lipscomb stated that the chief objective of the 1845 constitutional provision was the protection of the property rights of married women. He explained that the first legislation following the constitutional guarantee was the 1846 act which prescribed the manner in which married women could transfer their property. 

Addressing the argument that the contract was void because Sarah Patterson had not acknowledged it in the fashion prescribed by law, Lipscomb explained that though Patterson had not complied with the act, the court was obliged to interpret the law equitably. That is, the court had to consider what the parties actually intended. He emphasized that to construe the 1846 statute equitably was not to annul it. 

Up to the final minute, Lipscomb reminded the court, a wife had a right to withdraw from a contract. The reasons were clear.

This statute, even when strictly observed, affords flimsy protection to the separate property of the wife. Such is the influence the husband acquires over the wife, that however worthless and profligate he may be, he would be able generally to procure her
assent to transfer her property with all forms required by the statute; and the proceeds would be spent by him in riot and debauch, if so inclined. 15

Since the appellant failed to prove that Patterson was unable to support his wife, the court refused to subject her property to debts contracted for her support. 16 The court defended the property of married women against creditors' claims and assured families a semblance of support.

Where a family's debts were for necessities the courts, as in Cartwright v. Hollis, held a married woman's property liable, regardless of the fact that her husband incurred the debts. 17 William and Elizabeth Hollis owed money for supplies which William Hollis purchased allegedly for his plantation and for his family. During the transaction Hollis offered his wife's property as security for the payment of the goods. While his wife owned a substantial amount of property, Hollis owned none. There was no community property. Elizabeth Hollis refused to liquidate her assets, primarily land, slaves, and livestock, to satisfy the debt, and the creditor sued. With her husband, Hollis objected to the creditor's claims on the grounds that there was no case for relief. The San Augustine County court sustained the objection, and the creditor appealed. 18

To Hemphill, the central question was whether
married women could make contracts with their husbands
binding their property when their husbands were property-
less and when there was no community property. Hemphill
admitted that the 1840 act did not define clearly the
control that married women could have of their own
property. Not until 1846, he added, did the law establish
the manner in which married women could dispose of their
property. Prior to that law, he noted, Texas had swept
Spanish laws aside and adopted the common law but only
partially. Except for the changes made by the courts of
equity in governing the property rights of married women,
he thought that Texas was unsuited for regulation by the
common law of marital property. The equity courts, he ob-
served, equated property ownership with the right to
contract. He added that some courts limited that right to
the method described by the instrument creating the
property, such as a will or a trust.\textsuperscript{19}

Hemphill declared that since Texas did not vest a
husband with the ownership of his wife's property, as was
common law custom, that as manager of her property, a
husband was merely his wife's agent. Her property, he
concluded, was liable for debts incurred for supplies
necessary for it and for herself and her children when her
husband was unable to support them. Whether the husband
created the debt was immaterial.\textsuperscript{20}

For Hemphill, the statute governing the disposal
of a married woman's property was excessive and rigid and threatened to undermine the very objective it sought to achieve, the protection of a married woman's property.

If none of her effects can be disposed of but by acknowledgment before a public officer, can the crops produced upon her lands be alienated in any other mode? The cotton, corn, and sugar are the effects of the wife. . . . If the statute be strictly construed as depriving the wife of all power over her separate estate, except exercised in conformity with the mode prescribed, can a sale of these effects be valid if not acknowledged before the public magistrate? 21

He observed that statutory and constitutional law guarded the property of a married woman from the "influence of her affection for her husband, or from his fraud, oppression, and circumvention, or that of others." 22 Such laws, he contended, deprived a wife or her husband, acting as her agent, of the power to contract for the benefit of her property or of herself and family in the absence of other resources. 23

Though the 1840 statute restricted the power of married women to contract, the notion that their property was not responsible for debts for family necessities because they were incurred by their husbands was, remarked Hemphill, "frivolous, and founded on no principle." 24 The heart of the question, he emphasized, was whether the purchases were for the benefit of a wife's property or for herself and children. Upon that answer hinged the liability. Since Hollis purchased the goods for his
family and for the property itself, his wife's property was subject to the creditor's claim. In overturning the decision of the lower court, the state supreme court affirmed in the case of married women that limited contract rights carried limited liabilities.\textsuperscript{25}

Four years later the state supreme court in \textit{Christmas v. Smith} clarified and refined the points of law addressed in \textit{Cartwright}, and reaffirmed its vigilant stance in guarding the property of married women from negligent husbands and zealous creditors.\textsuperscript{26} Lydia Christmas bought merchandise on credit allegedly needed for herself, her children, and her property. The creditors, J. C. and R. Smith, claimed that both Lydia and her husband James received the goods and asked the Walker County court to exact payment from either the Christmas' community property or from Lydia Christmas' separate property. James Christmas was a pauper and unable to support his family.\textsuperscript{27}

Christmas stated that he made purchases often for his family. His wife did not know if any of the goods sued for were the articles she purchased. She maintained that she frequently received items from her husband but never asked him where he obtained them from. The lower court decided for the creditors, and the Christmases appealed.\textsuperscript{28}

Hemphill explained that the lower court based its decision on the provisions of the 1848 act which held
husband and wife responsible for debts contracted by the wife for necessities for herself or for her children. If the court believed that the debts were for such purposes, the court could order payment from the community property or from the wife's property at the creditor's discretion. Hemphill remarked that these provisions were "anomalies not easily . . . reconciled."\(^{29}\)

That law, he explained, committed a wife's property to payment for charges for herself or children regardless of her husband's ability to pay. The law made the wife responsible for such debts without giving her control of her property. Hemphill recommended that in this instance the husband should manage his wife's property only under the authority of his wife.\(^ {30}\)

