ARTICLE XVI

GENERAL PROVISIONS

Sec. 1. OFFICIAL OATH. Members of the Legislature, and all other elected officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ________, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ________ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward for the giving or withholding a vote at the election at which I was elected. So help me God."

The Secretary of State, and all other appointed officers, before they enter upon the duties of their offices, shall take the following Oath or Affirmation:

"I, ________, do solemnly swear (or affirm), that I will faithfully execute the duties of the office of ________ of the State of Texas, and will to the best of my ability preserve, protect, and defend the Constitution and laws of the United States and of this State; and I furthermore solemnly swear (or affirm), that I have not directly nor indirectly paid, offered, or promised to pay, contributed, nor promised to contribute any money, or valuable thing, or promised any public office or employment, as a reward to secure my appointment or the confirmation thereof. So help me God."

History

Section 1, as adopted in 1876, prescribed a single oath of office for members of the legislature and all state and local officers. It included a section requiring the official to swear that he had not fought a duel, made or accepted a challenge to fight a duel, acted as a second, or "aided, advised or assisted" in such acts. The original oath contained two conclusions, one for elective officers and one for appointees.

In 1938 the section was amended. All language dealing with dueling was omitted. The phrase requiring officers to swear to "preserve, protect and defend" the state and federal constitutions was inserted in place of the previous promise to perform official duties "agreeably" to the constitution and laws. The court of criminal appeals suggested that this change was intended to strengthen the oath in response to what were considered radical and subversive movements.

> In this present day and time, when subversive influences and activities which would destroy our governments and the principles upon which they are founded are abroad in this country, it is a matter of much concern and importance that our public officials should be required to swear their personal allegiance to, and belief in, the principles upon which our governments are founded. The wisdom of such an addition to the former oath is, therefore, demonstrated and readily apparent.

(*Enloe v. State,* 141 Tex. Crim. 602, 605, 150 S.W.2d 1039, 1041 (1941).)

The 1938 amendment omitted the alternative conclusion for appointed officials, thus requiring all officials to swear that they had not given or promised any favors "as a reward for the giving or withholding a vote at the election at which I was elected." This obviously was nonsensical as applied to an appointed official, but the attorney general held that appointive officers should insert after "reward" the words "to secure my appointment" and omit the reference to votes and election. (Tex. Att'y Gen. Op. No. O-322 (1939).) Nothing in the constitution authorizes such a rewriting, but apparently no one ever challenged the authority of an official who took the oath as modified by the attorney general.

In 1956 Section 1 was amended to its present form, providing two oaths, one for legislators and other elected officers and another for appointed officers.

The Constitutions of 1845, 1861 and 1866 (Art. VII, Sec. 1) contained provisions

essentially the same as the 1876 version of Section 1, except that the portion dealing with bribery did not appear until 1876.

The 1869 Constitution contained an oath reflecting the concerns of Reconstruction; it required an official to promise that he had not committed assault with a deadly weapon, was not disqualified under the Fourteenth Amendment to the federal constitution (which disqualified former officers and supporters of the Confederacy), and was a qualified elector of the state. This language disappeared in 1876 with the end of Reconstruction.

Explanation

There is nothing complex about the role of this section: It simply supplies the oath that is administered to every official when he takes office. The major questions that have arisen under the section are (1) what officers are required to take the oath? and (2) what are the consequences of failing to take the prescribed oath? The oath is required of everyone who takes office under the authority of the state or its subdivisions. For example, trustees of a school district must take the oath (*Buchanan v. Graham,* 81 S.W. 1237 (Tex. Civ. App. 1904, *no writ*)), but a special prosecutor employed by the victim's family in a murder trial need not. (*Lopez v. State,* 437 S.W.2d 268 (Tex. Crim. App. 1969).) The general rule is that if an officer is one who is required to take the oath, his official actions are void if he fails to do so. In the leading case (*Enloe v. State,* 141 Tex. Crim. 605, 150 S.W.2d 1039 (1941)), the court of criminal appeals held a murder indictment void because it was returned by a grand jury impaneled by a special judge who had taken the wrong oath. The problem was only that the judge had taken the pre-1938 oath instead of the later version, and the person indicted had been fairly tried and convicted. But the court of criminal appeals held nevertheless that the slight difference between the old and new oaths was fatal:

> Heretofore the officer was required only to swear to perform the duties of the office agreeably to the Constitutions and laws, while now he must not only swear to faithfully perform the duties of the office, but, in addition, must swear and affirm his personal allegiance to his governments. The former oath related only to performance of the duties. The present oath, in addition, relates to a personal attitude and relation to his governments and their preservation.

(150 S.W.2d, at 1041.) The court of criminal appeals has taken this same strict view in at least two subsequent cases. (See *Garza v. State,* 157 Tex. Crim. 381, 249 S.W.2d 212 (1952) (murder conviction reversed because judge had taken old oath); *Brown v. State,* 156 Tex. Crim. 32, 238 S.W.2d 787 (1951) (liquor law conviction reversed for same reason).)

Despite these cases, the same court held that either the pre-1938 or post-1938 oath is sufficient to fulfill the requirement in Article VI of the federal constitution that all state officials pledge to support the Constitution of the United States. (*Van Hodge v. State,* 149 Tex. Crim. 64, 191 S.W.2d 24 (1945).)

Comparative Analysis

Almost every state has some constitutional provision dealing with the oath of office. About 41 other state constitutions prescribe the oath of office for legislators, and about 46 have similar provisions for certain other officers or officers in general. Most states that have a constitutional oath of office require the oath of virtually all officers, but about eight exempt certain "inferior" officers or permit them to be exempted by law.

About 35 states provide in their constitutions that legislators shall swear to

faithfully perform their duties; about 44 have a similar requirement for other officers. A pledge by legislators to support the constitution (and in some cases the laws) of the United States is required by the constitutions of about 35 other states, and about 39 require an oath to support the constitution of the state. About 42 other state constitutions require officers in general to promise to support the federal and state constitutions.

At least seven other states make some reference to bribery in the oaths required of legislators. About five require a pledge that no bribe was given to secure election, and about seven include a promise that the legislator will not accept a bribe. In three of these states legislators and other elected officials must also swear that they have not knowingly violated election laws. At least five states require officeholders in general to pledge that they have not bribed anyone to secure their offices. Two states that previously had bribery provisions in their oaths, Pennsylvania and Illinois, have omitted them from recent revisions and now require simply a pledge to support the federal and state constitutions and faithfully execute the duties of office.

The United States Constitution (Art. VI, Clause 3) requires that "the Members of the several State Legislatures, and all executive and judicial officers . . . of the several States, shall be bound by Oath or Affirmation, to support this Constitution . . . ." The *Model State Constitution* suggests an oath pledging support for the federal and state constitutions and promising to faithfully discharge the duties of office. (Sec. 1.07.)

Author's Comment

The bribery disclaimer in Section 1 is one of many sections in the Texas Constitution piously designed to ensure honesty in government. (See also Secs. 4 and 41 of Art. XVI; *Citizens' Guide*, p. 68.) Like most of the others, this section has little legal effect. As the supreme court has pointed out, this section is effective only "insofar as it appeals to the conscience of the candidate, and subjects him to the chances of an indictment for perjury . . . ." (*State v. Humphreys*, 74 Tex. 466, 470, 12 S.W. 99, 101 (1899).)

