MAY 1978

A SEQUEL

TOM SOHAR

Four years ago I appeared on the open session meeting of the Athenaeum Society with Curtis Brasher. The meeting was held at the Fairgrounds and a large and enthusiastic crowd attended. Since that time it seems that the open session meetings of the Athenaeum have not been the drawing cards that they were in earlier days and now we have been relegated to a much smaller, though more sumptuous, meeting place. In an effort to upgrade our attendance again, it was decided by the Athenaeum big-wigs that perhaps we should have a repeat of the program of four years ago which was responsible for the full house at the Fairgrounds. I was therefore placed upon the program once again, this time with George Boone rather than Curtis, and perhaps it is the presence of George on the program, rather than Curtis, that accounts for the fact that the attendance tonight, while good, is nevertheless somewhat below that of four years ago at the Fairgrounds.

I might add, of course, that the attendance tonight could be considered highly satisfactory in view of what happened last year. As many of you will recall, we were forced to secure a last minute replacement on the open session program, and the Society made the choice of Dr. Jack Amis. A meeting or so before, Jack had given a paper, whose exact title excapes me, but which could have been entitled "The Evils of the Theory of Evolution". The paper was approximately ninety minutes in length, about triple the maximum length for an Athenaeum paper. But it was mercifully honed, somewhat, to a barely tolerable 50 minutes by Jack's machine-gun delivery. Unfortunately, however, the rapidity of the delivery prevented many of the listeners from absorbing the content of the paper, and maybe 90 minutes of understood prose would have been no worse than 50 minutes of rapid-fire monologue -- only longer.

Reverting again to four years ago I remember the enthusiasm which greeted both Curtis' paper and mine at our open meeting. In all honesty I cannot remember what Curtis' paper was about but I do recall it was well received. My own topic was Woman's Lib, and since the Society and our guests showed such appreciation for it back then, I have decided to update my subject matter and deliver another paper on essentially the same ~~subject~~ topics. I will doubtless be castigated for this, but you must admit that if you are going to give a paper on Woman's Lib you ought to do it at a meeting where the ladies are present. Since this happens only once a year, at the open session, and since a speaker appears on the open session at most every four or five years, it is not often that an opportunity like this presents itself. I, therefore, was unable to refuse the challenge of returning before you with another chapter about the Woman's Liberation Movement.

~~The latest~~ One area in which the Woman's Lib people are active is ~~their effort~~ attempting to have ratified ~~is~~ the so-called Equal Rights Amendment to the United States Constitution, which if adopted, would be the Twenty-Eighth Amendment. The proposed amendment itself seems innocuous enough. The principal section reads, "Equality of rights under the law shall not be denied or abridged by the United States or any State on account of sex". The drive to ratify the Equal Rights Amendment at the time of its initial proposal seemed irresistible. Practically every state that considered the matter adopted it, and by August of 1975, 34 states had adopted. With only four more states needed to attain the 38 states necessary for the

trouble began. Several states refused ratification, but even worse, several states that had ratified, attempted to repeal their earlier ratification. Most recently this activity centered here in Kentucky, and we shall look at the Kentucky Equal Rights repeal in a little more detail.

The question whether a state which had once adopted a constitutional amendment could rescind it was a close one. All parties in the Kentucky Legislature suddenly became instant experts on Constitutional law, and postively affirmed, or denied, the proposition that it was legally possible to rescind the ratification of a Constitutional amendment. The point, however, is not clear. I did a little legal research on the question myself, and the main cases on the subject seem to indicate that essentially the question is for Congress to determine. The main precedents on the point arose back in the late nineteen thirties when states which had initially repudiated the proposed Child Labor amendemtn, which would have given Congress the power to regulate child labor, began to be adopted by socially conscious, Depression Era, Legislatures which had previously turned it down. In the year 1939 both Kansas and Kentucky, who had earlier rejected the amendments, adopted them. The cases went to the United States Supreme Court and by a quirk of fate the Kansas case became the leading case on the question with the Kentucky case the secondary one. The Supreme Court of Kansas had held that a Legislature could change its mind, at least where it was ratifying an amendment and not rejecting one previously ratified. The Kentucky Court, in Chandler vs.

