ACTS AND RESOLVES

OF THE

FIFTY-FOURTH LEGISLATURE

OF THE

STATE OF MAINE.

1875.

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OPINIONS OF THE JUSTICES OF THE SUPREME JUDICIAL COURT.

Upon Questions proposed by the Executive Council.

"Ordered, That the opinion of the Supreme Judicial Court be requested as to the following questions:

First. Under the constitution and laws of this State, can a woman, if duly appointed and qualified as a justice of the peace, legally perform all acts pertaining to such office?

Second. Would it be competent for the legislature to authorize the appointment of a married or unmarried woman to the office of a justice of the peace, or to administer oaths, take acknowledgement of deeds, or solemnize marriages, so that the same shall be legal and valid?"

The Court responded to the order in the following opinions:

Bangor, July 16, 1874.

To the questions proposed we have the honor to answer as follows:

Whether it is expedient that women should hold the office of justice of the peace is not an inquiry proposed for our consideration. It is whether, under the existing constitution, they can be appointed to such office, and can legally discharge its duties.

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 art. 6, § 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.

To the first question proposed, we answer in the negative.

To the second, we answer that it is competent for the legislature to authorize the appointment of a married or unmarried woman to

administer oaths, take acknowledgment of deeds, or solemnize marriages, so that the same shall be legal and valid.

JOHN APPLETON,
JONAS CUTTING,
CHARLES DANFORTH,
WM. WIRT VIRGIN,
JOHN A. PETERS.

DISSENTING OPINION *per* WALTON AND BARROWS, JJ.

We, the undersigned, Justices of the Supreme Judicial Court, concur in so much of the foregoing opinion as holds that it is competent for the legislature to authorize the appointment of women to administer oaths, take the acknowledgment of deeds, and solemnize marriages. But we do not concur in the conclusion that it is not equally competent for the legislature to authorize the appointment of women to act as justices of the peace.

The legislature is authorized to enact any law which it deems reasonable and proper, provided it is not repugnant to the constitution of this State, nor to that of the United States. A law authorizing the appointment of women to act as justices of the peace would not, in our judgment, be repugnant to either. We fail to find a single word, or sentence, or clause of a sentence, which, fairly construed, either expressly or impliedly, forbids the passage of such a law. So far as the office of justice of the peace is concerned, there is not so much as a masculine pronoun to hang an objection upon.

It is true that the right to vote is limited to males. But the right to vote and the right to hold office are distinct matters. Either may exist without the other.

And it may be true that the framers of the constitution did not contemplate—did not affirmatively intend—that women should hold office. But it by no means follows that they intended the contrary. The truth probably is that they had no intention one way or the other; that the matter was not even thought of. And it will be noticed that the unconstitutionality of such a law is made to rest, not on any expressed intention of the framers of the constitution that women should not hold office, but upon a presumed absence of intention that they should.

This seems to us a dangerous doctrine. It is nothing less than holding that the legislature cannot enact a law unless it appears affirmatively that the framers of the constitution intended that such a law should be enacted. We cannot concur in such a doctrine. It would put a stop to all progress. We understand the correct rule to be the reverse of that; namely, that the legis-

lature may enact any law they think proper, unless it appears affirmatively that the framers of the constitution intended that such a law should not be passed. And the best and only safe rule for ascertaining the intention of the makers of any written law is to abide by the language which they have used. And this is especially true of written constitutions; for in preparing such instruments it is but reasonable to presume that every word has been carefully weighed; and that none are inserted, and none omitted, without a design for so doing. Taking this rule for our guide, we can find nothing in the constitution of the United States, or of this State, forbidding the passage of a law authorizing the appointment of women to act as justices of the peace. We think such a law would be valid.

C. W. WALTON,
WM. G. BARROWS.

DISSENTING OPINION *per* DICKERSON, J.

I am unable to find anything to prevent women from holding the office of justice of the peace, in the nature of that office, the statutes or the constitution.

It is a public office with judicial functions which are clearly within the sphere of woman's capacity.

The proficiency which women, in recent times, have acquired in various departments of industry, the arts, education, literature, works of benevolence, and in some of the learned professions, vindicate and establish their capacity and fitness to discharge the simple and well defined duties of justice of the peace.

The possibilities of woman's nature which have been disclosed in these new spheres of usefulness warrant and demand the extension and multiplication of her opportunities. The ability of women to elicit, quicken and purify the activities of humanity, is one of the most important factors in modern civilization. Wise statesmanship and enlightened jurisprudence alike seek to enlarge the scope of such instrumentalities, without regard to race, color, sex or previous condition of servitude, either of race or sex.

By ancient usage women were regarded as inferior beings, and treated as the servants or slaves of men; married women were subject to personal chastisement from their husbands without any adequate right of redress; the church denied all women the right of speech in the sanctuary; and even the common law gave the husband all the wife's personal property upon marriage, and, also, that which should subsequently fall to her during coverture; her legal identity became merged in her husband, so that in fact her person, property, earnings and children belonged to him; the husband and wife were one, and the husband was the one. Even

at the present time there is but one State in the Union in which the wife living with her husband has equal right to their children with him. But, thanks to an advancing civilization, by usage or law, some of these relics of a less enlightened age, have been swept away, and women in a far greater and more just degree have come to be esteemed as the peers of men in both capacity and right. To deny to women the right to hold office upon the ground of usage would be to set back the clock of time and substitute reaction for progress.