Aside from this minimal role in preventing corruption, the only function served by this section is to provide the language to be used in the oath of office. The purpose of such an oath presumably is to impress upon the officeholder the importance of the undertaking and his own subordination to the constitution and laws. Presumably the oath also is expected to lend dignity to swearing-in ceremonies. For that purpose the present oath seems somewhat inappropriate; its repetitive language about bribery and corruption tends to overwhelm the more positive portions of the oath and gives the occasion the tone of a public denial of guilt rather than an affirmative undertaking of public trust. The oath could be provided by statute; if it is to be retained in the constitution, it should be simplified, perhaps along the lines suggested by the *Model State Constitution*.

Sec. 2. EXCLUSIONS FROM OFFICE, JURY SERVICE AND RIGHT OF SERVICE; PROTECTION OF RIGHT OF SERVICE. Laws shall be made to exclude from office, serving on juries, and from the right of suffrage, those who may have been or shall hereafter be convicted of bribery, perjury, forgery, or other high crimes. The privilege of free suffrage shall be protected by laws regulating elections and prohibiting under adequate penalties all undue influence therein from power, bribery, tumult or other improper practice.

History

This section comes, with minor changes in wording, from the Constitution of 1845 (Art. VII, Sec. 4) and was included in all the intervening constitutions.

(Constitutions of 1861 and 1866, Art. VII, Sec. 4; Constitution of 1869, Art. XII, Sec. 2.) Provisions of this type are very common in other state constitutions, and the adoption of this section does not seem to have generated any controversy, although Article VI, Section 1, was the subject of some debate during the 1875 Convention. (See *Debates,* pp. 258-62.)

Explanation

This provision has attracted less attention than the somewhat similar provisions in Sections 1, 2, and 4 of Article VI. (See also Art. XVI, Sec. 19, and Art. I, Sec. 15.) Statutes implementing this section include articles 1.05 and 5.01 of the Election Code, article 1002a of the Penal Code, and articles 2133 and 5968 of the civil statutes.

The courts have held that where the constitution prescribes qualifications for office, it is beyond the power of the legislature to change or add to those qualifications unless the constitution specifically authorizes the legislature to do so. (*Burroughs v. Lyles,* 142 Tex. 704, 181 S.W.2d 570 (1944).) The courts have said that provisions restricting the right to hold public office are to be strictly construed, *i.e.,* to restrict the right as little as possible. (*Hall v. Baum,* 452 S.W.2d 699 (Tex.), *appeal dismissed,* 397 U.S. 93 (1970). Disabilities resulting from felony conviction, including ineligibility to hold office, may be removed. (*Brackenridge v. State,* 11 S.W. 630 (Tex. Ct. App. 1889).)

Because of the disqualification of convicted felons from jury service, a conviction returned by a jury that included a convicted and unpardoned perjurer cannot stand. (*Rice v. State,* 52 Tex. Crim. 359, 107 S.W. 832 (1908).) A full pardon, however, removes the disqualification from jury service. (*Easterwood v. State,* 34 Tex. Crim. 400, 31 S.W. 294 (1895).)

Texas courts have stated that the right to vote is not inherent, that no one may vote unless the people have conferred on him the right to do so, and that the right of suffrage may be withdrawn or modified by the authority which conferred it. (*Koy v. Schneider,* 110 Tex. 369, 221 S.W. 880 (1920).) These statements probably are too broad in light of recent United States Supreme Court decisions. (See, *e.g., Dunn v. Blumstein,* 405 U.S. 330 (1972).)

A pardon or dismissal of the indictment restores a convicted felon's right to vote; where no such action has been taken, however, the disqualification remains. (*Aldridge v. Hamlin,* 184 S.W. 602 (Tex. Civ. App.—Amarillo 1916, *no writ*); Tex. Att'y Gen. Op. No. M-795 (1971).) The Supreme Court of California has held that its constitutional provision disfranchising persons convicted of crime, as applied to all ex-felons whose term of incarceration and parole had expired, violates the Equal Protection Clause of the Fourteenth Amendment. (*Ramirez v. Brown,* 9 Cal.3d 199, 507 P.2d 1345, 107 Cal. Rptr. 137 (1973).) Similar attacks in Texas, New York, and North Carolina have been unsuccessful. (*Hayes v. Williams,* 341 F. Supp. 182 (S.D. Tex. 1972); *Green v. Board of Elections,* 380 F.2d 445 (2d Cir. 1967), *cert. denied,* 389 U.S. 1048 (1968); *Fincher v. Scott,* 352 F. Supp. 117 (M.D.N.C. 1972), *aff'd,* 411 U.S. 961 (1973).)

Comparative Analysis

Some 38 other states have provisions for disqualification from office on conviction for felonies, high crimes, and/or certain state offenses.

Three other states besides Texas provide for disqualification from jury service on grounds similar to those of Section 2. Two states provide that jurors must be qualified electors, and in separate provisions identify certain crimes for which conviction is a disqualification.

The constitutions of 46 other states make some provision for disfranchisement of those convicted of crime.

Six states have provisions virtually identical with Section 2. Three states have similar sections relating to preservation of the process from corruption and disorder. Twenty-four constitutions contain statements that elections "shall" or "ought to be" free.

The *Model State Constitution* provides that the legislature may establish "disqualifications for voting for mental incompetency or conviction of felony." (Sec. 3.01.) There is no similar provision regarding qualifications for office or jury duty.

Author's Comment

The last sentence of Section 2 has little real effect, because it simply exhorts the legislature to pass laws protecting the sanctity of the ballot box. It is unnecessary as an authorization to vote because Section 2 of Article VI provides generally for the right of suffrage. The provision disqualifying felons from voting is unnecessary, because Section 1 of Article VI does that. There is no other constitutional prohibition against felons serving on juries, but Section 19 of Article XVI permits the legislature to establish the qualifications of jurors and Section 15 of Article I directs the legislature to pass laws to regulate jury trial and "maintain its purity and efficiency."

Section 2 is the only section that addresses the subject of disqualification of felons to hold public office. This too could be eliminated simply by providing elsewhere that only persons qualified to vote are eligible for public office; since felons are disqualified from voting under Section 1 of Article VI, they would also be ineligible for office.

Sec. 5. DISQUALIFICATION TO OFFICE BY GIVING OR OFFERING BRIBE. Every person shall be disqualified from holding any office of profit, or trust, in this State, who shall have been convicted of having given or offered a bribe to procure his election or appointment.

History

Section 5 is the descendent of similar provisions in the Constitutions of 1845, 1861, and 1866. The Constitution of 1869 contained a section which read: "It shall be the duty of the Legislature immediately to expel from the body any member who shall receive or offer a bribe, or suffer his vote influenced by promise of preferment or reward; and every person so offending, and so expelled, shall thereafter be disabled from holding any office of honor, trust, or profit in this State." (Art. III, Sec. 32.)

Explanation

This is one of four sections in Article XVI dealing with bribery of or by officeholders. Section 1 requires, as part of the oath of office, that an official swear that he did not commit bribery to secure his office. Section 2 states that laws "shall be made to exclude from office" anyone convicted of certain crimes, including bribery. Section 41 provides a detailed definition of bribery and specifies that an officeholder found guilty of bribery shall forfeit his office. There is an apparent conflict between Sections 2 and 5; Section 2 obviously envisions a statutory method for removing persons convicted of bribery while Section 5 appears to be self-executing. It has been suggested that Section 5 "would probably be considered as prevailing over the somewhat more general provisions of Section 2 . . . ." (Texas

Legislative Council, 3 *Constitutional Revision* (Austin, 1960), p. 225.) The same conflict may exist between Sections 2 and 41.