In the Christmas case, the court found that none of the articles purchased were for Lydia Christmas, her children or her property. Christmas did not contract for the goods personally; rather, her husband received the credit though she usually consented to her husband's purchases. The court decided that her husband had not acted as her agent. Hemphill explained that debts incurred on the basis of a wife's property had to be contracted by the wife or by her husband acting as her representative. Her consent had to be clear. If her consent was implied the circumstances had to be unquestionable.\(^ {31}\)

To subject a wife's property to family expenses,
the charges had to be for family needs. As for the
Christmases, the court ruled that the questioned goods did
not go wholly to the wife or to her children.32

They may all have been necessary for the
family, but not for the wife and children.
A husband is a member of the family; but a
necessary for him is not one which, under
the statute, would involve the wife's
property in responsibility.33

The court distinguished between necessities for the
family generally and for the wife and children specifically.
Such a distinction emphasized the degree to which the law
forced a husband as head of household and as manager of
his family's assets to support his family. The court
reversed the decision of the lower court by ordering the
decision against the husband and wife reversed. But it up-
held the decision against the husband.34

Hemphill reminded the court that the Christmas case
rested solely upon statutory law. Aside from statute,
Hemphill believed that where a husband was insolvent and
where there was no community property his wife's property
was responsible for debts she made for family essentials.
By exercising their equity powers in the absence of a
statute, the courts, he explained, could treat creditors
fairly without unnecessarily sacrificing a wife's
property. He suggested that the courts hold the profits
from her property responsible for family debts to spare
the body of the property.35
Hemphill criticized the 1848 state.

It is characterized by a peculiar feature, and one which is oppressive upon the wife. It authorizes the creditor at discretion to levy upon the common property or the separate property of the wife. . . . If we can imagine a case in which a married woman ought not to be made liable where there is common property, then we find one in which the creditor ought to have no discretion to levy on the separate property of the wife.36

He maintained that the freedom that the statute gave to creditors was contrary to the community property principle which assigned that property as the primary source for the payment of community debts. Such a law was unjust to married women, "whose legal disability exposed them to so many inconveniences."37 The state's constitution, he concluded, protected the property of married women. If there was community property, the law should not surrender the property of married women to marital debts.38

Whether a husband was opulent or penniless, as long as he was head of the household, he retained full control of his family's assets, while his wife's role remained secondary. When he vacated his position, the law expanded his wife's powers and shifted the controls to her, as in Wright v. Hays.39 The case arose from a family squabble among John Wright, his wife, Margaret, and her son, Peter Hays, over a parcel of family property which Wright gave her son as a gift. The Wrights challenged Hays's claims but lost in the lower court. They appealed to the state's
high court which upheld the decision. \textsuperscript{40}

According to the court's record, during the absence of her husband, Wright gave her son 640 acres of land. There was no proof that John Wright journeyed to the Rio Grande without her approval or that he deserted her. One witness stated that Wright was in pursuit of a runaway slave, another maintained that Wright wanted to escape an old Mississippi debt, and another who accompanied him on the trip declared that Wright never revealed why he left home. \textsuperscript{41}

There was evidence that Wright had given his wife a general power of attorney. She owned a large stock of cattle and was comfortable financially. Occasionally she visited her husband. Since Wright's excursions from home were habitual the court construed his absences as abandonment. Previously, Wright left his wife for more than five years. At that time, remarked Hemphill, he fled to the Rio Grande for asylum in Mexican territory. To the court the critical element was that Margaret Wright received no financial assistance from her husband while he was away. She supported herself and her family, "managing the business... and bringing suits in her own name." \textsuperscript{42}

Under such circumstances, Hemphill queried whether a wife had the same powers over property as a single woman. He recited the effects of marriage upon the legal status of women. It stripped them of their powers to dispose of
their property without the joint consent of their husbands and an acknowledgment before an officer that they consented to the transfer. Husbands controlled their wives' separate property and alone could dispose of the community. Except as agents of their husbands or with their husbands' consent, married women could not contract. They could charge essentials for themselves, for their children, and for the benefit of their property. Married women could not sue for their property unless joined in a suit with their spouses. If their husbands refused to join they could sue alone but only through court order.43

Since the Wrights married under Spanish law, Hemphill felt compelled to describe that law as it regulated marital property and to compare it to Texas law. To Hemphill, there were no large differences. Under Spanish rule husbands could freely dispose of the community property provided they did not cheat their wives. They were responsible for marital expenses and could object to their wives' sale of property on the grounds that a sale could deplete the common fund and impair their ability to support the family. Thus the law required married women to obtain the approval of their husbands before transferring their property.44

As far as the court could ascertain, the land in contention was part of the community property, prompting Hemphill to remind the court that in the instance of
community property the respective rights of husband and wife were "perfectly equivalent." The difference was that during marriage "her rights were passive; his were active." As long as a husband performed his duties, explained Hemphill, "his superior rights remained. . .in full vigor." A neglect of those duties forfeited those rights and activated the latent powers of the wife. If a husband shirked his family responsibilities, his wife assumed them. To facilitate her new role, the law offered her control of the family property.

Wright contended that his wife could not transfer the property without complying with statutory requirements. His position, responded Hemphill, was "positively repugnant" to the idea of protecting a wife against desertion. A breadwinner's abdication of his family duties, exhorted Hemphill, compelled his wife to assume those obligations.

