

are cited as authority, and therefore the present status of the law seems to be that suits cannot be maintained to recover on contracts growing out of violations of the Sunday labor law.

R. S. Mo. 1919, Sec. 3599 prohibits the exposing to sale of goods on Sunday¹⁷⁰ and the following section (Sec. 3600) excepts sales of drugs or medicines, provisions or other articles of immediate necessity. Under these statutes the sale of tobacco on Sunday is unlawful,¹⁷¹ as is exposing for sale, and selling groceries, meats and feed, unless the necessity for them is urgent and immediate. The "necessity" spoken of in Sec. 3600 must be of such character that it could not reasonably have been foreseen or guarded against.¹⁷² Selling lemons was approved as being both a medicine and a food and within Sec. 3600.¹⁷³ In view of the statutes prohibiting the exposing to sale of goods, and the fact that the "necessity" must be urgent and immediate, there is, no doubt, much goods sold in Missouri on Sunday in violation of the law.

The law prohibiting sales of goods on Sunday makes no exception for members of a religious society by whom some other day of the week is observed, whereas the Sunday labor law makes such an exception (in Sec. 3597).¹⁷⁴

It seems that the general laws in Missouri making it unlawful to labor or sell goods on Sunday are as strict as those of any state. At the present time, the laws of Massachusetts pertaining to labor and sales are more liberal than those of Missouri, although the former state is generally regarded as a "Blue Law" state. In Massachusetts, the sale of ice cream, tobacco and some other goods is expressly made lawful, and even bootblacks may labor until eleven o'clock on Sunday,¹⁷⁵ whereas in Missouri to be lawful the labor must be "necessity or charity," or performed in the operation of ferry boats, or performed by one observing another day,¹⁷⁶ and the sales must be of "drugs or medicines, provisions or other articles of immediate necessity."¹⁷⁷

C. SIDNEY NEUHOFF.

RIGHT OF WOMEN TO SERVE ON JURIES IN MISSOURI*

You have asked us for our opinion on the question whether, in order to qualify women for jury service in Missouri, it will be necessary first to obtain an amendment to the State Constitution, or whether the result can be accomplished without an amendment to the Constitution and only by Legislation.

The question whether a Constitutional amendment is necessary arises

¹⁷⁰ *Supra*, footnote 133.

¹⁷¹ State v. Ohmer, 34 Mo. App. 115.

¹⁷² State v. Hogan, 212 Mo. App. 473, 252 S. W. 90.

¹⁷³ State v. Campbell, 206 Mo. 579, 105 S. W. 637.

¹⁷⁴ State v. Hogan, *supra*, footnote 172.

¹⁷⁵ See Massachusetts General Laws—1921, Ch. 136, Sec. 6.

¹⁷⁶ *Supra*, footnote 132.

¹⁷⁷ *Supra*, footnote 133.

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from the fact that our Constitution (Section 28 Article II) says that in courts not of record (inferior courts such as Justice of the Peace and Police courts) a jury "may consist of less than twelve men" and that the "grand jury shall consist of twelve men." Does the use of the word "men" in this section of the Constitution mean that only males may be jurors? Or is the word used in a generic sense, meaning human beings collectively?

Section 28 of Article II of the Constitution of Missouri reads as follows:

Sec. 28. Trial by Jury Inviolate—Majority Verdicts—Grand Jury, Twelve Men.—The right of trial by jury, as heretofore enjoyed, shall remain inviolate; but a jury for the trial of criminal or civil cases, in courts not of record, may consist of less than twelve men, as may be prescribed by law; and that a two-thirds majority of such number prescribed by law concurring may render a verdict in all civil cases. And that in the trial by jury of all civil cases in courts of record, three-fourths of the members of the jury concurring may render a verdict. Hereafter, a grand jury shall consist of twelve men, any nine of whom concurring may find an indictment or a true bill: Provided, however, that no grand jury shall be convened except upon an order of a judge of a court having the power to try and determine felonies; but when so assembled such grand jury shall have power to investigate and return indictments for all character and grades of crime.

In our opinion this section does not attempt to fix the qualifications of jurors. The clauses in which the word "men" is used deal only with the number of jurors that must compose juries. Secondly, it is our opinion that the word "men," as used in this section, is used in its generic sense and therefore includes women. Thirdly, it is our opinion that it is for the Legislature alone to fix the qualifications of jurors.