Under the terms of Section 5, a person must be convicted before he is disqualified. In *State v. Humphreys* (74 Tex. 466, 12 S.W. 99 (1889)), a quo warranto proceeding sought to oust the clerk of the county court who had offered during the election to serve for less than the lawful compensation of the office. The court said such a promise might constitute bribery of the voters but held that under Section 5 "he could not be deprived of the office until he had been convicted of the offense (of bribery) in a court of competent jurisdiction, and in a proceeding instituted and prosecuted according to the provisions of our Code of Criminal Procedure. . . . [O]ur constitution does not warrant the removal of the respondent from office for the act charged against him in a proceeding of this character, before a legal conviction of the offense." (74 Tex., at 468; 12 S.W., at 100.)

Section 5 applies to bribery committed by the officeholder but not to attempts by private citizens to bribe officials. Sections 2 and 41, however, appear to cover bribery or attempted bribery of an officeholder by a citizen.

Statutes proscribing bribery of officers are codified in Chapter 36 of the Penal Code (1974).

Comparative Analysis

About half of the states have constitutional provisions barring from office persons convicted of bribery. A few are more lenient than Section 5, either limiting the period of disqualification or barring the offender only from the office to which he was elected. Almost all of these provisions refer to "conviction" for bribery.

The *Model State Constitution* does not directly address the subject of bribery, but provides that "the legislature may by law establish . . . disqualifications for voting for . . . conviction of felony"; other sections require certain officials, such as legislators and the governor, to be qualified voters.

For provisions of other state constitutions comparable to Sections 2 and 41 of Article XVI, see the *Comparative Analysis* of those sections.

Author's Comment

Section 2 of Article XVI provides for a statutory scheme of removal from office for bribery, and Section 41 provides the detailed constitutional treatment of the subject. The major virtue of this section is (1) its simplicity and (2) the fact that it is self-executing. Neither of these would be lost by combining it with Sections 2 and 41, however, or, better still, providing for disqualification and removal in a comprehensive statute.

Sec. 6. APPROPRIATIONS FOR PRIVATE PURPOSES; STATE PARTICIPATION IN PROGRAMS FINANCED WITH PRIVATE OR FEDERAL FUNDS FOR REHABILITATION OF BLIND, CRIPPLED, PHYSICALLY OR MENTALLY HANDICAPPED PERSONS. (a) No appropriation for private or individual purposes shall be made, unless authorized by this Constitution. A regular statement, under oath, and an account of the receipts and expenditures of all public money shall be published annually, in such manner as shall be prescribed by law.

(b) State agencies charged with the responsibility of providing services to those who are blind, crippled, or otherwise physically or mentally handicapped may accept money from private or federal sources, designated by the private or federal source as money to be used in and establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care and treatment

of the handicapped. Money accepted under this subsection is state money. State agencies may spend money accepted under this subsection, and no other money, for specific programs and projects to be conducted by local level or other private, nonsectarian associations, groups, and nonprofit organizations, in establishing and equipping facilities for assisting those who are blind, crippled, or otherwise physically or mentally handicapped in becoming gainfully employed, in rehabilitating and restoring the handicapped, and in providing other services determined by the state agency to be essential for the better care or treatment of the handicapped.

The state agencies may deposit money accepted under this subsection either in the state treasury or in other secure depositories. The money may not be expended for any purpose other than the purpose for which it was given. Notwithstanding any other provision of this Constitution, the state agencies may expend money accepted under this subsection without the necessity of an appropriation, unless the Legislature, by law, requires that the money be expended only on appropriation. The Legislature may prohibit state agencies from accepting money under this subsection or may regulate the amount of money accepted, the way the acceptance and expenditure of the money is administered, and the purposes for which the state agencies may expend the money. Money accepted under this subsection for a purpose prohibited by the Legislature shall be returned to the entity that gave the money.

This subsection does not prohibit state agencies authorized to render services to the handicapped from contracting with privately-owned or local facilities for necessary and essential services, subject to such conditions, standards, and procedures as may be prescribed by law.

History

Article VII, Section 8, of the Constitution of 1845 prohibited appropriations for private or individual purposes or for internal improvements without the concurrence of two-thirds of both houses of the legislature. The statement and account were also required, but not under oath. The Constitutions of 1861, 1866, and 1869 contain language identical with that of the 1845 section.

This section, as reported out by the Committee on General Provisions of the 1875 Convention, included the provisions now found in Article VIII, Section 6, together with the following:

> . . . and no appropriation for private or individual purposes shall be made without the concurrence of both houses of the Legislature. A regular statement, under oath, and on [*sic*] account of the receipts and expenditures of all public money shall be published annually, in such manner as shall be provided by law. (*Journal,* p. 554.)

On second reading this section was amended first by inserting after the word "concurrence" the words "of two thirds." Then the phrase "without the concurrence of both houses of the Legislature" was stricken. (*Journal,* p. 685.)

On third reading the sentences now found in Article VIII, Section 6, were deleted from this section. (*Journal,* p. 776.)

In 1966 this section was amended by adding the phrase "unless authorized by this Constitution" to the first sentence of Subsection (a) and by adding Subsection (b).

Explanation

Subsection (a) is more evidence of the intent of the 1875 Convention delegates to restrict the use of public funds, and it is often cited along with the many other restrictive fiscal provisions in litigation challenging government spending as not for a public purpose. (See the annotations of Art. III, Secs. 44, 50, 51, 52, 53; Art. VIII, Sec. 3; and Art. XI, Sec. 3.) In Ex parte *Smythe* (56 Tex. Crim. 375, 120 S.W. 200 (1909)), for example, the court held unconstitutional a law which authorized the proceeds of a fine imposed for nonsupport to be paid to the spouse or

children. Reasoning that a fine when paid became public money, the court concluded that payment over to the needy spouse or children violated this section because it was for "private or individual purposes." (See also *Terrell v. Middleton,* 187 S.W. 367 (Tex. Civ. App.—San Antonio 1916), *writ ref'd n.r.e. per curiam,* 108 Tex. 14, 191 S.W. 1138 (1917).)

As the annotations to the other fiscal restriction provisions point out, however, Texas courts and attorney general opinions over the years have broadened considerably the scope of the public-purpose doctrine, upholding in recent years uses of public funds that would have been struck down during the earlier period. These decisions are elaborated elsewhere, particularly in the *Explanation* of Section 51 of Article III.

Subsection (b) was added to comply with the requirements of the federal Vocational Rehabilitation Act of 1964. That act made federal funds available to match private contributions but required depositing the funds with the state's vocational rehabilitation agency. Since on deposit these federal and private funds would become state funds and would be spent for "private or individual purposes," constitutional authority was considered necessary as an exception to Subsection (a) and the related constitutional restrictions.

Comparative Analysis

Alaska's Constitution forbids appropriations except for public purposes. Mississippi requires a two-thirds vote of each house of the legislature to appropriate a donation or gratuity. Iowa, Michigan, Rhode Island, and New York require a two-thirds vote in each house to appropriate money for a local or private purpose. The *Model State Constitution* does not limit the object of public expenditures, requiring only that they be matters of public record. (Sec. 7.03(c).)

Author's Comment

Putting aside the question of whether the uses of public money and credit ought to be constitutionally limited to serving a public purpose, the chief vice of Section 6(a) is redundancy. The public-purpose limitation is repeated elsewhere, in various and repetitive forms throughout the constitution, and there is no need for it in Article XVI. (See the *Author's Comment* on Secs. 44 and 51 of Art. III.) Moreover, the exception embodied in Subsection (b), authorizing expenditure for vocational rehabilitation purposes, is no longer necessary, if it ever was, because health and welfare expenditures by government are clearly a public purpose.