His desertion and absence are the foundation of her new rights and authority. His absence or civil death are prerequisite to the acquisition of these rights by the wife. The joining of the husband in the wife's conveyance, her privy examination and declaration that she acts freely, all presupposes that a husband is present and may be exercising undue influence over her. But how can these formalities be requisite in cases where the rights of the wife... depend upon the supposition that, de facto, she has no husband? How could he join in a conveyance when his absence is the ground upon which she acquired her right of property, and upon which she can make contracts, and sue and be sued in her own name?
The court dismissed as irrelevant Wright's occasional visits to her husband because such visits, whatever their purpose, left her rights as an abandoned wife intact. Hemphill concluded that one fact was certain and that was that her visits did not persuade him to return home.51

If the law protected married women and their children from destitute but loving husbands and fathers, it protected them against those who were immoral or dissipated, by reserving the property of married women strictly for themselves and their children. Their property was subject to creditors' claims, and those claims remained valid, though the debts were created by a dissolute spouse, because the charges were for family essentials. In Milburn v. Walker, B. and W. Milburn charged that William and Elizabeth Walker owed them for goods "furnished for the use and benefit of Elizabeth, her family and negroes."52 William Walker was "wholly insolvent" and unable to support his wife and children.53 Allegedly, the supplies were necessary for the wife, her children, and slaves. The Milburns sought to levy the charges against Elizabeth Walker's property.54

William Walker was of less than sterling character. A witness testified that Walker was of "improvident habits" and was "addicted to intemperance" and thought that given the opportunity, Walker would squander the family property.55
Counsel for the creditors argued that the 1840 and 1848 statutes gave a husband sole management of his wife's property. Those laws permitted a husband to use his wife's property to support the marriage. If the property was land, the husband was responsible for its upkeep; if the property consisted of slaves, he had to provide them with food, clothing, and medicine. Neglect of his obligations, claimed the counsel, was mismanagement. The husband could bind the property to assist him in his duties. If the maintenance of the property required expenditures, and if the husband was poor and powerless to charge the property for such costs, the property, concluded the counsel, would fall into disrepair and depreciate. A husband's capacity to bind his wife's property was incidental to his right to manage it. 56

Speaking for the court, Hemphill confirmed a husband's right to manage the family property. Purchasing supplies for it, incurring debts for its upkeep, and liquidating it for necessities, were, he declared, actions legitimately within the scope of a husband's managerial powers. If he had no property and if there was no community property, he, as administrator of his wife's estate, and responsible for family necessities, had, asserted Hemphill, a right to draw from her property, perhaps the only means by which the family could be supported. 57
The law had not obliterated completely a wife's property rights. For example, she remained a necessary party to suits involving her property.

She is the real party defendant. The liability of the husband is only nominal. The contracts were made by him in exercise of his agency; and, if made for the legitimate purposes of his trust, they bind the property, and, in effect, the wife, who is its owner.\textsuperscript{58}

In effect, she was responsible for actions over which she had little control.

Comparing the laws of Spain and Louisiana and the rules of equity with Texas' laws, Hemphill judged the latter's laws harshest in their treatment of married women. Under the former systems, he explained, if a married woman owned property, she could manage it. If the property was not limited to her sole use or if it helped support the family, the husband controlled it to bear the expenses of the marriage. "But," he quipped, "our statute, with a single comprehensive proviso or exception, [swept] all such property. . .under the management of the husband."\textsuperscript{59} Without elaborating, he added that the Milburn case was not the appropriate case to test the constitutionality of the law against the constitutional guarantees for married women. The court reversed the decision of the lower court and decided for the Milburns.\textsuperscript{60}

With virtually plenary powers over the family property, a husband could, the court decided in \textit{Thomas v.}
Chance, vest his wife "with all the authority possessed by himself over the community." Lucy and Edward Ferris sold land to Colonel Lewis Goddard for slaves. Ferris executed the sale in his wife's name and received the slaves himself. The matter was complicated by the fact that the slaves were owned by John Dodds. Goddard backed the deal with a note. Essentially, Goddard sold the slaves for Dodds in exchange for the land and owed the amount of the sale to Dodds through the note.

Dodds died, and the administrator for his estate claimed that the title to the land was not good because Lucy Ferris was a married woman at the time of the sale, and her husband did not join her in the transfer of the land. The administrator charged that Ferris and Goddard deceived Dodds. Since Goddard was bankrupt, the administrator suggested that the only remedy was to reclaim the slaves. Since Ferris was dead, the administrator petitioned the court to name Lucy Ferris along with Goddard as a party to the suit and as executor of her late husband's estate.

Hemphill agreed that the law allowed only the husband to dispose of the community property. He reaffirmed that the law did not recognize a deed by the wife conveying the same. A married woman, he continued, could sell the community property with her husband's consent. He emphasized that under the community property system
the wife with her husband was the joint owner of the property and that her interest in it equalled his. Her acts with his consent had the same force as his. It was immaterial whether the husband's consent came before or after his wife's transactions. Without her husband's approval, Lucy Ferris' contract with Goddard was invalid. The court found that she made the contract with her husband, and he put the contract in her name. Ferris received the slaves. The court concluded that Lucy Ferris was a nominal rather than a real party to the contract; he, not she, paid for and received the goods.  

Though a wife disapproved of her husband's management of the community property, the court upheld his actions provided they did not defraud her. The court demonstrated the expanse of his latitude in governing the family's assets. *Stramler v. Coe* involved the transfer of community property by a husband, allegedly to the dissatisfaction of his wife.  

Her children, as her heirs, sought to invalidate the transaction. The court asked whether the contract bound the wife and her heirs, who claimed a portion of the community property in her right, though she opposed the deal. The answer lay in whether the husband, through the exchange, intended to cheat his wife. If he did not, the contract was good.

While reiterating that a husband alone had control of the community property and that his wife's consent was
not necessary for its disposition, the court cautioned that "excessive or capricious donations and sales" with an intent to deceive the wife invalidated his actions. In such instances, the wife could claim against her husband's property and against third parties.