This, however, is not merely a question of usage but of constitutional right. The exclusion of one-half of the people of the State from participation in the administration of the laws, by the dominant half, however long continued, neither implies nor confers the right to enforce such exclusion. A usage originating in contravention of the constitution, does not become obligatory by lapse of time. The constitution and not usage is the touchstone of civil and political rights.

The statutes relating to justices of the peace, for the most part refer to their powers, duties and jurisdiction. Whoever legally holds that office, be it man or woman, is entitled to exercise the jurisdiction and powers, and to discharge the duties appertaining thereto.

The disability of women to hold office, if any there is, arises from some express provision of the constitution, or some necessary implication therefrom. The constitution does not, in terms, create such disability, nor does it by implication. No adverse implication, in this respect, arises from the use, in the constitution, of words importing the male sex and not the female sex, that does not also lie against the claim of women to the natural rights predicated in terms only of "men" by sections one, three and six of the declaration of rights. If women are ineligible to office for this reason, they are, also, denied the rights of enjoying and defending life, liberty and property, of religious freedom, and the right to be heard by themselves or counsel in criminal prosecutions.

Such a construction is not only unreasonable, but it is contrary to the meaning of the word "men," as used in the constitution. The primary signification of the word man is a human being. It is used in a generic sense to denote the human race, including both sexes. It is only by giving the word "men" this signification, that women have any rights under the constitution that men are bound to respect. The word "men" found in the constitution, is synonymous with "people" and "persons," and includes all persons, as well women as men.

The implications of the constitution are in harmony with this construction. The objects and purposes of its establishment, as

set forth in the preamble, are as applicable and necessary for women as men, and the rights enumerated in the declaration of rights are affirmed of both women and men.

The words "citizens" and "people," found in the constitution, are synonymous. Women are citizens under the constitution no less than men. The language of the clause regulating suffrage, "every male citizen of the United States," implies that there are other citizens than male citizens. The word male is used in contradistinction from the word female to show that male citizens only, and not female citizens are qualified electors of the officers named.

Previous to the decision of the Supreme Court of the United States, in the Dred Scott case, the constitution of the United States did not define the meaning of the word citizen.

A majority of the court in that case say that "the words 'people' and 'citizens' describe the political body, who, according to our republican institutions, form the sovereignty, and who hold the power, and control the government, through their representatives." This definition makes the qualified voters of the country alone citizens of the United States, and the sole constituent members of the national sovereignty, and also places not only persons of African descent, but white women too, without the pale of citizenship.

But the fourteenth amendment of the constitution of the United States, article one, which was evoked by that decision, abrogates and annuls that definition, by declaring that "all persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States, and of the State wherein they reside."

Women are thus made citizens by the supreme law of the land, and as such, are entitled to all the rights, privileges and immunities predicated of citizens, and its synonym "people," in the constitution which are not therein specifically denied to them; and we have seen that eligibility to office is not of that number. It should not be forgotten that we live under the fourteenth amendment, and not under the Dred Scott decision, if we would avoid falling into the error of following the dictum in that case, instead of obeying the supreme law of the land.

If, by the common law, women are ineligible to the office of justice of the peace, by the common law also, married women have no right to make contracts, or control their personal property during coverture, and parties are not competent witnesses, and yet I am not aware that any court has held, or any jurist maintained that our statutes, removing such disabilities are unconstitutional because they conflict with the common law. Moreover, if the rules of the common law prevent women from holding

the office of justice of the peace, they also preclude the legislature from the right to alter or amend the jurisdiction and powers of such officers which are also derived from the common law. Thus the fallacy of the argument against the right of women to hold office because of the rules of the common law, might be shown in numberless instances.

It by no means follows, that women are ineligible to the office in question, because by the act of separation they were not permitted to take part in the formation of the constitution, and, by the organic law itself, were excluded from voting upon its adoption. I have always understood, and still understand, that the convention that formed the constitution of this State, was an independent body, and perfectly free to propose a framework of government upon a broader, and more liberal basis than that of the parent commonwealth, though it should provide for woman suffrage, and allow the eligibility of women to office. They did not do the former, and whether or not they did the latter, depends upon the constitution they framed, and not upon the government which that superseded, or the act or manner of separation.

The constitution restricts the right of suffrage to male citizens, but does not confine eligibility to office to males. In the one case words importing a sexual qualification are inserted in the constitution; in the other, they are omitted. This distinction is of great significance, as it shows that the framers of the constitution placed eligibility to office upon a broader basis than suffrage, else they would have expressly restricted it within the same limits, when their attention was called to that subject.

To hold that these rights are co-extensive is, in my judgment, to disregard a plain distinction made in the constitution, and to interpolate into it a clause that would debar one-half of the citizens of the State from their right to participate in the administration of the laws.