Wise, came to the opposite conclusion and held that a state having previously acted on the amendment had exercised its only option on the question and the matter was therefore dead. The Kentucky Court of Appeals drew an analogy to contract law. It reasoned that a constitutional amendment was like an offer proposed to the states. When a state rejected the offer, it was no longer in effect. Of course, an opposite analogy to contract law could be ~~taken~~, namely that the offer of the amendment by Congress to the States was a continuing offer, and that any number of rejections would not cause the offer to be revoked, while one acceptance would create a "contract", or to leave our analogy, a binding and irrevocable adoption of the Constitutional amendment. The Supreme Court agreed with the Kansas decision. The Kentucky case was dismissed on the technicality that Governor Chandler had already sent the official letter to Congress advising that Kentucky had accepted the amendment a day or ~~two~~ before the Court of Appeals ruled otherwise. As we all know, ~~from a historical standpoint,~~ ~~that while~~ the child labor amendment never passed, the Supreme Court ~~expanded~~ the Interstate Commerce clause of the ~~United~~ States Constitution to the extent that Congress was able to regulate almost all forms of interstate commerce, including, of course, ~~the~~ child labor.

So it seems that the Constitutional debate in the Legislature could be one which might go on indefinitely. Both sides could claim, and legitimately so, that the issue was somewhat in doubt. The final answer would be up to Congress. ~~Therefore~~ the drive to repeal the ERA ~~began~~.

The ~~proponents~~ opponents of repeal realized that the principal difficulty would be in the Kentucky Senate, where Lieutenant Governor Thelma Stovall, a staunch ERA supporter, presided. Not only was she, as presiding officer, able to project her own views on the subject, but she was quite popular with many members of the Senate who hated to embarrass her by adopting a repealer resolution. It was widely, and, as it turned out, correctly, ~~believed~~ felt that if the repeal resolution went to a vote in the Senate, it would pass. So the crucial question was whether the repeal legislation could be kept in committee. At one point, a motion to withdraw the bill from committee failed by one vote, that of our own Senator, Pat McCuiston, who was accused of casting his vote to keep the bill in committee, at the request of Governor Carroll who was presumptively acting on a telephoned plea from the First Lady, Mrs. Rosalyn Carter, a staunch ERA advocate. Senator McCuiston, however, maintained that he had voted as he did for procedural reasons and he subsequently changed his vote, getting the bill on the floor. Once on the floor, the matter passed easily and coupled with easy passage in the House of Representatives, it seemed that the ERA repealer had been adopted by Kentucky. But more was yet to come.

As many of you know, under Kentucky's antiquated 1890 Constitution, the Governor of the State ceases to serve as such not only upon death or disability but upon his simply leaving the state. (The 1890 authors of our Constitution could not conceive of inventions like the telephone, not to mentioned ~~the lear~~ jet which can whip a Governor, or anybody else from the ~~West Indies~~ Bahamas to Frankfort as quickly as one used to go from Harlan to Hazard!) And when Governor Carroll took

a short vacation after the adjourment of the Legislature ~~he~~ he left in charge Lieutenant Governor Thelma Stovall, ~~the heretofore mentioned advocate of ERA and a bitter foe of its repeal~~. She therefore ~~executed~~ exercised what she considered to be her executive perogative and vetoed the bill. This was greeted with horrified ~~shouts~~ by repealer advocates that the repealer could not be vetoed since it was not really a bill, but a resolution. However, there rushed to the aid of Lt. Gov. Thelma Stovall, wily Frankfort attorney Joseph Leary, who has been the legal adviser to more prominent political people than most of us have ever known. He announced that his research disclosed that Mrs. Stovall's action was perfectly proper. Although Mr. Leary has sometimes been ~~said to have~~ charged with letting politics ~~interfere with~~ color his legal conclusions, it seems that in this case he might well be correct. Section 88 of the Kentucky Constitution is the principal section on vetoes but Section 89 provides that not only bills are subject to executive veto, but also joint resolutions. The veto therefore appeared proper under Kentucky law.