Pronouncing the sale of the community property a legitimate exercise of the husband's right to manage that property, the court denied the wife's heirs the right to halt the transaction initiated by the husband before marriage and concluded thereafter. Though the heirs inherited their mother's interests, they inherited them, asserted Hemphill, "incumbered with burdens which have the same binding force...as they have upon the husband and surviving partner."

Any other interpretation of the law, Hemphill warned, would multiply the volume of litigation over community property rights. He emphasized that the court's ruling did not signify that a husband, as a surviving spouse, had unchecked freedom with family property, including commitments to previous obligations. On the contrary, the law expected him to pay any prior debts "with all convenient speed, so that the estate be not consumed with interest." If he defaulted, the law held him accountable to his wife's heirs.

For purposes of protecting a married woman and her children from an irresponsible husband or father, the
court in *Cheek v. Bellows* construed the imprisonment of a husband to be similar to desertion. Mary Bellows rented the family’s Hicks Hotel in Hallettsville, Texas, and loaned two slaves to N. S. Cheek for one year. In exchange Cheek agreed to pay her a sum, to furnish her and her children with room and board in the hotel, and to care for the slaves. They signed an agreement, but Bellows did not acknowledge the contract. In a lower court her husband’s representative charged Cheek with "forcible entry" on Bellows’ property. The court decided for Bellows, but the appellate court reversed the decision.

Bellows' husband was in the county jail for assault with intent to kill. When Mary Bellows made the arrangement with Cheek, her husband had escaped from prison. Allegedly, she was destitute; she pleaded that she urgently needed to sell or rent the property to support herself and her children because her husband had deserted her. Her husband's attorney argued that she failed to acknowledge properly her contract with Bellows. That is, she neglected to execute it in the presence of a public official. The evidence did not show that her husband abandoned her, thereby justifying her right to contract without his consent.

Lipscomb stated that Mary Bellows and her husband owned the hotel jointly, that the husband’s whereabouts were unknown, and that she could not support herself and
her children. The central question was whether a wife could contract given the circumstances. Although a husband controlled the community property as well as his wife's property, the court recognized exceptions that were matters of necessity. If a husband was absent and no one else had authority to administer the family property, the wife, ruled the court, had the power to do so. 75

Denying a wife the power to contract in her husband's absence, insisted Lipscomb, aggravated her miseries. Since Mary Bellows disposed of the property for only a year, she did not go "beyond the emergency of her condition." 76 She and her family, concluded the court, were entitled to support from the family property. 77

To balance a system that yielded so much power to a husband the court gave force to what was essentially a moral obligation, namely that a husband was responsible for maintaining his family. As the court indicated in Black v. Bryan, maintenance signified more than subsistence. 78 John Bryan sued James Black for labor and materials, worth $225, in extracting and replacing the teeth of Black's wife, Sarah. Bryan insisted that the work was necessary and that Black consented to it. 79

In a refreshing twist to the abandonment cases, Black countered that Bryan dealt with Sarah as a single woman because prior to the work Sarah had deserted him. He argued that Bryan performed the work on the sole credit
of Sarah and that in exchange he took a note from her. Bryan, insisted Black, knew this and dealt with her in light of their pending separation. Black argued that since Sarah was living on a substantial income, she could pay the bill herself. He contended that the dental work was unnecessary.

Bryan claimed that the Blacks were living together as husband and wife when he performed the services and that Black owned $15,000 worth of community property. Black reiterated that Bryan knew that he, Black, opposed the services and that he and Sarah agreed that she would pay the bill and that he would not be responsible. The lower court instructed the jury that if it believed that the work was crucial to Sarah Black's health and was "an expense suited to her station in society," it should decide for Bryan. 81 Bryan won, and Black appealed. 82

Referring to the disabilities that married women experienced under the common law, Hemphill stated that "even under this system, so hostile to the rights of property in the wife," a wife could act as her husband's agent and obligate him by contract. 83 The law, he added, did not require that the representation be explicit. Rather, it was "raised, by law from a variety of circumstances." 84 Generally, he explained, a husband was liable for supplies which his wife purchased for herself and her family. He defined necessities as "articles suited to
her situation and the means of the husband and his condition in life."\textsuperscript{85}

This accountability, Hemphill judged, was a matter of the husband's implied permission. He cautioned that the law could hold the husband responsible for the purchases of unimportant items which he expressly approved of. This consent could "be inferred from slight circumstances."\textsuperscript{86} Hemphill added that a husband could spare himself from liability even for essential items by plainly denying permission for the purchases.\textsuperscript{87}

He cited an English case where a merchant, forbidden by a husband to sell his wife clothing, could not reclaim the costs from the husband because as Lord Hale colorfully remarked, "'it [should] not be left to a jury to dress my wife in what apparel they think proper'."\textsuperscript{88} The husband not a court of law was the final arbiter in marital matters. A husband's express opposition to purchases repudiated any implied consent. Though the law gave a husband ample latitude, it would not tolerate minimum support for a wife whose husband could provide more.

Hemphill noted that holding a husband responsible for his wife's welfare was originally a fiction of law. It was founded on a set of theoretical circumstances, such as where a husband forced his wife from the house, and she being physically and mentally incapable of making a contract, obtained essentials for which he was
financially liable. Since such circumstances were remote, Hemphill thought that a practical reason for the existence of the legal invention was the nature of the marital relationship itself. A husband controlled the family wealth by law, and the wife was automatically financially dependent upon him. The law had to compensate where a husband neglected or refused to support his wife. Hemphill noted that it was a "monstrous proposition" to assume that a husband who evicted his wife and who detested her gave her permission to bind him in contract. 89

As for Sarah Black's situation, the court determined that the dental work was necessary for her health and her social standing. Addressing Black's defense, the court stated that the only instance where a husband would not be liable for essentials for his wife was where she had control of property. In any other instance, exemption of a husband from liability was, asserted Hemphill, preposterous. 90

