

# MAINE STATE LEGISLATURE

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# STATE OF MAINE

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REPORT

OF THE

# ATTORNEY-GENERAL

FOR THE TWO YEARS ENDING

NOVEMBER 30, 1918

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## PUBLIC OFFICE—ELIGIBILITY OF WOMEN—REGISTER OF PROBATE.

25th January, 1918.

*Hon. Carl E. Milliken, Governor of Maine, Augusta, Maine.*

DEAR SIR: In reply to your question as to the eligibility of women for appointment as Registers of Probate, I will call your attention to the Constitutional provision relating to that office and the Opinion of the Justices upon the subject.

Constitution of Maine, Article VI, Sec. 7.

“Judges and registers of probate shall be elected by the people of their respective counties, by a plurality of the votes given in at the annual election, on the second Monday of September, and shall hold their offices for four years, commencing on the first day of January next after their election. (c) Vacancies occurring in said offices by death, resignation or otherwise, shall be filled by election in manner aforesaid, at the September election next after their occurrence; and in the meantime, the Governor, with the advice and consent of the Council, may fill said vacancies by appointment, and the persons so appointed shall hold their offices until the first day of January thereafter.”

In the Opinion of the Justices of the Supreme Judicial Court, 62 Maine 596, appears the following:

“By the constitution of Massachusetts, of which we formerly constituted a portion, the entire political power of that commonwealth was vested, under certain conditions, in its male inhabitants of a prescribed age. They alone, and to the exclusion of the other sex, as determined by its highest court of law, could exercise the judicial function as existing and established by that instrument.

By the act relating to the separation of the district of Maine from Massachusetts, the authority to determine upon the question of separation, and to elect delegates to meet and form a constitution, was conferred upon the “inhabitants of the several towns, districts and plantations in the district of Maine qualified to vote for governor or senators,” thus excluding the female sex from all participation in the formation of the constitution, and in the organization of the government under it. Whether the constitution should or should not be adopted was, specially, by the organic law of its existence submitted to the vote of the male inhabitants of the State.

It thus appears that the constitution of the State was the work of its male citizens. It was ordained, established and ratified by them, and by them alone. By it the powers of government were divided into three distinct departments Legislative, Executive and Judicial. By Article VI, Section 4, justices of the peace are recognized as judicial officers.

By the constitution, the whole political power of the State is vested in its male citizens. Whenever, in any of its provisions, reference is made to

sex, it is to duties to be done and performed by male members of the community. Nothing in the language of the constitution or in the debates of the convention, by which it was formed, indicates any purpose whatever of any surrender of political power by those who had previously enjoyed it or a transfer of the same to those who had never possessed it. Had any such design then existed, we cannot doubt that it would have been made manifest in fitting and appropriate language. But such intention is no where disclosed. Having regard, then, to the rules of the common law as to the rights of women married and unmarried, as then existing; to the history of the past; to the universal and unbroken practical construction given to the constitution of this State, and to that of the commonwealth of Massachusetts upon which that of this State was modelled; we are led to the inevitable conclusion that it was never in the contemplation or intention of those forming our constitution, that the offices thereby created should be filled by those who could take no part in its original formation, and to whom no political power was intrusted for the organization of the government then about to be established under its provisions, or for its continued existence and preservation when established.

The same process of reasoning, which would sanction the conferring judicial power on women under the constitution, would authorize the giving them executive power by making them sheriffs and major generals.

But while the offices created by the constitution are to be filled exclusively by the male members of the State, we have no doubt that the legislature may create new ministerial offices, not enumerated therein and, if they deem expedient, may authorize the performance of the duties of the offices so created by persons of either sex.'

This opinion has never been overruled or even modified by our Supreme Court or the Justices thereof and therefore must be accepted as the established law of our State upon the question. The office of Register of Probate is created by the Constitution and therefore must be filled by the election or appointment of a male member of the State.

In case of temporary vacancy, however, an exception to this rule has been made by the legislature as appears in Section 26, Chapter 67, R. S.

“In case of the death or absence of the register, the judge shall appoint a suitable person, of either sex, to act as register, until the register resumes his duties, or another is qualified in his stead; he shall be sworn, and if the judge requires it, give bond as in the case of the register.”

This provision being statutory and not constitutional and at variance with the Opinion of the Justices just considered, it must in my opinion be construed strictly and looked upon as limited in its scope and application to the exact facts and situations specifically set forth in the section itself, namely, in case of death or absence of the register and until the register resumes his duties or another is qualified in his stead, a person of *either*

*sex* may be appointed by the Judge of Probate. This is a temporary expedient provided for undoubtedly because of the well-known fact that most of the clerks and assistants in the Probate offices are of the female sex and would be fitted temporarily to preserve the business of the office until a regular register was qualified.

Furthermore, the power of appointment of a woman to fill such vacancy temporarily, rests solely in the Judge of Probate and is not within the powers of the Governor and Council.

It is my opinion, therefore, that you have no power whatsoever to appoint any woman to act as Register of Probate temporarily or permanently.

Yours very truly,

GUY H. STURGIS,

*Attorney General.*

TUBERCULOSIS—POWER TO DEPORT OR ISOLATE  
CITIZEN OF ANOTHER STATE—RIGHT OF MUNICIPALITY TO REIMBURSEMENT FROM STATE.

Portland, Maine, 11th June, 1917.

*A. G. Young, M. D., Sec. of State Board of Health, Augusta, Maine.*

DEAR SIR: In reply to your inquiries of June 5th, relative to citizen of New York State coming into Maine suffering from advanced tuberculosis, and as to authority to deport or detain, isolate, etc., and the liability of the State, therefor, I will call your attention to the various Statutes applicable.

The only authority for deportation by either State or local Board of Health seems to be in case of a person coming from a place where an infectious or malignant distemper is known to exist, in which case, by authority of Sections 72 and 73 of Chapter 19, R. S., the local Board of Health may order such person to leave the State. It does not appear to me that these Sections could be construed to cover such a case as the one before us. The reference is, undoubtedly, to a general epidemic such as small pox, scarlet fever and the like. I find no other Statutes authorizing deportation by health officers, and considering these Sections 72 and 73 of Chapter 19 not broad enough to cover this