Rushing back into the fray, however, came the ~~attorneys~~ legal beagles for the other side. Louisville's Senator Gus Shehan, a repeal advocate, claimed that although in form a resolution, the action taken was on a Constitutional Amendment, and ~~since~~ the United States Constitution controlled. Since ~~the United States~~ Constitution provides that amendments could be adopted by the "Legislatures" of the States, no veto was possible; ~~that~~ a vote would be executive, not legislative action. The Legislative Research Commission was urged to get into the act and to file a test suit, but the Research Commission wisely refused, and the

practical effect of the action of the Legislature, coupled with Lt. Gov. Stovall's veto, remains in limbo.

Mrs. Stovall's act, however, regardless of its legal effect, did have one practical feature. Women's organizations had been threatening to boycott convention sites those states which had either refused to adopt the ERA or which had repealed an earlier ratification. Back during the legislature, Louisville Hotel operators were most conscious of this and had worked diligently to keep the ERA from being repealed. Although the hotel operators were unsuccessful in preventing ~~the repealer~~ repeal, the action of Mrs. Stovall in vetoing the measure has left the question in such legal doubt that the women's organizations have concluded that they do not regard Kentucky as an offending state, and therefore are permitting conventions to be held in Kentucky. I might observe here paranthetically that this is, to some extent, ~~an~~ a mixed blessing. Last Saturday night my family and I went to Louisville to attend the Derby Classic, a high school basketball All-Star game, ~~between the Kentucky-Indiana All Stars~~ and those from ~~the rest of the country~~. Although I called a good six weeks earlier trying to get a reservation at the Executive Inn, the motel which adjoins the Fairgrounds ~~area~~ where the game was held, I was unable to get a room --- the facility was full. It was not until we arrived in Louisville Saturday, and went into the Executive Inn restaurant for supper that we noticed that the great majority of the persons in the Executive Inn were not college basketball scouts, but were ladies all wearing identification badges showing that they were members of an Equal Rights Amendment group!

I will start off by stating that I regarded the movement in the Kentucky Legislature to do this as almost a complete waste of time. As mentioned, 35 states finally adopted the amendment, but four more were needed and not one single state was added to the ERA list since the year 1975. It therefore seemed that there was no real chance that the amendment would ever obtain the three-fourths majority needed. It was also questionable whether a state could rescind a previously adopted amendment, It was also questionable whether a state could rescind a previously adopted amendment. If recissing were constitutionally impossible there was no need to bother with rescinding. On the other hand, if recision were legally permissible, the recision of prior ratifications by some three other states, Tennessee, Nebraska and Iowa, meant that the amendment was now seven states short of ratification, an impossible hurdle for the ERA people to surmont.

As the drive for the ERA began to bog down other problems began to arise. The matter became increasingly one of serious debate, and only a couple of weeks ago, "Dear Abby" in her column in the Louisville Courier-Journal was written in the following fashion: "Dear Abby: I read that you were all for the Equal Rights Amendment. Can you tell me why women need it. Use plain language please. I only went through the ninth grade. Signed Confused in Elgin, Illinois. To which Dear Abby replied: "Dear Confused: No one explained it better than Shana Alexander when she debated James J. Kilpatrick two months ago on CBS' Sixty Minutes TV program." She began

"Under the law today women are not being treated as equals with men." Ms. Alexander then proceeded to give the following illustrations, each of which we will examine briefly in passing, somewhat in the fashion of Shana's "Point-Counter Point" adversary, James J. Kilpatrick.

One, "Social Security laws. Divorced women don't get a fair share of their husband's earnings even if they were married thirty years." Comment: A hard charge to prove; furthermore the law has been amended so that divorced women do get considerable credit for their husband's social security. In any event, how is this an argument against equal rights? Perhaps husbands do not get a "fair share" of their wives' earnings.

