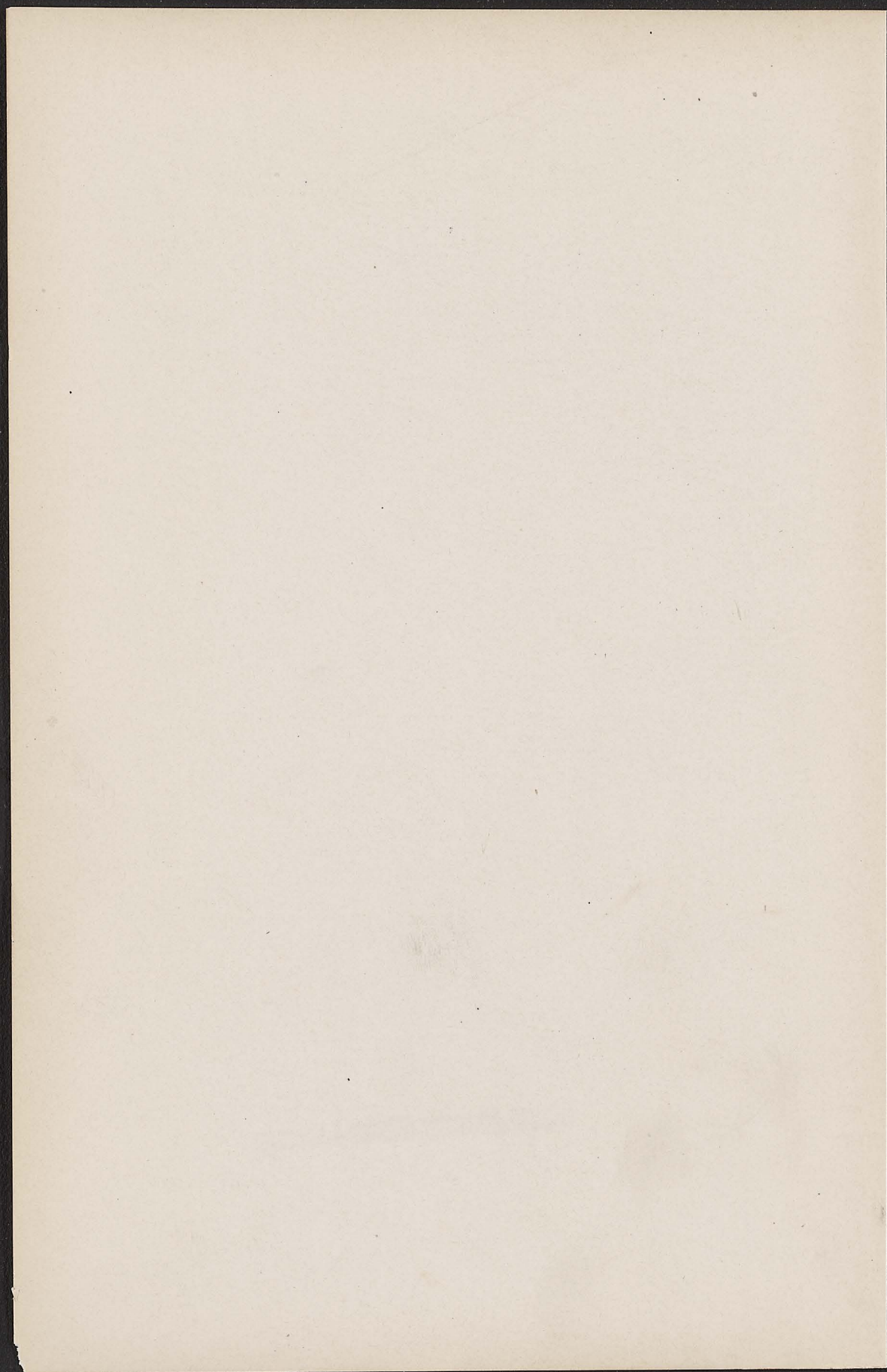


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New Jersey State Library



## Writ of Error.

NEW JERSEY, ss.