The second sentence of Subsection (a) arguably is worth saving, especially if coupled with a public record requirement like the *Model State Constitution*'s Section 7.03(c), as a solemn statement of policy to be implemented by detailed statutory and administrative accounting procedures. If it is retained, it should be combined with a similar requirement in Article IV, Section 24, which applies only to the executive branch.

Sec. 8. COUNTY POOR HOUSE AND FARM. Each county in the State may provide, in such manner as may be prescribed by law, a Manual Labor Poor House and Farm, for taking care of, managing, employing and supplying the wants of its indigent and poor inhabitants.

History

The 1869 Constitution, in Article XII, Section 26, contained a similar provision which directed that each county "shall" provide a poor house. The 1869 section also included a provision, deleted from the 1876 version, that persons committing "petty

offenses" might be committed to the county poor house for "correction and employment."

The sharp increase in indigency following the Civil War, accompanied by recognition that private charity, which had been relied on previously, could no longer cope, was apparently the motivation for inclusion of the provision in the 1869 Constitution. (See 3 *Interpretive Commentary*, p. 71.)

Explanation

This section appears to have escaped notice almost completely. No case was found construing, or even citing, it. Relevant civil statutes include article 718, which gives the commissioners courts power to issue bonds for the establishment of "county poor houses, farms, and homes for the needy or indigent," and article 2351, directing the commissioners courts to "provide for the support of paupers . . . who are unable to support themselves."

Comparative Analysis

Seven other state constitutions provide for care of the poor by counties, and seven expressly confer this power on their legislatures. Five states have a provision to the effect that prohibitions against aid to private individuals do not preclude the care and maintenance of the sick and indigent. The recent Florida, Michigan, and North Carolina constitutions omit their predecessors' references to this matter altogether. The *Model State Constitution* is silent on the matter.

Author's Comment

This section is obviously outdated. The federal and state governments have taken over virtually all responsibility for the welfare of indigents. It may be desirable for the counties to have some power in this field, but it could be provided by statute.

Sec. 9. FORFEITURE OF RESIDENCE BY ABSENCE ON PUBLIC BUSINESS. Absence on business of the State, or of the United States, shall not forfeit a residence once obtained, so as to deprive any one of the right of suffrage, or of being elected or appointed to any office under the exceptions contained in this Constitution.

History

This section originated in the 1845 Constitution (Art. VII, Sec. 11) and has appeared without substantive change in all succeeding constitutions. (Constitution of 1861, Art. VII, Sec. 11 (substituted "Confederate States of America" for "United States"); Constitution of 1866, Art. VII, Sec. 11; and Constitution of 1869, Art. XII, Sec. 7.) The section supplements those dealing with residence requirements for suffrage (Art. VI, Secs. 2 and 2a) and officeholding (*e.g.*, Art. III, Secs. 6 and 7; Art. IV, Secs. 4 and 16; Art. VI, Secs. 2, 4, 6, 7.).

Explanation

Section 9 purports to deal with the problem of residence requirements for those who are called away from their homes on public business. As a court of civil appeals said, "To hold otherwise would be to deprive hundreds of voters who are employed by the state and federal government of an opportunity to vote at any election." (*Clark v. Stubbs*, 131 S.W.2d 663, 666 (Tex. Civ. App.—Austin 1939, *no writ*).) The same protection extends, however, regardless of constitutional statement, to those who are temporarily absent from their residence on private business, due to

illness, or, apparently, for virtually any reason, so long as the absence is in fact temporary and there is an intention to return. (*E.g., Atkinson v. Thomas,* 407 S.W.2d 234 (Tex. Civ. App.—Austin 1966, *no writ*); *Mills v. Bartlett,* 375 S.W.2d 940 (Tex. Civ. App.—Tyler), *aff'd,* 377 S.W.2d 636 (Tex. 1964).) However, the protection afforded public employees by this section is not so absolute as it sounds; a court may conclude, in light of all the circumstances, that a residence has been forfeited. In *Spraggins v. Smith,* 214 S.W.2d 815 (Tex. Civ. App.—Amarillo 1948, *no writ*), for example, the court held that a voter who had lived in Washington, D.C. for six years while working for the federal government, visiting Texas only occasionally, and who had not paid a poll tax between 1941 and 1947 (when someone paid it for her) was a resident of the District of Columbia and not entitled to vote in Texas.

Comparative Analysis

Approximately 26 other states have similar provisions stating that absence from one's residence for certain stated causes will not affect the right to vote or hold office.

In addition to the circumstances provided for in Section 9, other states frequently include absence due to military service; attendance at college; confinement in a poorhouse, asylum, or prison; navigation in state waters or on the high seas; and necessary private business.

Author's Comment

This provision is unnecessary. So long as the legislature has the power to prescribe requirements for voting and officeholding, the circumstances provided for in Section 9 can be handled by statute. The need for a provision such as this, at least concerning suffrage (and, by implication, officeholding, if all officers must be qualified electors), is further weakened by the United States Supreme Court's decision in *Dunn v. Blumstein,* 405 U.S. 330 (1972), which held lengthy residence requirements for voting unconstitutional. The court suggested that a 30-day residence requirement would be ample for the state to complete all necessary paperwork for voting.

The *Model State Constitution* contains a provision which would allow the legislature to "define residence for voting purposes, insure secrecy in voting and provide for the registration of voters, absentee voting, the administration of elections and the nomination of candidates." (Sec. 3.02.)

Sec. 10. DEDUCTIONS FROM SALARY FOR NEGLECT OF DUTY. The Legislature shall provide for deductions from the salaries of public officers who may neglect the performance of any duty that may be assigned them by law.

History

All previous constitutions of the state contained sections almost identical with Section 10; the earlier provisions stated that the legislature "shall have power" to provide for such deductions. At the 1875 Constitutional Convention, the Committee on General Provisions included this section in its proposed article, changing the language from a grant of power to the legislature to a command. (*Journal,* p. 555.) The section was adopted without change and apparently without debate.

Explanation

This section is not self-executing. A court of civil appeals has held that, absent

statutory authorization, salary deductions may not be made for neglect of duty. (*Miller v. James*, 366 S.W.2d 118 (Tex. Civ. App.—Austin 1963, *no writ*).) The attorney general has held that a college has no power to withhold a professor's salary unless the legislature has authorized it to do so. (Tex. Att'y Gen. Op. No. H-509 (1975).) The only implementing statute found is Tex. Rev. Civ. Stat. Ann. art. 6252—2, enacted in 1949, which authorizes judicial forfeiture of salary upon suit by a public prosecutor for an officer's failure to publish legal notices or financial statements. There is no annotation under the statute, so apparently no forfeiture suit has ever reached an appellate court in Texas.

Comparative Analysis

About five other states have similar provisions in their constitutions. One provides that the legislature may reduce salaries for neglect of duty. Four states declare that "it shall be the duty" of the legislature to describe the cases in which deductions shall be made. There is no similar provision in the *Model State Constitution*.

Author's Comment

The legislature needs no constitutional grant of power to forfeit salary because of a public servant's neglect of duty. There is probably no likelihood that the legislature will pass a rash of forfeiture statutes. Section 10 serves no purpose except to clutter the constitution.

Sec. 11. USURY; RATE OF INTEREST IN ABSENCE OF CONTRACT. The Legislature shall have authority to classify loans and lenders, license and regulate lenders, define interest and fix maximum rates of interest; provided, however, in the absence of legislation fixing maximum rates of interest all contracts for a greater rate of interest than ten per centum (10%) per annum shall be deemed usurious; provided, further, that in contracts where no rate of interest is agreed upon, the rate shall not exceed six per centum (6%) per annum. Should any regulatory agency, acting under the provisions of this Section, cancel or refuse to grant any permit under any law passed by the Legislature; then such applicant or holder shall have the right of appeal to the courts and granted a trial de novo as that term is used in appealing from the justice of peace court to the county court.

