

# HOUSE . . . No. 1477

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## The Commonwealth of Massachusetts.

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### OPINION OF THE JUSTICES OF THE SUPREME JUDICIAL COURT:

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*To the Honorable the House of Representatives of the Commonwealth of  
Massachusetts.*

The Justices of the Supreme Judicial Court, having considered the questions set forth in the order of March 14, 1921, copy whereof is hereto annexed, respectfully submit these answers:

These questions are considered strictly with reference to the proposed bill, copy of which accompanies the order.

The first question is interpreted to mean, whether by the existing laws, under the present provisions of the Constitution of the Commonwealth and of the Nineteenth Amendment to the Constitution of the United States, women may be required and compelled to serve as jurors.

It is plain that prior to the adoption of the Nineteenth Amendment to the Constitution of the United States, women could not serve as jurors under our Constitution and laws. The law at the time of the adoption of the Constitution, the frame and purport of that instrument, and the universal understanding and unbroken practical construction of its provisions from that time up to 1920 are inconsistent with any other view. See *Opinion of Justices*, 107 Mass. 604; 165 Mass. 599. Women never have served as jurors within the Commonwealth except in the rare and restricted instances of a jury of matrons. "Trial by jury" both at

common law and in American constitutions has been held to mean "a trial by a jury of twelve men." *Capital Traction Co. v. Hof*, 174 U. S. 1, 13.

The words of G. L. c. 234, § 1, to the effect that "a person qualified to vote for representatives for the general court shall be liable to serve as a juror," are broad enough as matter of mere verbal analysis, in connection with G. L. c. 51, § 1 conferring such right to vote upon women, to include women as well as men. Those words, however, like the words of every statute, are not to be interpreted in their simple literal meaning, but in connection with the history of the times and the entire system of which the statute in question forms a part, in the light of the Constitution, of the common law and of previous legislation upon the same subject. The provisions of law prescribing the qualifications of those subject to jury service have been in almost the same essential words since the adoption of the Constitution. No sound ground for the contention that women could be jurors existed until after the adoption of the Nineteenth Amendment to the federal Constitution. It cannot be thought that the General Court by re-enacting in G. L. c. 234, § 1, the description of those liable to be drawn as jurors, in words previously used and without change, intended to include women.

This conclusion is confirmed by the facts that the statute contains no reference to exemption of the large numbers of women who manifestly ought not to be required to serve as jurors, that no provision is made for the convenience of women in court houses, some of which are already overcrowded and unfit for their accommodation, and that the jury of "men" is continued in G. L. c. 123, § 7 as applicable to the cases there described. It is a familiar rule of statutory construction that the re-enactment of an earlier statute does not affect its meaning or enlarge its scope in the absence of definite indication of a legislative purpose to that end.

The decisions of *Strauder v. West Virginia*, 100 U. S. 303, *Ex Parte Virginia*, 100 U. S. 339 and *Neal v. Delaware*, 103 U. S. 370, were made under conditions different from those here presented. The court in those cases were con-

sidering the freedom, citizenship, civil rights and voting privileges guaranteed to the colored race by the then recent amendments to the Constitution of the United States. Those decisions recognize the powers of the states to prescribe the qualifications of jurors, and in so doing to make discriminations, and to "confine the selection to males, to freeholders, to citizens, to persons within certain ages or to persons having educational qualifications."

The first question is answered in the negative.

Article XIX of the Amendments to United States Constitution, declared adopted by certification of the Secretary of State, on August 26, 1920, is in these words: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex. Congress shall have power to enforce this article by appropriate legislation." The adoption of this Amendment, by its inherent force, struck from the Constitution of this Commonwealth the word "male" wherever it occurred as a limitation upon the right of the citizen to vote. *Guinn v. United States*, 238 U. S. 347, 362-363. It follows that, under c. I, § II, Art. II, c. I, § III, Art. IV, c. II, § I, Art. III of the Constitution of this Commonwealth as amended by articles III, XVII, XX, XXVIII, XXXI and XXXII of the Amendments, "every citizen of twenty-one years of age and upwards," possessing other requisite qualifications, has a right to vote. Clearly women are included among the electorate of this Commonwealth by the terms of our Constitution as thus modified by the Nineteenth Amendment to the Constitution of the United States. So far as we are aware the Congress has not enacted any legislation pursuant to the Nineteenth Amendment.