That the word "men," as used in the above section, may include women is confirmed by the authorities:¹

Our Legislature has declared that with respect to statutes pertaining to crimes and punishments "words importing the masculine gender only may be extended to females also" (R. S. Mo. 1919 Sec. 3720). And in Chapter 57 R. S. Mo. 1919 entitled Laws and particularly in Section 7055 Article II thereof entitled Construction of Statutes it is provided:

Sec. 7055. Words in the Masculine Gender Include What—When any subject-matter, party or person is described or referred to by words importing the singular number or the masculine gender, several matters and persons, and females as well as males, and bodies corporate as well as individuals, shall be deemed to be included.

¹ 38 C. J. 521; 2 Bouv. Law Dictionary, p. 2073; Black's Law Dictionary; State v. Seiler, 106 Wis. 346, 82 N. W. 167; Turner's Adm'rs v. Whitten, 40 Ala. 530; Anderson v. State, 117 Ga. 255; Hightower v. State, 14 Ga. App. 246; Eichorn v. Missouri, 130 Mo. 575; Rockliffe v. Seal, 36 Mo. 317; State ex rel. v. Hostetter, 137 Mo. 636.

Our own Supreme Court has held that the rules enacted by the Legislature for the construction of statutes apply as well to the construction of the Constitution.²

The *Hostetter Case* is especially interesting because it holds that women are not disqualified from taking office by the use of the pronoun "his" in Article 8, section 12. Judge Barclay declared the law to be that "where persons are referred to by words importing the masculine gender, females as well as males shall be deemed included thereby, unless a contrary intent appears by the context or otherwise."³

Another well established principle which must be borne in mind is stated in *Collard v. Springfield*, note 2:

The Constitution of Missouri was designed by its framers to be a single, symmetrical and harmonious chart of government, free from repugnancy and conflict in any of its provisions.

Having this principle in mind we cannot read Article II of the Constitution, which is entitled Bill of Rights, without being driven to the conclusion that the masculine noun and pronoun used in the Constitution meant by the framers to apply likewise to women. Section 5 of the Bill of Rights declares "that all men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience . . ." Section 13 defines treason and uses the masculine pronoun. Section 14 guarantees freedom of speech and that again uses the masculine pronoun only. Section 17 preserves to every citizen the right to bear arms in defense of "his home, person and property." Section 22 guarantees certain rights to the accused in criminal prosecutions and there again the masculine pronoun only is used. Section 23 protects persons against being compelled to testify against themselves in criminal cases and also protects them against being placed twice in jeopardy and uses the masculine pronoun only. Of course no one will contend that the rights preserved to us in some of the sections of

² State ex rel. v. Immel, 242 Mo. 393; Collard v. Springfield, 264 Mo. 296; State ex rel. v. Hostetter 137 Mo. 636.

³ 137 Mo. l. c. 647.

The Hostetter case is quoted and followed in the recent case of *Dickson v. Strickland*, 265 S. W. 1012, involving the right of Mrs. Miriam A. Ferguson to hold the office of governor of Texas. The constitution of that state repeatedly refers to the governor as "he" or "him," and to the duties as the duties of "his" office. Commenting on these words the court said:

"Since we have no English word, which in the singular number, includes both 'he' and 'she,' the most appropriate word under common usage, to include both sexes while using the singular number, is the word 'he.' The context of the Constitution, as a whole, plainly reveals the sense in which 'he' is used. Cooley says: 'As a general thing, it is to be supposed that the same word is used in the same sense wherever it occurs in a Constitution.' That 'he' must include 'she' is obvious when we read such sections as section 10 of article 1, where, in stating the rights of the accused in criminal prosecutions the following language is used:

'He shall have the right to demand the nature and cause of the accusation against him . . . He shall not be compelled to give evidence against himself etc.'

In line with reasoning the court reached the unanimous conclusion that a woman could hold the office of governor.—ED.

Article II of the Constitution are limited to males only. And yet to hold that the word "men" and the masculine pronoun used in the sections we have just referred to applies to women as well as to men and at the same time to hold that the word "men" as used in Section 28 of the same article applies only to males is to violate the principle that "The Constitution of Missouri was designed by its framers to be a single, symmetrical and harmonious chart of government, free from repugnancy and conflict in any of its provisions."

In the case of *State v. Chase*,⁴ (1923), followed in the case of *State v. Putney*,⁵ (1924), the statute which the Oregon Legislature had passed qualifying women as jurors was held to be Constitutional.