History

Usury has been condemned at least since biblical times. (*E.g.*, Deuteronomy 15:7-10.) Originally it was considered usurious to make any charge for the use of money. It was not until about the time of the Reformation that the term took on its present connotation of excessive interest. (See generally J. Noonan, *The Scholastic Analysis of Usury* (1957).)

The Texas Constitution of 1869 abolished all usury laws and forbade the legislature from passing new ones. (Art. XII, Sec. 44.) This probably was a response to the argument, advanced by many in the mid-19th century, that usury laws were an unnecessary interference with the principles of free enterprise. The experiment was short-lived, however; the Constitution of 1876 fixed the maximum interest rate at 12 percent, declaring all higher rates usurious, and fixed 8 percent as the legal rate when the parties did not agree on another figure. An 1891 amendment reduced these rates to 10 and 6 percent, respectively.

The section was completely rewritten in 1960 to permit the legislature to authorize rates higher than 10 percent. The 10 percent limit (and the 6 percent rate in the absence of contract) continue to be applicable when the legislature has not

provided some other figure.

The amendment was designed to legalize—and thus subject to regulation—the small loan industry that had long been charging rates higher than the 10 percent constitutional maximum. The amendment made possible passage in 1963 of the Texas Regulatory Loan Act and in 1967 of its successor, the Texas Consumer Credit Code. (Tex. Rev. Civ. Stat. Ann. art. 5069-1.01 *et seq.*)

Explanation

This section authorizes the legislature to fix maximum interest rates and retains a 10 percent maximum if the legislature does not. The legislature apparently takes the position that it may exercise some of the powers given to it by this section (*e.g.*, to classify loans and fix maximum interest rates for such loans) without exercising all of the other powers given (*e.g.*, to classify lenders, license and regulate lenders, and define interest). It has been argued that this interpretation of the section is correct. (See Loiseaux, "Some Usury Problems in Commercial Lending," 49 *Texas L. Rev.* 419, 438 (1971).)

Most of the litigation citing this section involves the definition of "interest." The legislature has narrowed the definition of usury considerably by providing that the term interest "shall not include any time price differential however denominated arising out of a credit sale." The courts have held that the difference between a "cash price" and a "credit price," no matter how large, is not interest under this definition. (*Hernandez v. United States Finance Co.*, 441 S.W.2d 859 (Tex. Civ. App.—Waco 1969, *writ dism'd*).) However, the courts have held that the term interest may include "points," origination charges, bonuses, premiums, closing fees, and unearned interest that becomes due under an acceleration clause. (See Loiseaux, *supra,* at 422-430.)

The courts also have limited the application of the usury prohibition by holding that the statutory penalties for usury apply only to intentional overcharges. A contract usurious on its face is presumed to be intentional. (*Walker v. Temple Trust Co.*, 134 Tex. 575, 80 S.W.2d 935 (1935)); but if the overcharge results from a bona fide error, the statute precludes a penalty. (Tex. Rev. Civ. Stat. Ann. art. 5069-1.02.) In fixing the amount of interest to be awarded on damages assessed in lawsuits, however, the courts seem to rely on the statutory "legal interest rate" rather than the constitutional provision. (See *Smelser v. Baker,* 88 Tex. 26, 29 S.W. 377 (1895).) Moreover, there is dictum in at least one case suggesting that the legislature is free to vary this rate from time to time. (*Ellis v. Barlow,* 26 S.W. 908, 909 (Tex. Civ. App. 1894, *no writ*).)

The last sentence of Section 11 is a "trial de novo" provision. Its effect is to dilute the power of administrative agencies set up to regulate interest rates. It gives a lender whose permit is denied or cancelled a right to have a court redetermine the issue. Generally, in the absence of a "trial de novo" requirement, courts will not reject the findings of administrative agencies if those findings are supported by substantial evidence. Under "trial de novo," the court disregards the decision of the agency and redetermines the issue itself.

Comparative Analysis

Although most states impose statutory limits on interest rates, only four besides Texas have a constitutional ceiling. Arkansas and Tennessee have a 10 percent maximum. California also has a 10 percent maximum, but exempts most major categories of lenders from it and permits the legislature to regulate interest rates charged by the exempted lenders. In 1968 Oklahoma adopted an amendment copying the 1960 Texas amendment without the "trial de novo" provision. About

half the states have provisions prohibiting the fixing of interest rates by local, private, or special law.

Author's Comment

Since the 1960 amendment, Texas has had no real constitutional limit on interest rates because the amendment permits the legislature to set limits for any class of loans or lenders. The only effect of the present limit is to provide a 10 percent ceiling on loans that the legislature has not regulated. This could be accomplished just as effectively by a statute stating that the maximum allowable interest is 10 percent unless otherwise provided.

Section 11 also establishes an interest rate of 6 percent when the parties have not agreed upon a rate, but as pointed out above, the courts seem to rely exclusively on the statutory "legal interest rate" rather than the constitutional provision. Since prevailing rates of interest are subject to change much more quickly than the constitution can possibly be amended, it would probably be wise to permit the legislature to fix the rate of interest to be paid in noncontractual transactions.

The major effect of Section 11 at present seems to be its requirement of trial de novo. Despite efforts to provide for trial de novo of agency decisions generally, the voters have refused to do so. (For example, a 1961 amendment proposition authorizing the legislature to provide for trial de novo of all administrative agency decisions was soundly defeated. See H.J.R. 32, 57th Legislature, 1961.) It is difficult to see why decisions of the Consumer Credit Commission and other agencies that may be authorized to regulate interest rates under this section should be subject to trial de novo while decisions of most other state agencies are not. In any event, the standard by which decisions of individual agencies are judicially reviewed is more appropriately a subject of statutory law than constitutional law.

Sec. 12. MEMBERS OF CONGRESS; OFFICERS OF UNITED STATES OR FOREIGN POWER; INELIGIBILITY TO HOLD OFFICE. No member of Congress, nor person holding or exercising any office of profit or trust, under the United States, or either of them, or under any foreign power, shall be eligible as a member of the Legislature, or hold or exercise any office of profit or trust under this State.

History

This provision has been included in every Texas constitution. In the Constitutions of 1845, 1861, and 1866 it was Article VII, Section 13; in the Constitution of 1869 it was Article XII, Section 9. The present Section 12 must be read together with Sections 33 and 40, which extend the prohibition against dual-officeholding to state officers and provide numerous exceptions.

Explanation

The Texas Constitution reflects a preoccupation with the problem of persons holding more than one public job. This is one of three sections dealing with the subject. Two other sections deal with the related subject of prohibiting certain public officials from running for the legislature. (See Secs. 19 and 20 of Art. III.)

Section 12 of Article XVI deals only with persons who hold offices of profit or trust with the federal government, a foreign government, or another state.

Section 40 of this article is not so limited. It prohibits (with many exceptions) a person from holding any two "civil offices of emolument," whether they are state, local, or federal. (Because of federal supremacy, the state could not prevent a person from holding two federal offices, but it can prevent a federal official from holding state or local office.)

Section 33 of Article XVI provides that no one who holds two offices in violation of Section 40 may receive compensation from the state treasury.

Originally, each of the three sections probably had a distinct purpose. Section 12 evidently was designed to exclude officials of "foreign" governments from government positions in Texas. Section 40 apparently was written with local officials in mind, since it excepted certain local officials such as justices of the peace and county commissioners. Section 33 originally prevented the state from paying persons who held two positions, even if the two positions were permissible under Sections 12 and 40. (See *Explanation* of Sec. 33.)