Her notes, obligations, and contracts are void. Her money, time and labor are not her own, but her husband's; and she is wholly under his control; and it is idle to talk of a tradesman giving credit and expecting payment from a wife who has no property and no will of her own, both being absorbed by the husband, whose duty it is, under the marriage relation, to purchase and pay for these supplies. 91

It was immaterial that Black left her husband, that Bryan knew of the departure, and that a separation was pending. If the separation had materialized when Bryan
extended credit to Black, and if she had an income, her husband would not be burdened. Hemphill observed that no one alleged that Black caused the separation. On the contrary, he thought that the fact that Black provided his wife with a maintenance suggested that he was at fault. If this was so, the husband was liable for her needs. Acknowledging Lord Eldon's remark, Hemphill concurred that where a husband ejected his wife from his home, he armed her with credit for her expenses. 92

Hemphill qualified the doctrine with judicial precedent which showed that where a husband clearly forbade his wife from buying some item, the court construed the term "necessary" narrowly. He warned that the law assigned considerable weight to what the husband believed was essential for his wife. Hence, shopkeepers should be aware of dealing with married women. A husband's decision was subject to appeal. A wife, he felt, was often the most qualified to judge her needs. This was especially true where the husband was stingy or cruel. Hemphill, contradicting Lord Hale's vivid dictum, suggested that the question of necessity be submitted to a jury. Where a husband caused the separation, the law, Hemphill reiterated, gave no import to his express prohibitions and hence precluded him from denying his wife reasonable requests. 93

Though Sarah Black owned property and could pay the dental fee, the court, by virtue of a law that denied
her control of property, held her husband responsible. Accordingly, the high court upheld the lower court's decision in favor of Bryan.94

As administrator of his family's property, a husband could pervert that trust by exercising what the law termed "undue influence" over his wife. It was a charge which the courts found troublesome to prove, as the Texas Supreme Court illustrated in 1857 in *Shelby v. Burtis.*95 The case involved a sale of slaves between John O. Shelby and Elbridge Walbridge. Shelby's wife, Rebecca, a defendant with her husband in the lower court, appealed to the high court because her husband refused to join her in her defense.96

She testified that Walbridge terrorized her husband by threatening to claim a bulk of cotton, valued at $2,000, if he did not pay. She pleaded that her husband was "perplexed, harassed and distressed" and that he asked her to sign a note mortgaging her property for the payment of his debt.97 She refused, and his attorney told her that her signature on the note was "a mere matter of form" and that she would not be bound by it.98 She signed and acknowledged the document before a notary public.99

Walbridge, she insisted, knew what was happening. He, her husband, and her husband's attorney, she charged, conspired against her; they exercised "undue influence" over her, ill-advised her, and gave her no time to think
about the deal. Her signature, she argued, was a fraud. She asked the court to void the note. 100

Since the introduction of the common law in Texas, began Hemphill, a married woman could encumber her property to pay her husband's debts. He noted that this rule was in force under Spanish law. Under that system contracts in which a wife joined her husband as a "co-obligor" were not absolutely void but voidable. That is, they were valid provided they were beneficial to the wife. The institution of the common law effected no major changes in this respect. 101

It is not to be disguised that her condition, to say the least, has not been improved by the change. Had her freedom of action been increased in a degree commensurate with her power to bind her estate, there would have been a manifest improvement on the ancient law. But her estate is now, as it was in former times, under the control of her husband. 102

Hemphill added that the Texas law, in giving married women the power to charge their property for the benefit of their husbands, copied the principles of equity which gave married women a measure of proprietary freedom. Such commitments by a wife, he advised, had to be closely scrutinized for signs of fraud, coercion or undue influence, which he admitted was difficult to prove. There was, he perceived, a thin line between "a strong influence...brought to bear on the feelings and affections of the wife" and "that species of undue influence, which [was] reprobated by the law." 103
Rebecca Shelby's case, he believed, was an example of the first condition.\textsuperscript{104}

Though the court realized that a husband had abundant powers over his wife, it assisted her only when the husband exerted such force as to incapacitate her. In the Shelby suit the court found that John Shelby merely appealed to his wife's sympathies. He wanted simply, thought Hemphill, short-term relief from his debt until he could find the means to pay the debt either out of the community property or out of his own.\textsuperscript{105}

Even in the management of the homestead, where a husband could not sell it without his wife's consent, he could exercise superior rights, ostensibly to ease his job as principal family backer. In \textit{Brewer v. Wall} the court decided that though a husband was not at liberty to sell the homestead without his wife's approval, he could sell it "at a future time" without violating the law.\textsuperscript{106} A husband, reasoned Judge James H. Bell, could make such a sale in the "confident expectation" that his wife would enter into the contract voluntarily or that he would acquire another homestead.\textsuperscript{107}

The court decided that a wife's interest in the homestead ceased with her death.\textsuperscript{108} Thus her children inherited nothing of the homestead which would circumscribe the husband's powers over that property.\textsuperscript{109} Upon the wife's death the husband gained complete control of
the homestead. The court's decision was on solid ground. The homestead was property reserved for a family's daily survival and was not a device to perpetuate a family line. To manage the homestead purely for the future interests of the children could take from the family's present needs. Thus the law did not address the children's prospective interests. Rather it assumed that such interests were served adequately by their parents' accumulated holdings apart from the homestead. Accordingly, a husband who was responsible for his family's daily needs received upon his wife's death full control of the homestead without the constraints of his children's future interests.

Like imprisonment, insanity, the court indicated in Forbes v. Moore, was a form of abandonment. Enoch Moore sued his wife and three other persons for taking his property, comprised of livestock, farm equipment, and household furnishings, worth $2,000. Moore claimed that at the time that his property disappeared, he was "laboring under temporary derangement," inflicted with an acute illness. The lower court awarded him the amount for the damages, and his wife and others appealed.