The common sense view of the whole matter is that the intention of the framers of the Constitution was to insure to a criminal defendant the right guaranteed by Magna Charta, namely, a trial by an impartial jury of his peers leaving details, as to competency and method of selection to the legislature. Women are now the peers of men politically and there is no reason to question their eligibility upon constitutional grounds.

"The fact that a common law jury was defined to be a 'jury of twelve men' etc., had its origin in the circumstance of the political servitude of women in the early days of judicial history so that they were not 'peers' of a man accused of crime. In the broad sense of the word they are now 'freemen' and neither the Constitution nor the laws when they use the term 'men,' except in rare instances, use it with reference to sex. Thus in Section 1 of the Bill of Rights, which declare that all 'men' are equal in right, in Section 2 which provides that all 'men' shall be 'secured in their natural right to worship Almighty God,' etc. and in Section 10, which declares that 'every man shall have remedy by due course of law for injury done him in his person, property or reputation,' nobody would contend that women are not included.

A Michigan statute had fixed as one of the qualifications of jurors that they must be electors. But the Constitution of Michigan, just as the Constitution of Missouri, specifically stated that juries in courts not of record "may consist of less than twelve men." The Supreme Court of Michigan held that the term "men" in the Constitution was used generically and included women.⁶

Iowa also had a statute qualifying electors for jury service and there again the Constitution fixed the number of jurors in inferior courts at "less than twelve men." The Supreme Court of Iowa held that, notwithstanding the use of the word "men" in the Constitution, inasmuch as the Nineteenth Amendment to the Federal Constitution made women electors they were qualified for jury service. In the case of *State v. Walker*,⁷; later followed in *State v. Hickman*⁸ (1923) the Court said:

⁴ 106 Ore. 263.

⁵ 110 Ore. 634.

⁶ People v. Barltz, 212 Mich. 580, 180 N. W. 423, 12 A. L. R. 520, (1920); People v. Merhige, 219 Mich. 95, (1922).

⁷ 192 Iowa 283, 185 N. W. 619.

⁸ 195 Iowa 765.

It is the number that is guaranteed by our Constitution and nowhere therein are qualifications of jurors defined or limited. The essential elements for a trial by jury at common law are number, impartiality and unanimity. 16 R. C. L. 181. It is the accepted law that the Legislature may fix the qualifications of jurors, even though the qualifications are different from those existing at common law. * * * The common law concept of a jury which the original Constitution makers had in mind need not be respected in its entirety in order that 'the right of trial by jury shall remain inviolate.' This concept is primarily one of historical significance, and we are not bound in the interpretation of a jury under the fundamental law of Iowa to construe the word 'men' other than in its generic sense.

In the case of *State v. James*,⁹ (1921) the Court said:

"But our Constitutional provisions in no way trammel legislative power with reference to the qualifications of jurors."

In *Commonwealth v. Maxwell*,¹⁰ the Court held that the Nineteenth Amendment to the Federal Constitution qualified women as electors and that therefore as such they were entitled to perform jury service and said:

The qualifications of jurors and mode of selecting them are usually statutory. 16 R. C. L. 234 * * * They are not essential elements of trial by jury and so are not within the Constitutional guarantee.

In *Smith v. Times*,¹¹ the Court said:

It was never intended to tie up the hands of the legislature so that no regulations of the trial by jury could be made; * * * all the authorities agree that the substantial features * * * are the number twelve, and the unanimity of the verdict.

In *Palmer v. State*,¹² (Feb. 1926), the Court held that the Nineteenth Amendment qualified women for jury duty under the Indiana statute which provided that jurors must be selected from qualified electors and the Court said:

It is now settled, beyond any controversy, that qualifications of jurors are matters of legislative control, even though the qualifications laid down by the legislature differ from those of the common law.

In *Tynor v. U. S.*,¹³ (1924), the U. S. Court of Appeals while discussing an Alaska statute qualifying women for jury service said:

⁹ 96 N. J. L. 132, 16 A. L. R. 1141.

¹⁰ 271 Pa. 378, 114 Atl. 825.

¹¹ 178 Pa. 481, 35 L. R. A. 819.

¹² (Ind.) 150 N. E. 917.

¹³ 297 Fed. 177.

The contention that the act is inconsistent with the Constitution of the United States is based upon the claim that a common law jury must necessarily consist of men only, and that women are incompetent. The competency of women to sit on grand and petit juries has been the subject of much consideration in recent years, and more especially since the adoption of the Nineteenth Amendment of the Constitution of the United States. So far as we are advised, it has been uniformly held that to prescribe the qualifications of jurors and the mode of their selection, is a proper and rightful subject of legislation, and that acts similar to the Alaska act in question do not violate constitutional provisions similar to the provision of the Sixth Amendment of the Constitution of the United States.