Now, however, partly because of amendments to all three sections, it is impossible to deal with any one of these sections without also considering the other two.

There are still some technical differences among the three sections. While the offices mentioned in Section 12 are undoubtedly "civil offices" as that term is used in Section 40, the offices covered by Section 12 need not be offices "of emolument"; Section 12 covers offices of *profit or trust.* (Apparently there have been no cases construing the Sec. 12 term "office of profit or trust.") Thus a state employee who holds a federal office "of trust" but receives no compensation for that office would not be violating Sec. 40 but might be in violation of Sec. 12.

Section 33 no longer applies in any situation that is not also covered by Section 40, but it still serves an enforcement function. Without it, a person could hold two offices in violation of Section 40, and could continue to be paid, until someone took action to have him removed from one of the jobs. Section 33 in effect makes the comptroller the enforcer of Section 40 by requiring him to make sure he does not pay anyone who is violating Section 40.

Despite these differences, in practice the three sections often have been lumped together. The 1926 amendment to Section 40, permitting state officials to hold National Guard or military reserve positions, probably should have amended Section 12, since the latter deals specifically with federal officeholding. The courts saved the draftsmen of the amendment from possible embarrassment, however, by holding that the amendment to Section 40 in effect also amended Section 12, so that a person permitted to hold two "civil offices of emolument" under Section 40 also was permitted to hold two "offices of profit or trust" under Section 12, although nothing in Section 12 said so. (*Carpenter v. Sheppard,* 135 Tex. 413, 145 S.W.2d 562 (1940), *cert. denied,* 312 U.S. 697 (1941).)

The 1926 and 1932 amendments adding new exemptions to Section 40 also added the exemptions to Section 33, probably on the assumption that the two sections were designed to work together. The 1972 amendment makes this assumption explicit by directly referring in Section 33 to Section 40.

Many of the decisions and attorney general's opinions interpreting Sections 12, 33, and 40 are obsolete because they deal with types of officials (especially retired military and reserve officers) who have since been excepted from the operation of these sections by the 1926, 1932, 1967, and 1972 amendments. Many of the questions that have arisen in interpreting these sections have never been decided by the courts. On these questions, the only sources of interpretations are opinions of the attorney general, which are not definitive. The lack of appellate litigation on these questions may be attributable in part to the fact that those affected by these provisions are often persons who are eligible to obtain an attorney general's opinion (which is free) and who, as public officials, feel bound to abide by the advice of the state's chief legal officer.

In addition to its more general prohibition against dual-officeholding, Section 12 also specifically prohibits holders of federal, foreign, or sister-state offices

from serving in the legislature. This ban differs only slightly from the one found in Section 19 of Article III.

Comparative Analysis

Two states provide that the legislature may declare what offices are incompatible. Eighteen states have provisions similar to Section 12 which forbid state officers from holding federal positions at the same time. Often exceptions are made, usually for service in the militia or national guard; for notaries public; or for postmasters (sometimes limited to those not earning over a specified amount). The *Model State Constitution* contains no provision on dual-officeholding.

Author's Comment

The differences among Sections 12, 33, and 40, described in the *Explanation* above, hardly seem significant enough to justify retaining all three sections. Section 40 covers virtually all of the offices covered by Section 12, except federal offices of trust but not profit, and if it is thought desirable to apply the ban to these offices, Section 40 can easily be reworded so to provide. The Section 40 exceptions apply to Section 12 (see *Carpenter v. Sheppard*). Section 33 now has no effect except as an enforcement provision for Section 40. (See the *Explanation* of Sec. 33.) Under these circumstances, there is no persuasive reason for retaining Sections 12 and 33. For a discussion of the desirability of retaining any dual-officeholding prohibition, see the *Author's Comment* on Section 40.

Sec. 14. CIVIL OFFICERS; RESIDENCE; LOCATION OF OFFICES. All civil officers shall reside within the State; and all district or county officers within their districts or counties, and shall keep their offices at such places as may be required by law; and failure to comply with this condition shall vacate the office so held.

History

This section, with the exception of the failure-to-comply clause, which was added in 1876, comes verbatim from the Constitution of 1845, Article VII, Section 9, and was included in all intervening constitutions. (Constitution of 1861, Art. VII, Sec. 9; Constitution of 1866, Art. VII, Sec. 9; Constitution of 1869, Art. XII, Sec. 12.)

Explanation

There are several other constitutional provisions dealing with residence of various officers and location of offices, including: Article III, Sections 6, 7, and 23; Article IV, Sections 4, 13, 16, 22, and 23; and Article V, Sections 2, 4, 6, and 7. The general requirements of Section 14 make most of these other provisions unnecessary.

The cases involving this section do little more than enforce the plain language of the provision. It has been held inapplicable to officers of local districts such as levee improvements and navigation districts (*Waton v. Brownsville Navigation Dist. of Cameron County,* 181 S.W.2d 967 (Tex. Civ. App.—San Antonio 1944, *writ ref'd*)) and to a special judge appointed by the governor when the regular judge disqualified himself (*Edwards v. State* ex. rel. *Lytton,* 406 S.W.2d 537 (Tex. Civ. App.—Corpus Christi 1966, *no writ*).) According to the attorney general, a county commissioner who moved from his precinct to an adjoining one in the same county did not thereby vacate his office. (Tex. Att'y Gen. Op. No. 0-6905 (1945).) And where there is more than one judicial district in a county, the court clerk may serve both districts so long

as he resides within the county. (*Kruegel v. Daniels,* 109 S.W. 1108 (Tex. Civ. App. 1908, *writ ref'd*).)

Comparative Analysis

Four states have provisions similar to Section 14. Three have provisions to the effect that executive officers shall reside and keep records at the seat of government. There is no comparable provision in the *Model State Constitution.*

Author's Comment

Either this section or the many others concerning residence requirements for officers and specifying location of offices—or all of them—should be deleted. If this section is retained, it would be helpful to include in it citizenship and length of residence requirements for officeholders. That would eliminate the need for many, if not all, of the specific references to these matters in several other sections. If such requirements vary so much from office to office that they cannot be standardized, they should be provided for separately, and this section should be eliminated.

Sec. 15. SEPARATE AND COMMUNITY PROPERTY OF HUSBAND AND WIFE. 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 the separate property of the wife; 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; provided that husband and wife, without prejudice to pre-existing creditors, may from time to time by written instrument as if the wife were a feme sole partition between themselves in severalty or into equal undivided interests all or any part of their existing community property, or exchange between themselves the community interest of one spouse in any property for the community interest of the other spouse in other community property, whereupon the portion or interest set aside to each spouse shall be and constitute a part of the separate property of such spouse.

. This Amendment is self-operative, but laws may be passed prescribing requirements as to the form and manner of execution of such instruments, and providing for their recordation, and for such other reasonable requirements not inconsistent herewith as the Legislature may from time to time consider proper with relation to the subject of this Amendment. Should the Legislature pass an Act dealing with the subject of this Amendment and prescribing requirements as to the form and manner of the execution of such instruments and providing for their recordation and other reasonable requirements not inconsistent herewith and anticipatory hereto, such Act shall not be invalid by reason of its anticipatory character and shall take effect just as though this Constitutional Amendment was in effect when the Act was passed.