Delivering the decision of the court, Chief Judge Amos Morrill agreed that what constituted a temporary mental disorder was subject to debate. The facts of the case justified the actions taken by Moore's wife.
Allegedly Moore's father-in-law, learning of his son-in-law's illness, removed, along with his daughter and her five children, Moore's possessions to his home. He intended to support the family and to protect their property during Moore's confinement. 114

To the court, there was no other place for the troubled mother to go but to her parent's home. During the insanity of her husband, only she, insisted the court, could fill the needs of her family. She was the head of the household and could appropriate the community property or her husband's property, if there was no common stock, for family essentials. Whether the wife or her agents consumed the husband's property frivolously, was in the court's opinion a matter for future adjudication. Referring to the Wright case, the high court criticized the lower court for being "oblivious" to the guidelines established by Hemphill and overturned that court's decision. 115

Announcing that a married woman could not sue for community property without her husband's joinder, the Texas Supreme Court in Murphy v. Coffey reaffirmed the inert role of a married woman in a community property arrangement. 116 Allegedly a husband transferred land to another without his wife's consent. The wife stated that she opposed the transfer, but her husband ignored her and refused to join her in suing for the property. 117
Morrill explained that a married woman could sue alone for her separate property when her husband refused or neglected to do so. Otherwise the husband alone or with his wife sued for the property. Statutory law, he continued, did not empower her to sue alone for her husband's property or for the community property under any circumstances. She could, he added, sue for divorce or for support for herself and children. The exceptions were narrow. 118

When married women could contract, sue and be sued without first obtaining the consent of their husbands remained unclear. The mere absence of their husbands, as Sorrel v. Clayton illustrated, did not expand their proprietary capacities automatically. 119 If a married woman had no control of the family property while her husband was absent, her property was exempt from liability for family essentials. Against creditors, her marriage was an effective defense.

On appeal from the Wharton County court, the case sprung from a claim by a plantation overseer, W. J. Clayton, for payment from Martha Sorrel for cotton she borrowed from the estate of W. H. Reeves which Clayton managed. Clayton contended that Reeves's wife, who was Sorrel's sister, had sold the cotton to him. 120

He stated that Sorrel's husband was in the Confederate Army and by virtue of his absence, Sorrel had
"full management and control of his affairs." While her husband was in the army, he continued, she acted as a single woman with respect to the family property. He argued that she acquired the cotton for purposes of bartering it for supplies for herself, her children, and the plantation. Since these were necessities, he believed she was liable for their payment. Since she was a widow, he wanted payment taken from her property or from the community property. Sorrel's husband, maintained Clayton, died a pauper.

Sorrel responded that when she borrowed the cotton she was married, that the cotton belonged to her sister, that her husband had bargained with Clayton, and that when Clayton sued her husband the court dismissed the case. At the time of the loan, she explained, she did not have to purchase essentials with the cotton because her husband's wealth was ample. She argued that her husband did not intend to bind her property. She denied liability for the cotton because she was acting as her husband's agent during his absence. She stated she received no community property either before or after marriage; her husband died bankrupt. The lower court decided for Clayton, and Sorrel appealed.

Presenting the decision of the high court, Judge Thomas J. Devine asked whether Sorrel's property was liable for the debt. During her husband's absence
Sorrel was not, according to Devine, legally "living separate and apart" from him. She was not, the court ruled, acting as a single woman. Rather she was acting as her husband's agent; she managed the plantation with his consent. The court found that at the time of the loan Sorrel's husband was financially stable. There was no evidence that his wife exchanged the cotton for family items or that she used it to benefit her separate property.

Ordinarily, explained Devine, the debt would bind the community or the husband's separate property. But the Sorrels had neither. The facts failed to support the claim that Martha Sorrel was responsible. On the contrary, remarked Devine, the attempted settlement between her spouse and Clayton showed that Clayton considered the debt to be the husband's. Concluded Devine, for Clayton to exact payment from Martha Sorrel's estate, he had to prove that Sorrel incurred the debt for provisions for herself and children and that the debt was warranted. Failing to show that, Clayton lost.

A wife could sue her husband for the protection of her property, but the courts had to examine scrupulously such causes because they were potential devices for evading creditors. In Ryan v. Ryan, to protect her estate, sued her husband and requested relief from the community property. The husband's creditors intervened claiming
that the Ryans' actions were collusive and fraudulent. They argued that the Ryans were attempting to cheat them. The lower court in Tarrant County supported the creditors because it believed that the wife could not "acquire paramount rights over community creditors."128

Judge Charles S. West of the state's supreme court thought otherwise. Texas marital property law, he argued, supported a wife's right to sue her husband for the protection of her property. He urged the courts, however, to review carefully such suits to prevent husbands and wives from conspiring against lenders. By successfully suing for her husband's property or for the community property, a wife could isolate those assets from a creditor's legitimate claims.129

Faithful to the Spanish tradition, the Texas courts vigilantly upheld a married woman's right to own property. Following that tradition and that of Anglo-America, the courts tailored a married woman's property rights to her family role. Consequently, she enjoyed abbreviated civil rights, her rights to contract, to sue and to be sued.

From Texas' judicial decisions and opinions, a family's interests were paramount to any individual interests within it. Assuming that a husband was the family's breadwinner, the courts endorsed concentrating powers over the family's wealth in him. Perhaps like the
legislature the courts feared that splitting authority between husband and wife over a family's estate would precipitate family divisiveness. The courts stayed within legislative designs.

Only under extenuating circumstances did a married woman acquire full civil rights. Her rights expanded to meet family exigencies. As the Texas cases illustrated, limited rights meant limited accountability. A married woman's contracts or liabilities were restricted to essentials for herself and children. Confining her property to those purposes shielded her estate from a careless and unloving spouse and his creditors and left the family a means of support.