The Justices of the Supreme Court of Massachusetts reached the conclusion that it was within the power of the legislature to qualify women as jurors.¹⁴

A Nevada statute qualifying women for jury duty was held constitutional.¹⁵ Minnesota,¹⁶ and California¹⁷ have decisions to the same effect.

A final argument that the Missouri Constitution does not bar women from jury service is the fact that in 1921 that Constitution was amended so as to qualify women to hold office. Similar amendments to the constitutions of Minnesota and California respectively were stressed in the opinions of the two cases above cited:

Women may be elected to the judicial office. It would be a strange anomaly if they could not sit as jurors.¹⁸

Our Constitution also expressly provides (art. 20 section 18): 'No person shall, on account of sex, be disqualified from entering upon or pursuing any lawful business vocation or profession.'

And while service is neither a 'business, vocation, or profession,' the Constitution recognizes the capacity of women to enter upon any 'lawful business, vocation, or profession.' By an amendment to our Constitution, October 10, 1911 (art. 2, sect. 1), women were given the right to vote and hold office. If the contention of the petitioner is well grounded, we would then have a situation where a woman on trial for a crime might be brought to trial before a woman judge, prosecuted by a woman district attorney, defended by a woman lawyer, brought in court by a woman bailiff, and yet forced to a trial before a jury of men, because men only were considered as eligible for jury duty at common law. It would seem that the inferences to be derived from so radical an amendment of the Constitution are quite as strong as those to be derived from the use of the term 'Trial by jury.'

We have discovered but one intimation that a constitutional provision

¹⁴ *In re Opinion of the Justices*, 237 Mass. 591, 130 N. E. 685.

¹⁵ *Parus v. Dist. Court*, 42 Nev. 229, 174 Pac. 706, 4 A. L. R. 140, (1918).

¹⁶ *State v. Rosenberg*, 192 N. W. 194.

¹⁷ *In re Mava*, 178 Cal. 213, 172 Pac. 986, L. R. A. 1918 E. 771.

¹⁸ See Note 16.

such as is contained in Section 28 of Article II of the Constitution of Missouri might prevent a legislature qualifying women to serve as jurors. It is contained in the opinion of *State v. Mittle*,¹⁹ 1922. A male defendant had moved to quash the venire upon the ground that all women electors had been excluded. His motion was denied and, after conviction, he appealed. The judgment was of course affirmed upon the unquestionable ground that it did not lie in his mouth to make the objection because he was not one of the class excluded. The court however—wholly without warrant we submit—took upon itself to deliver an opinion as to whether women were qualified jurors in South Carolina.

Its first proposition is that the Nineteenth Amendment did not of itself confer the right of suffrage—is indubitably correct. So is its second: That even if the Nineteenth Amendment did give females the right to vote, that right did not necessarily carry with it the right to serve as a juror. The court, however, felt the need of still further utterance and delivered itself of the following:

Not being implied in the Nineteenth Amendment, the right of jury service is expressly denied by the State Constitution (Article 5, section 22), ‘The petit jury of the Circuit Courts shall consist of twelve men.’ The further provision in that section, ‘Each juror must be a qualified elector,’ does not confer upon every elector, male or female, the right of jury service. It means that every juror must be a qualified elector, not that every qualified elector shall be a qualified juror.

This gratuitous dictum does not, in our opinion, present a basis which the Missouri Courts are likely to use as a point of departure from the square decisions herein cited that women may be qualified as jurors under constitutional provisions which speak of a jury of “men.”

We therefore conclude that the word “men” as used in the Constitution of Missouri is used in its generic sense and that it is for the State Legislature to fix the qualifications of jurors. Therefore, we believe that in order to qualify women for jury service in Missouri an amendment to our Constitution is not necessary.

Our Legislature has, however, fixed as a qualification for jurors that they must be of the male sex. Section 6607 R. S. Mo. provides:

Every juror, grand and petit, shall be a male citizen of the state, resident of the county, sober and intelligent, of good reputation, over twenty-one years of age and otherwise qualified.

It is our opinion that by the adoption of an amendment by our Legislature, removing this restriction, women will be qualified for jury service in Missouri.

¹⁹ 113 S. E. (S. C.) 335.