The Constitution of this Commonwealth contains no statement concerning the qualifications of jurors. By articles XII and XV of the Bill of Rights "trial by jury" is preserved. Trial by jury in its essentials was matter of general knowledge and was adequately defined by the common law, which was continued as it then existed in the Commonwealth by c. VI, Art. VI of the Constitution. It was said by Chief Justice Shaw in *Commonwealth v. Anthes*, 5 Gray,

185 at 229, that the mandate of the Constitution preserving trial by jury "was a provision for securing to all the great benefit of jury trial, as it was then understood and practised." Speaking by Chief Justice Chapman in *Commonwealth v. Dorsey*, 103 Mass. 412 at 418, the court said: "Undoubtedly the Constitution contemplated a jury of twelve men, who should be good and impartial." In *Robinson's Case*, 131 Mass. 376, 377, Chief Justice Gray referring to women used the words: "They could not take part in the administration of justice, either as judges or jurors, with the single exception of a jury of matrons upon a suggestion of pregnancy." These expressions were of course entirely accurate as applied to the provisions of the Constitution then existing. The trial by jury preserved by our Constitution indubitably is the common law trial by jury in its indispensable characteristics as established and known at the time the Constitution was adopted.

An examination of the statutes of the provincial period of Massachusetts shows that jurors were selected from those possessing the privilege of voting. It has been the practice since the adoption of the Constitution to select the grand and petit jurors from those qualified to vote. No exception to this general statement is to be found in any of our statutes. That has been the procedure in the courts. By the express words of the Constitution as originally adopted only those male inhabitants of twenty-one years and upwards "having a freehold estate within the Commonwealth of the annual income of three pounds, or any estate of the value of sixty pounds" had a right to vote. C. I, § II, Art. II, c. I, § III, Art. IV, c. II, § I, Art. III. That provision has been changed from time to time by amendment until now for many years there has been no property qualification for voting. It has never been doubted that thereby the qualifications of jurors required by the Constitution have been modified accordingly. It is a constituent element of the trial by jury preserved by the Constitution that jurors be selected from the body of the electorate. The enlargement of the body of the electorate, before the adoption of the Nineteenth Amendment, so as to include substantially universal man-

hood suffrage, has not been treated as violating the constitutional features of trial by jury. That has been the interpretation of practical administration in the courts and the course of statutory enactments. When the suffrage has been extended by amendments to the Constitution, there has followed a like enlargement of the class of citizens liable to jury service. It is common knowledge that many men have served as jurors not possessing the qualifications of electors under the Constitution of 1780. In other respects qualifications of jurors required by common law in 1780 have been modified. See *Commonwealth v. Wong Chung*, 186 Mass. 231.

No reason based on the Constitution is perceived why women, when they become qualified to vote under the Nineteenth Amendment to the federal Constitution, should not also be eligible to jury service, if the General Court so determines. In numerous particulars of a minor nature the trial by jury as it existed at the adoption of the Constitution has been altered. Other changes by legislative enactment have been proposed of such vital character as to be beyond the power of the General Court. These all are set forth in detail in *Bothwell v. Boston Elevated Railway*, 215 Mass. 467. See also *Opinion of Justices*, 232 Mass. 601, and *Lebowitch's Case*, 235 Mass. 357.

As a result of our constitutional history and practice respecting trial by jury it follows that a change by an amendment to the Constitution in the qualifications of the electorate, such as that wrought by the Nineteenth Amendment, by its own force authorizes the General Court to make a corresponding change in the qualifications of jurors.

This is in harmony with the conclusion reached in *Neal v. Delaware*, 103 U. S. 370. A similar result has been reached in other jurisdictions where kindred questions have arisen, although by somewhat different reasoning. *In re Eban Mana*, 178 Cal. 213. *People v. Barltz*, 210 Mich. (180 N.W. 423). See *Parus v. District Court*, 42 Nev. 229.

It is not necessary to discuss whether the right of trial by jury secured by Art. III, § II of the Constitution of the United States and by Art. VII of the Amendments thereto

will be satisfied by a trial by a jury composed in whole or in part of women. The Supreme Court of the United States has been rather strict in adhering to the jury of the common law in some matters not regarded as essential by the Supreme Judicial Court of Massachusetts. Compare *Slocum v. New York Life Insurance Co.* 228 U. S. 364 and *Bothwell v. Boston Elevated Railway*, 215 Mass. 467, 471 to 477. Those provisions of the federal Constitution do not govern jury trials within the states.