By interpreting the statutes in this way and by clarifying the rights and duties of husband and wife, the Texas courts on a case-by-case basis assisted the legislature in creating a family maintenance scheme for a society unaccustomed to collective solutions. The private law with minimum assistance from the public sector operated to keep families financially fastened. Combined, these institutional responses comprised one nineteenth-century society's alternative to a comprehensive public support plan.
FOOTNOTES - CHAPTER VI

1 Edrington v. Mayfield, 5 Tex. 364, 366 (1849).
2 Ibid., p. 366.
3 Ibid.
4 McKnight, "Texas Community Property Laws," pp. 120-23.
5 1 Tex. 481 (1847).
6 Ibid., pp. 481-82.
7 Ibid., p. 484.
8 Ibid.
9 Ibid.
10 4 Tex. 61, 66 (1849).
11 Ibid., p. 61.
12 Ibid., pp. 61-63.
13 Ibid., pp. 64-65.
14 Ibid., pp. 65-66.
15 Ibid., p. 65.
16 Ibid., pp. 67-68.
17 5 Tex. 152 (1849).
18 Ibid., p. 154.
Ibid., pp. 155, 164-68.

Ibid., pp. 164-65.

Ibid., pp. 165-66.

Ibid., p. 166.

Ibid.

Ibid., p. 169.

Ibid., pp. 169-70.

10 Tex. 123 (1853).


Ibid., pp. 124-25.


Ibid., p. 126.

Ibid., p. 127.


Ibid., p. 128.

Ibid., p. 130.

Ibid., pp. 128-29.

Ibid., p. 129.

Ibid., p. 129.

Ibid., pp. 129-30.
39 10 Tex. 130 (1853).

40 Ibid., pp. 130-31.

41 Ibid., p. 131.

42 Ibid., pp. 131-32.

43 Ibid., pp. 132-33.

44 Ibid., p. 133.

45 Ibid.

46 Ibid.

47 Ibid.

48 Ibid., p. 134.

49 Ibid., p. 135.

50 Ibid., pp. 135-36.

51 Ibid., p. 136.

52 11 Tex. 329, 331 (1854).

53 Ibid., p. 331.

54 Ibid., pp. 331-32.

55 Ibid., p. 333.

56 Ibid., p. 335.

57 Ibid., p. 340.

58 Ibid., p. 341.
59. Ibid., p. 343.
60. Ibid., pp. 343-45.
61. 11 Tex. 634, 638 (1854).
62. Ibid., pp. 634-36.
63. Ibid.
64. Ibid., pp. 637-41.
65. 15 Tex. 212 (1855).
66. Ibid., pp. 213-16.
67. Ibid., p. 216.
68. Ibid.
70. Ibid., p. 218.
71. Ibid.
72. 17 Tex. 613 (1856).
73. Ibid., p. 614.
75. Ibid., pp. 617-18.
76. Ibid., p. 618.
77. Ibid., pp. 617-18.
78. 18 Tex. 453 (1857).
79. Ibid., p. 454.
80 Ibid., pp. 454-55.
81 Ibid., p. 457.
82 Ibid., pp. 455-57.
83 Ibid., p. 461.
84 Ibid.
85 Ibid.
86 Ibid.
87 Ibid.
88 Ibid.
89 Ibid., pp. 462-64.
90 Ibid., p. 465.
91 Ibid.
92 Ibid., p. 466.
93 Ibid., p. 467.
94 Ibid., p. 468.
95 18 Tex. 644 (1857).
96 Ibid., pp. 645-46.
97 Ibid., p. 646.
98 Ibid.
99 Ibid., pp. 646-47.
100 Ibid., p. 647.
101 Ibid., pp. 649-50.
102 Ibid., p. 650.
103 Ibid.
104 Ibid.
105 Ibid., pp. 650-51.
106 23 Tex. 585, 589 (1859).
107 Ibid., p. 589.
108 Ibid.
109 Ibid.
110 Ibid.
111 32 Tex. 195 (1869).
112 Ibid., p. 196.
113 Ibid.
114 Ibid., pp. 198-99.
115 Ibid., p. 199.
116 33 Tex. 508 (1870).
117 Ibid., p. 509.
118 Ibid., pp. 509-10.
119 42 Tex. 188 (1875).
120 Ibid., p. 189.
121 Ibid.

122 Ibid.

123 Ibid., pp. 191-92.

124 Ibid., p. 192.

125 Ibid.

126 Ibid., p. 193.

127 61 Tex. 473 (1884).

128 Ibid.

129 Ibid., pp. 474, 476.
EPILOGUE

Cardinal to this investigation is the argument that despite Texas' continental law moorings the development of its marital property laws from 1840 to 1913 resembled that of those states grounded strictly in Anglo-American legal tradition. Texas' marital property statutes were constituents of a national movement during the first half of the nineteenth century to codify and reform the property rights of married women. Like other states' marital property acts, Texas' acts embodied piecemeal changes at least until the twentieth century. Overall the married women's property acts of the Anglo-American states shielded the property of married women from negligent and thriftless spouses. In addressing that socioeconomic problem, Texas' marital property laws simulated a "national strategy."

In the realm of marital property rights, Texas' experience was a miniaturization of what occurred nationally rather than a deflection from a prevailing American current. Like other states' marital property laws, Texas' laws constituted in a most fundamental way a family support scheme. By shielding a portion of a family's estate, namely the wife's property, from the
husband's creditors, in the instance of a shiftless husband or father, Texas' laws guaranteed a family something roughly equivalent to a maintenance income and assisted it from becoming a public charge. Public action substituted timidly where private action failed.