History

A definition of separate property has appeared in every Texas Constitution. It has never been significantly changed. Texas inherited the community property system from Spain. When Texas was first settled, in 1821, it was Spanish territory. Spanish law, including community property law, was retained as the basic law when Texas came under the Mexican flag in 1824, and again when the Republic of Texas was established in 1836. (See de Funiak & Vaughn, *Principles of Community Property* (Tucson: University of Arizona Press, 1971), p. 72.) The first explicit decision to adhere to the community property system rather than the common-law property system came in 1840, when the Republic by statute adopted the common law of England as the general law of the Republic but retained the community property system with regard to land and slaves. (2 *Gammel's Laws,* pp. 177-80.) The constitution adopted when Texas joined the Union retained the community

property system with regard to "all property, both real and personal." (Art. V, Sec. 19 (1845).)

Everything in the present Section 15 except the definition (*i.e.*, everything from the word "provided" to the end) was added in 1948. The amendment was an attempt to overcome a decision holding that a husband and wife could not convert their community property to separate property by voluntarily partitioning it. (*King v. Bruce,* 145 Tex. 647, 201 S.W.2d 803 (1947).) As is pointed out in the *Explanation,* the amendment did not fully succeed in permitting spouses to alter the status of property by agreement.

Explanation

An excellent discussion of the origins, effects, and desirability of the present constitutional provision appears in Huie, "The Texas Constitutional Definition of the Wife's Separate Property," 35 *Texas L. Rev.* 1054 (1957).

The apparent purpose of this section, as indicated by its history, was to establish the community property system in Texas. The principal alternative marital property system is the common law system, which came to the United States from England. The common law system was based on the idea that upon marriage, the wife's legal identity merged with that of her husband, and therefore she could have no independent property rights. At common law, all personal property owned by the wife at marriage or acquired thereafter became the property of her husband. The wife's realty remained hers in theory, but the husband was entitled to manage it and keep all profits from it, and the land could not be sold by the wife without the husband's consent. The harshness of the common law system has been softened somewhat by the passage of the Married Women's Acts, which generally give the wife power to manage her own property. However, under the common law system, the wife still has no ownership interest in the husband's property until his death. (See 2 Pollock & Maitland, *History of English Law* (2d ed. 1898), pp. 403-08; Cribbet, *Principles of the Law of Property* (Brooklyn: Foundation Press, 1962), pp. 83-86).)

By contrast, under the community property system the spouses are treated as partners. As a general rule property acquired during marriage is community property, and one-half belongs to each spouse. Property acquired by either spouse before marriage or during marriage by gift, inheritance, or devise (a gift pursuant to a will) is the separate property of that spouse.

Although Section 15 is entitled "Separate and community property of husband and wife" (the title is unofficial and has no legal effect), the text does not establish a community property system. Indeed, it does not even mention community property. It only defines *separate* property, and only the wife's separate property at that. The 1840 statute went on to define community property, but no Texas constitution has done so. The courts have assumed that the section establishes a community property system in Texas and have deduced a definition of community property from what is not defined as separate property. (See *Arnold v. Leonard,* 114 Tex. 535, 273 S.W. 799 (1925).)

Whether the husband's separate property is defined the same way as the wife's has never been completely resolved. One decision suggested that since the husband's separate property is not constitutionally defined, the legislature is free to define it more broadly than the wife's. (*Stephens v. Stephens,* 292 S.W. 290 (Tex. Civ. App.—Amarillo 1927, *writ dism'd*).) Since 1929, the statutory definitions have been the same for both husband and wife, so the question has not arisen. (See Tex. Rev. Civ. Stat. Ann. arts. 4613 and 4614.) Any discrimination against either sex in the definition of separate property probably would violate the 1972 Texas "Equal

Rights Amendment" (Sec. 3-a of Art. I).

The portion of Section 15 that was added in 1948 attempts to permit spouses to convert community to separate property by agreement. It authorizes the legislature to regulate the method of executing and recording such agreements. The legislature has provided such regulations. (Tex. Rev. Civ. Stat. Ann. arts. 852a-6.09 (1964), 4624a.) Notwithstanding the 1948 amendment, however, the courts have severely restricted the circumstances under which community property by agreement can be converted to separate property. The supreme court has held that mutual fund shares are community property, if purchased with community funds, even though they are bought in the name of the husband and wife as "joint tenants with right of survivorship," and even though the parties clearly intend that form of ownership rather than community property. (*Hilley v. Hilley,* 161 Tex. 569, 342 S.W.2d 565 (1961).) After that decision, the legislature amended the Probate Code to provide specifically that "any husband and his wife may, by written agreement, create a joint estate out of their community property, with rights of survivorship." The supreme court held that statute unconstitutional, however, on the ground that Section 15 permits spouses to convert community assets to separate property only if they first comply with the partition statutes passed pursuant to the 1948 amendment. (*Williams v. McKnight,* 402 S.W.2d 505 (Tex. 1966).) The result is that married couples in Texas cannot convert their community property to another form of ownership, *e.g.*, joint tenancy, merely by agreeing to do so; rather they must first partition the community property by going through the procedures provided by statute. The parties then must go through another transaction to convert the property back into a form of joint ownership other than community.

Moreover, spouses are not permitted to make any kind of agreement changing the nature of community assets that may be acquired in the future, because the 1948 amendment permits agreements only with respect to "existing community property."

There is one possible exception to this general pattern of hostility toward agreements by spouses. Courts of civil appeals have held that spouses who are separated may enter into property settlements that have the effect of dividing the community property and making it separate. Such agreements are valid not only with respect to existing community property but also with respect to assets to be acquired in the future. (*Corrigan v. Goss,* 160 S.W. 652 (Tex. Civ. App.—El Paso 1913, *writ ref'd*); *Speckels v. Kneip,* 170 S.W.2d 255 (Tex. Civ. App.—El Paso 1942, *writ ref'd.*)) The supreme court has not considered this question, however, and since the rule adopted by these cases is contrary to the general trend, there is no certainty that it will be followed.

For nearly a century, the courts of Texas said Section 15 prohibited a wife from recovering from a negligent third party for her personal injuries if her husband's negligence contributed to the injuries. In 1883 the supreme court said such a recovery would be community property under Section 15, because it would be property acquired after marriage by means other than gift, devise, or descent. (*Ezell v. Dodson,* 60 Tex. 331 (1883).) From this the courts reasoned that since the wife's recovery would be community property, in which the husband would have a one-half interest, permitting the wife to recover would permit the husband to "profit from his own wrong." They therefore denied the wife any recovery. (*Texas Central Ry. Co. v. Burnett,* 61 Tex. 638 (1884).) The legislature attempted to change this rule in 1915 by statute declaring that all compensation received by a wife for personal injuries was her separate property. (Tex. Laws, 1915, ch. 54, 17 *Gammel's Laws,* p. 103.) A court of civil appeals held this statute unconstitutional under Section 15. (*Northern Texas Traction Co. v. Hill,* 297 S.W. 778 (Tex. Civ. App.—El Paso 1927, *writ ref'd.*) The court reasoned that the statute was invalid

because it attempted to add to Section 15's definition of separate property, and this line of reasoning survived until 1972 when the supreme court held that recovery for the wife's bodily injuries is her separate property. "Therefore, the contributory negligence by the husband does not bar the recovery by the wife." (*Graham v. Franco,* 488 S.W.2d 390, 397 (Tex. 1972).)

The new rule applies only to the wife's recovery for bodily injury, disfigurement, and pain and suffering. The court said recovery for the wife's loss of earnings and for medical expenses is still treated as community property, and therefore the husband's contributory negligence would still bar the wife from recovering for those losses. This apparently would be the rule even if Section 15 were repealed, because the court was relying not on the language of Section 15, but on general community property law principles.