Impressed with the conclusiveness of this reasoning, a majority of my brethren seek to impair its force by dividing offices into two classes, judicial offices and other offices enumerated in the constitution, and offices not judicial and not therein enumerated, excluding women from the former, and admitting them to the latter class of offices. While it is practicable to make this division, no sufficient reason is perceived, nor, indeed, is any given, why the distinction alleged should attach to such classifications. Certain it is, no such distinction is found in the constitution; it is in fact arbitrary, and has rather the flavor of dogmatism than argument.

What is there, it may be not inaptly asked, in judicial offices, and other offices named in the constitution, that invests them with

such importance and sanctity, inherently, or because they happen to be thus mentioned, that none but male citizens can hold them? What good reason can be assigned why women are eligible to the office of State Superintendent of Common Schools, Railroad Commissioner, Register of Deeds, and like offices, or members of boards of health, or trustees of State institutions, or of the bar, and not eligible to the office of justice of the peace? If satisfactory answers can be given to these questions, it is confidently maintained that they must be found outside of the constitution; they cannot proceed from within it.

It is not quite accurate to affirm that "the universal and unbroken practical construction given to the constitution of this State," is adverse to the eligibility of women to the office in question, as it is understood that women have been commissioned justices of the peace in this State in several instances, and are to-day acting in that capacity. It does not appear that women, in any considerable numbers, have applied for that office, or that the proportion of unsuccessful female applicants exceeds that of such males. The omission to claim a right, especially by the subordinated class of citizens, does not prove its non-existence, nor would acquiescence even, by such a class, in a denial of right, have that effect, unless to that is also superadded, the force of judicial sanction, which is wanting in this case.

The eligibility of women to office does not depend upon the common law or the usages, laws and constructions of the commonwealth of Massachusetts, prior to the adoption of the constitution, unless they are specifically made a part of it, and it is not pretended that they are for this purpose. The meaning and intent of the framers of the constitution are not to be learned from such recondite sources, but are to be ascertained from their own language, interpreted by the tribunal they established for this purpose, in accordance with the objects and purposes of the great charter of liberty, equality, justice and progress, which those masters of political science framed.

If the meaning of the constitution is to be ascertained from extrinsic sources, how are we to determine what considerations ought, and what ought not, to control its construction? Why may not laws authorizing the punishment of spiritual manifestations, so called, as witchcraft, or the erection of the whipping post in our public squares, as a legitimate mode of punishment, receive the sanction of the constitution? The history of the parent commonwealth furnishes precedents for such enactments, even under the domain of the common law. How long would our statutes, removing the disabilities of married women and of parties to be witnesses, and our prohibitory liquor law, stand the test

now relied upon to debar women from the right to hold the office of justice of the peace? What advantages, in fine, has our written constitution thus construed over the unwritten constitution of England? It is obvious that they are more mythical than real, ever liable to vanish from their grasp when the people approach them for protection.

If such a principle of construction upon so vital a question is allowed to obtain, there is great reason to fear that written constitutions will soon come to be of little value, and the experiment of setting limitations to power speedily prove abortive. Indeed, the history of jurisprudence, unfortunately, is not without such example. The precedent of outlawing freedmen, because, by such a rule of construction, their race had no rights that the dominant race was bound to respect, is no less repugnant to the judicial than the philanthropic mind, and deserves to be shunned as a perversion of the law, rather than followed as authority. The constitution is itself the rule for testing the validity of customs, usages and laws, and not they the rule for interpreting the constitution.

This principle of interpretation is in strict conformity with the rule laid down by Chief Justice Marshall in *Gibbon v. Ogden*, 9 Wheat., 189. "We know of no rules," says that eminent jurist in that case, "for interpreting the extent of the powers conferred by the constitution, other than is given by the language of the instrument that confers them, taken in connection with the purposes for which they were conferred."

It will not answer to strain, subordinate and dwarf the constitution of this State. That instrument does not bind the people to the perpetual observance of pre-existing customs, usages, constructions and laws which form no part of it, but it rather emancipates them from the exclusiveness, monopolies, inequalities and injustices, if any there be, that arise therefrom. Aside from the single discrimination in respect to suffrage, in certain specified cases, the constitution does not determine the rights of the people, according to caste, color or sex, but leaves them free, within specified limitations, to secure the objects stated in its preamble in the best possible manner. The plain people need no judicial hand-book to enable them to learn their rights under the organic law of their government; it is so plain, in this respect, that he that runs may read and understand his rights.

There is, in fine, one brief and conclusive answer to the questions propounded to the members of the court; it is, that the burden is upon those who deny the right of women to hold the office in question, to show affirmatively that the constitution prohibits them from so doing. This they certainly have not done.

There being no constitutional inhibition, the right to hold that office attaches alike to both female and male citizens.

I therefore answer the first question in the affimative, and the second also, though I am of the opinion that no further legislation is necessary to authorize the appointment in question.

I have the honor to be,

Yours faithfully,

J. G. DICKERSON.

BELFAST, 1874.