The problem presented by this question is to be solved wholly by considering the Constitution of this Commonwealth in connection with the Nineteenth Amendment to the Constitution of the United States.

The second question is answered in the affirmative.

ARTHUR P. RUGG.

HENRY K. BRALEY.

CHARLES A. DECOURCY.

JOHN C. CROSBY.

EDWARD P. PIERCE.

JAMES B. CARROLL.

CHARLES F. JENNEY.

## The Commonwealth of Massachusetts.

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MARCH 14, 1921.

*Whereas*, There is pending before the General Court a certain bill accompanying the petition of Honorable Andrew J. Peters, mayor of Boston, to amend section 1 of chapter 234 of the General Laws, a copy of said bill and petition being annexed hereto; and

*Whereas*, There exists grave question and uncertainty as to the constitutional power of the General Court to enact said bill; therefore be it

*Ordered*, That the House of Representatives respectfully requests the opinion of the Honorable Justices of the Supreme Judicial Court upon the following important questions of law: —

First, Under the existing Constitution and laws of the Commonwealth and the Constitution of the United States, are women liable to jury duty?

Second, If the first question be answered in the negative, has the General Court constitutional power to enact legislation so that women may be made liable to jury duty?

JAMES W. KIMBALL,

*Clerk.*

A true copy. Attest:

JAMES W. KIMBALL,

*Clerk of the House of Representatives.*

*To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled.*

The undersigned, Mayor of the City of Boston, respectfully petitions for the passage of an act relative to the liability of women qualified to vote for representatives for service as jurors, substantially as set forth in the accompanying bill or for such other, further or similar legislation, if any, as may be necessary or advisable to carry out the objects and purposes referred to.

(Signed)      ANDREW J. PETERS,

*Mayor.*

## The Commonwealth of Massachusetts.

In the Year One Thousand Nine Hundred and Twenty-One.

### AN ACT

Making Women, with Certain Exceptions, Liable for Service  
as Jurors.

*Be it enacted by the Senate and House of Representatives  
in General Court assembled, and by the authority of the  
same, as follows:*

1 SECTION 1. Section one of chapter two hundred and  
2 thirty-four of the General Laws is hereby amended by  
3 inserting in the first line thereof, after the word "person",  
4 the words: — of either sex, — and by adding at the end  
5 of the third line thereof, the words: — Women trained  
6 nurses, women assistants in hospitals, women with one  
7 or more children under the age of ten years and such  
8 other persons being women as are included under the  
9 following exemptions, — so that said section shall read  
10 as follows: — *Section 1.* A person of either sex qualified  
11 to vote for representatives to the general court shall be  
12 liable to serve as a juror, except that the following per-  
13 sons shall be exempt:

14 Women trained nurses, women assistants in hospitals,  
15 women with one or more children under the age of ten  
16 years and such other persons being women as are in-  
17 cluded under the following exemptions:

18 The governor, lieutenant governor, members of the  
19 council; state secretary; members and officers of the

20 senate and house of representatives during a session of  
21 the general court; judges and justices of a court; county  
22 and associate commissioners; clerks of courts and as-  
23 sistant clerks and all regularly appointed officers of the  
24 courts of the United States and of the commonwealth;  
25 registers of probate and insolvency; registers of deeds;  
26 sheriffs and their deputies; constables; marshals of the  
27 United States and their deputies, and all other officers of  
28 the United States; attorneys at law; settled ministers  
29 of the gospel; officers of colleges; preceptors and teachers  
30 of incorporated academies; registered practising physi-  
31 cians and surgeons; cashiers of incorporated banks; con-  
32 stant ferry-men; persons over sixty-five years of age;  
33 members of the volunteer militia; members of the ancient  
34 and honorable artillery company; superintendents, officers  
35 and assistants employed in or about a state hospital,  
36 insane hospital, jail, house of correction, state industrial  
37 school or state prison; keepers of lighthouses; conduc-  
38 tors and engine drivers of railroad trains; teachers in  
39 public schools; enginemen and members of the fire de-  
40 partment of Boston, and of other cities and towns in  
41 which such exemption has been made by vote of the  
42 city council or the inhabitants of the town, respectively.

1 SECTION 2. This act shall take effect upon its passage.