Comparative Analysis

Seven other states (Arizona, California, Louisiana, Nevada, New Mexico, Oregon, and Washington) have the community property system. The other 42 have various modifications of the common law marital property system. Of the seven other community property states, only two, California and Nevada, provide for such a system in their constitutions. In the other five the system is implemented entirely by statute and by reference to the civil law principles that governed community property in Spain, Mexico, and France. (See de Funiak & Vaughn, pp. 59-87.)

The community property provision of the California Constitution of 1849 was identical with the Texas provision before the 1948 amendment. In the 1879 California Constitution, its community-property section was rewritten to read as follows:

> All property, real and personal, owned by either husband or wife before marriage, and that acquired by either of them afterwards by gift, devise or descent, shall be their separate property.

In 1970 the section was again rewritten: "Property owned before marriage or acquired during marriage by gift, will, or inheritance is separate property."

The Nevada constitutional provision is identical with the sections of the pre-1948 Texas Constitution and the 1849 California Constitution, from which it was copied.

No other state has any constitutional provision comparable to the portion of Section 15 that was added by the 1948 amendment attempting to permit spouses to partition by agreement. Despite this specific provision authorizing agreements, Texas is said to be the strictest of all the community property states in restricting spouses' power to hold their property by means other than community. (de Funiak & Vaughn, p. 331.) Texas is the only state that prohibits both prenuptial and postnuptial contracts between spouses to change the character of community property, and it has been said that this rule has produced "some of the most fatuous cases in Texas jurisprudence." (Vaughn, "The Policy of Community Property and Inter-spousal Transfers," 19 *Baylor L. Rev.* 20 (1967).)

Author's Comment

A possible disadvantage of the community property system is that it is foreign to the common law tradition upon which most of the law of the United States—including Texas—is based. This means that Texas marital property laws seem strange, if not incomprehensible, to spouses and lawyers in the 42 states that adhere to the common law marital property system. It also means that in interpreting

marital property laws, Texas courts must refer not only to the principles of the Anglo-American common law but also to the principles of Spanish, Mexican, and French law. It has been suggested that some of the confusion that has arisen in the application of community property law in Texas is caused by a judicial tendency to "mix apples and oranges"—*i.e.*, to apply Anglo-American common law rules to a system that has entirely different antecedents and therefore different rules. (See Vaughn, p. 67.)

On the other hand, commentators suggest that the community property system recognizes the equality of the spouses more effectively than the common law system and generally provides more generously for the wife upon the husband's death. (See Cribbet, cited earlier, p. 90.) Moreover, even critics of the community property system concede that it is a generally satisfactory system for states that are familiar with it peculiarities. (Powell, "Community Property—A Critique of its Regulation of Intra-Family Relations," 11 *Washington L. Rev.* 12 (1936).)

A community property system can be maintained without specific constitutional authorization. This is apparent from the fact that five of the eight community property states have never had any constitutional statement on the matter. It is also apparent from the fact that Texas has always had a community property system even though none of its constitutions expressly required one.

Texas would continue to have a community property system if Section 15 were deleted. Section 5.01 of the Family Code establishes a community property system and the succeeding sections spell out its details. The general principles of Spanish law supplement the statutes and provide additional details of the system. (See *Graham v. Franco,* 488 S.W.2d 390 (Tex. 1972).)

Professor Huie has pointed out that inclusion of a provision in the constitution offers little real assurance that a particular type of community property system will be maintained. For example, although the California provision until 1970 was virtually identical with that of Texas, the courts of the two states interpreted that provision in exactly opposite ways. As pointed out earlier, the Texas Supreme Court has held that revenue from the wife's separate property is community property, and that the constitution prohibits the legislature from providing otherwise. The California Supreme Court, interpreting exactly the same language, held that revenue from the wife's separate property is separate property, and that the legislature cannot change *that.* (*George v. Ransom,* 15 Cal. 322 (1860).) These diametrically opposed views still prevail in the two states, thus demolishing the argument that a constitutional provision assures retention of the traditional community property rules.

It might be argued that deletion of all of Section 15 would repeal the 1948 amendment authorizing partition while retaining a statutory community property system, and thereby return community property law in Texas to its pre-1948 condition. This argument is not persuasive for two reasons. First, the decision that led to the 1948 amendment relied on Section 15's definition of separate property and the fact that the courts had held that the legislature could not add to that definition. If all of Section 15 were deleted, the rationale of *King v. Bruce* would fall. Second, the supreme court now seems to have recognized that in the absence of contrary legislation, the community property system is governed by general principles of Spanish law. Under those principles, spouses were permitted to freely contract away the community structure, either before or after marriage. Deletion of Section 15 thus might well accomplish what the voters attempted to do through the 1948 amendment, and what the legislature attempted to do in the amendment to Section 46 of the Probate Code—namely, permit spouses to freely contract to hold their property by means other than community.

The Texas courts' reluctance to permit such agreements may be based on a fear

that such a policy would encourage frauds on spouses or creditors. The answer to that argument lies in the experience of the other seven community property states. They have taken steps to protect spouses by requiring a clear showing that the agreement was entered into willingly and knowingly. (See, *e.g.*, *Estate of Brimhall*, 62 Cal. App.2d 30, 143 P.2d 981 (1943).) They have given protection to creditors by such methods as providing that agreements between spouses cannot prejudice preexisting creditors and requiring recordation of agreements in order to give notice to subsequent creditors.

Section 15 does not readily lend itself to shortening by partial deletion. Removal of the definition portion makes retention of the rest of the section unnecessary. Retention of the definition without retaining the rest of the section would raise the possibility of restoring the law on partition agreements to its pre-1948 state.

If the portion of the section defining separate property is to be retained, it should be reworded to make it applicable to husbands as well as wives. The 1970 California amendment, quoted above, accomplishes this with commendable clarity and brevity.

None of these possible methods of revision, however, accomplishes what the section apparently is intended to do: require the legislature to retain the community property system in Texas. The legislature probably can be trusted to retain the system, without constitutional compulsion, as long as the system serves satisfactorily; if it ceases to do so, the legislature should be free to change it. Although the community property system may be intrinsically satisfactory, there is always the possibility that extrinsic events, such as federal legislation, might suddenly make it unsatisfactory, just as federal tax laws suddenly made the community property system attractive to several common law states in the late 1930s and early 1940s—and just as suddenly made it unattractive to those same states after the tax advantage was terminated in 1948.

If the intent is not to leave the choice of a marital property system to the legislature, Section 15 should be replaced with a new section clearly requiring continuation of the community property system. Such a provision might read: "Marital property is governed by community property law." A less forthright, and therefore perhaps less desirable, alternative would be: "The legislature by general law shall provide for a system of community property."

Sec. 16. CORPORATIONS WITH BANKING AND DISCOUNTING PRIVILEGES. The Legislature shall by general laws, authorize the incorporation of corporate bodies with banking and discounting privileges, and shall provide for a system of State supervision, regulation and control of such bodies which will adequately protect and secure the depositors and creditors thereof.

No such corporate body shall be chartered until all of the authorized capital stock has been subscribed and paid for in full in cash. Such body corporate shall not be authorized to engage in business at more than one place which shall be designated in its charter.

No foreign corporation, other than the national banks of the United States, shall be permitted to exercise banking or discounting privileges in this State.

History

In the Constitutions of 1845, 1861, and 1866 this section read: "No corporate body shall hereafter be created, renewed or extended with banking or discounting privileges." (Art. VII, Sec. 30.) There was no similar provision in the Constitution of 1869, but the provision was restored in 1876. Commentators have attributed this to a depression, beginning in 1873 and lasting until 1880. "Unable to sell cotton or cattle for any price at the time of the constitutional conclave, Texans were not disposed to relax their typical distrust of financial organizations. As a result, the