Second, Shana: "Divorce Laws. A man can divorce a wife on the grounds of drunkenness, and adultery, but in some states a woman cannot divorce her husband on these grounds". Comment: Come on into the Twentieth Century, Shana. Perhaps there are a few states with laws like this, but the trend is in the other direction. Kentucky, for example, recognizes "No Fault" Divorce, where no grounds at all are needed, other than irretrievably broken marriage, and both spouses are treated equally on practically every single point in divorce law.

Third, Shana: "Property tax law. In all fifty states the husband owns the farm. When he dies his widow must pay inheritance tax even if she has to sell the farm, but when the wife dies he pays no inheritance tax." Comment: Shana, if this is what you think you are simply way off base. Mr. Boone and I and many other lawyers in this room will be happy to advise you and your husband, if any,

how you can own real estate and maximize the tax advantage of leaving it to your survivors. What you have said is perhaps true but it assumes that the property is owned all by one person, and if that one person dies there is obviously some inheritance tax problem. On the other hand, since in your illustration, the woman did not own the farm, at her death how could there possibly be an inheritance tax? The illustration is ridiculous and the statement made highly confusing. A large body of inheritance tax law protects the right of a wife to inherit. The Federal Government, as most of us know, allows a full one-half of a person's property to go to his spouse without estate taxes being charged, the so-called marital deduction, and this applies equally to both husbands and wives.

Shana's charge. "Physical abuse. In most states a wife can't sue a husband for beating her up". Once again, Shana, come into the Twentieth Century. This was the law in many states at one time but the converse was also true. Neither spouse could sue the other for personal wrongs of this sort but the reason was not that the wife was regarded as inferior. The law considered husband and wife as one, a unity. Such a position has ecclesiastical origins as well as legal ones. Since it was physically impossible for a person to sue himself, consequently because of the unity known as the marriage, neither spouse could sue the other.

Negligent injury. "If the wife was injured the husband could sue for the loss of her services, which includes sex because under the law he has a legal right to companionship, sex and domestic services. It's called consortium. A woman has no such legal right". Generally true, Shana, but some states including Kentucky, have changed this, KRS _____ provides that a wife as well as a husband can sue for loss of consortium.

Shana. "Alimony: Most states don't allow it, which isn't so bad in wealthy families but with poor couples whose only assets are the man's earning capacity the woman comes out of a divorce dead broke."

Not true, Shana. Most states still do allow alimony, although your charge that alimony is not often granted in marriages between poor couples is true. It is true, however, for both sides, men and women, and while the man's earning capacity may be the families' principal asset, divorces in this income bracket usually wind up with both parties, not just the wife, coming out of the divorce "dead broke". In any event, most states, including Kentucky, have now either adopted, or are in the process of adopting, laws which give either spouse the right to obtain maintenance or alimony from the other.

Shana's charge: "The Supreme Court said that pregnancy discrimination is not necessarily sex discrimination. It isn't? When is the last time you saw a pregnant man?"

Shana, you are off base again. What the Supreme Court held was that pregnancy benefits did not have to be placed

in medical insurance policies furnished employers to their employees. The Court pointed out that the policy might have also have legitimately excluded from coverage things to which only males are subject, for example, prostate operations. It was simply a question of what coverage was provided under the insurance, not sex discrimination. Furthermore it might be mentioned that if pregnancy benefits were included it would constitute unfair discrimination against men, since they would be required to pay for insurance covering a peril, pregnancy, which they could never, of course, collect on. Incidentally, a few days ago, the Supreme Court ~~almost did just that.~~ It held that women could not be required to pay in more than men ~~for pension benefits~~, in spite of one hundred years experience showing women live longer, and therefore draw more pension money, than men.

In taking Shana Alexander's points one by one and commenting on them I certainly do not want to appear to be beating a straw man. I thought, however, that the matter was important since here we have two of the most prominent Woman's Libbers on the American public scene, Shana Alexander and Abigail Van Buren, and they came up with nothing more convincing than that as a reason for adopting the ERA.

I think they have missed the boat. I think the point should simply be that women and men are and should be equals before the law. Our Constitution has been amended to show that under the law that blacks as well as whites are equal, former slaves as well as former masters were equal, and I think it time now to do the same for both men and women. To tediously take little examples and try to show what has occurred will simply not wash.