In Texas as elsewhere a capricious economy and its attendant social fluidity spurred a need to clarify the rights and duties of individual family members. Such public intrusions, though so slight, confirmed the fact that mutual affection among family members could not be assumed. Whatever militated against family sentiment threatened the economic as well as the emotional stability of a family. Laws could not force family members to love each other, but they could protect an emotionally fragmented family from financial liquidation.

From this perspective, Texas' marital property laws represented mechanical solidarity for a family. These cold rational responses to personal or emotional inadequacies that menaced a family's economic security followed a long Anglo-European tradition where statutory law from time to time intervened where private action failed. Submitting to public scrutiny, a family was "re-extended."

To prevent a family from becoming economically unglued by a wanton husband or father, Texas law exempted a wife's property from her husband's debts and limited its liability to essentials for herself and children. In
the absence of a husband the law expanded a wife's property rights to meet family exigencies. As manager of the family estate, she, like her husband, was responsible for her family's welfare.

In spite of the statutory movement, marriage in Texas remained at least until 1913 an arrangement of reciprocal rather than of equal rights. As administrator of his family's assets, a husband was obligated to support his wife and children in exchange for the prerogatives that his role encompassed. Moves to make the marital property laws more equitable typified the post-1913 years and became part of contemporary events. These efforts were piecemeal.

A relatively recent decision by a court of one community property state employed the Fourteenth Amendment of the United States Constitution to invalidate that state's law granting a husband dominion over the community property. This signals a turn toward fairer marital property laws and toward an enhancement of married women's civil rights.¹

In Texas as long as the reciprocal arrangement persisted, a married woman remained in terms of her civil rights a pawn of that system. Her rights were the price of her upkeep. Liberalization of the Texas law was a phenomenon of the twentieth century. Texas, one of the last holdouts, reformed its community property laws to
reflect more accurately an equal partnership.

Such developments destroy any notion that Texas' assumption of a community property system made it inherently more progressive than its strictly Anglo-American counterparts. Texas' experience constituted no deviation from a prevailing American direction. Rather it warranted for that state a place on the conservative end of the American jurisprudential spectrum.

As Alexander Keyssar observed of a family of another society in another time, a family in nineteenth-century Texas remained the "primary agency of social welfare."² A family was a private bailiwick wherein lawmakers hesitated to tread. As James Willard Hurst noted, a family in nineteenth-century American remained generally "an undisturbed autonomy" or largely outside the pale of public lawmaking.³ A nineteenth-century Texas family was no exception. Texas' marital property laws, however, projected the outlines, though barely perceptible, of a society that was something more than a loose collection of self-sufficient and staunchly independent individuals. Rather those laws characterized that polity as one more akin to a borderland commonwealth.
FOOTNOTES - EPILOGUE

1 The case originated in the Civil District Court, Parish of Orleans, Louisiana. See, Corpus Christi Parish Credit Union v. Martin, La., 358 So. 2d 295, 296 (1978).


BIBLIOGRAPHICAL ESSAY

Historical studies of Texas' marital property laws are meagre, narrow, and dated. They assess those laws in an isolated fashion and address the needs of practicing attorneys. They ignore the national context. Typical of this approach is Joseph W. McKnight's, "Texas Community Property Law--Its Course of Development and Reform," California Western Law Review, VIII (Fall, 1971), 117-45. McKnight summarily dismisses construing the 1840 Texas marital property act within the framework of the Married Women's Property Acts as a national phenomenon. He refuses to categorize the act as such because "by so classifying the act, some of its most significant contents are obscured." McKnight, "Texas Community Property Law," p. 119. In another study of Texas marital property laws, he fails to acknowledge the Married Women's Property Acts altogether. Referring to the stringent English common law rules governing married women's property rights, he asserts that ". . . there was certainly no movement for change in the Anglo-American states in the mid-nineteenth century." Joseph W. McKnight, "A Century of Development in Texas Law," Texas Bar Journal, XXXVI (November, 1973), 1054.


Other writers on Texas' marital property laws treat the Texas system as inherently progressive or fairer to married women than Anglo-American law because it embodied the Spanish principles of community property. See, William Quinby de Funiak and Michael J. Vaughn, Principles of Community Property (2d ed.; Tucson: University of Arizona Press, 1971); Leo Kanowitz, Women and the Law; the Unfinished Revolution (Albuquerque: University of New Mexico Press, 1969).

In researching this study of Texas' marital property laws, over five hundred libraries and research facilities in Texas were contacted. The results were disappointing. Manuscript collections and other unpublished sources were of little or no value. Newspapers from Austin, Galveston, and Houston for the period 1840-1913 offered no substantive comments on legislative activity on marital property rights. Biographies or biographical sketches of Texas lawmakers provided few insights into what motivated the lawmakers in devising marital property laws. Material on such individuals is apparently difficult to gather. In July 1977, the Texas Legislative Reference Service abandoned a project to compile biographies of Texas legislators because of a lack of data. One synthetic study is Ralph A. Wooster's, "Membership in Early Texas Legislatures, 1850-1860," Southwestern Historical Quarterly, LXIX (October, 1965), 163-73. Law school lecture notes on Texas marital property laws for the period 1840-1913 are extinct.

Accordingly, this study relies heavily upon the formal law and accompanying documents--statutes, bills,
committee reports, legislative journals, constitutional debates, and court cases. Sources utilized in gathering these documents are cited in the bibliography of primary sources. A valuable tool is Marian Boner's, A Reference Guide to Texas Law and Legal History (Austin: University of Texas Press, 1976).


Published too late to augment this study, Carl N. Degler's, At Odds: Women and the Family in America, 1776 to the Present (New York: Oxford University Press, 1980) signifies a valuable contribution to understanding historically the conflict between women's rights to equality and their family obligations.
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