The State of New Jersey to the Chief  
(L. s.) Justice of our Supreme Court of Judicature, GREETING:

For as much as in the record and proceedings, and also in the order discharging the rule to show cause why a writ of mandamus should not issue to compel Charles A. Cornish, Frederick Richter, Arthur N. Swenson and Walter Holmes, members of the Board of Registry and Elections in Passaic Township, southern division, to allow Harriet F. Carpenter to register as a qualified voter in said Township, which was in our said Supreme Court of Judicature, before you, wherein said Harriet F. Carpenter was prosecutor, and Charles A. Cornish, Frederick Richter, Arthur N. Swenson and Walter Holmes, members of the Board of Registry and Elections in Passaic Township, southern division, were defendants, manifest error hath intervened, to the great damage of the said prosecutor, as it is said; we being willing that the error, if any there be, should, in due manner, be corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, that if judgment be thereupon given and affirmed, then you distinctly and openly send, under your seal, the record and proceedings aforesaid, with all things touching the same, to our judges of our Court of Errors and Appeals in the last resort in all causes, at Trenton, forthwith, together with this writ, that the record and proceedings aforesaid being inspected, we may cause to be further done thereupon, for correcting that error, what of right, and, according to the law and custom of the State of New Jersey, ought to be done.

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*Return.*

Witness, our Chancellor, and President Judge, of our said Court of Errors and Appeals, at Trenton aforesaid, the twenty-seventh day of April, nineteen hundred and twelve.

DAVID S. CRATER,  
*Clerk.*

MARY PHILBROOK,  
*Attorney.*

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**Return.**

The answer of the Justices of the Supreme Court of the State of New Jersey, within named. The record and proceedings whereof mention is within made, with all things touching and concerning the same, we do certify to the Court of Errors and Appeals of said state, in a certain schedule to this writ annexed, as within we are commanded.

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WM. S. GUMMERE,  
*C. J. (SEAL)*

Endorsed:

“Filed, May 2, 1912,  
DAVID S. CRATER,  
*Clerk.*”

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*Order Discharging Rule to Show Cause.*

Order Discharging Rule to Show Cause.

## New Jersey Supreme Court.

Of the February Term, Ninteen Hundred and Twelve.

THE STATE, *ex rel*,  
HARRIET F. CARPENTER,

*Prosecutor,*

*vs.*

CHARLES A. CORNISH, *et als*,

*Defendants.*

*On*

*Mandamus.*

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A rule to show cause having been granted by the Supreme Court in the above entitled cause, wherein Charles A. Cornish, Frederick Richter, Walter N. Holmes and Arthur N. Swenson, members of the Board of Registry and Elections of Passaic Township, southern division, were directed to show cause, on Tuesday the eighth day of November last, before the Supreme Court at Trenton, why said Harriet F. Carpenter should not be allowed to register in said Township as a qualified voter.

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And it appearing that pursuant to the terms of said order and leave, granted for that purpose in open court, that affidavits were taken substantiating the facts stated in the petition herein, as well as stipulation of facts agreed upon between the parties hereto were presented to said Supreme Court at Trenton, and the pleadings and proof having been read, and the argument of counsel having been considered, and it appearing to the Court that said Harriet F. Carpenter is not a qualified voter under the constitution

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*Order Discharging Rule to Show Cause.*

and laws of the State of New Jersey, and is not entitled to be registered as such. It is thereupon, on this        day of April, nineteen hundred and twelve, ordered that said rule to show cause be discharged.

Entered in the minutes, April 23, 1912, on motion of

MARY PHILBROOK,  
*Attorney of Prosecutor.*

10

I, WILLIAM RIKER, JR., Clerk of the Supreme Court of the State of New Jersey, do certify that the foregoing is a true copy of a rule entered in the minutes of the court in the above stated cause.

In testimony whereof, I have set my hand and the seal of said Court at Trenton, this twenty-ninth day of April, A. D., nineteen hundred and twelve.

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(SEAL)

WM. RIKER, JR.,  
*Clerk.*

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*Petition for Writ of Certiorari.*

Petition for Writ of Certiorari.

## New Jersey Court of Errors and Appeals.

HARRIET F. CARPENTER,

*Plaintiff,*

*vs.*

CHARLES A. CORNISH, *et als,*

*Defendants.*

*Petition for  
Writ of  
Certiorari.*

10

*To the Judges of our said New Jersey Court of Errors  
and Appeals:*

Your petitioner, Harriet F. Carpenter, respectfully shows that she has taken out a writ of error in the above entitled cause directed to the Supreme Court of the State of New Jersey, and that in compliance therewith, the said Supreme Court has returned the second day of May, nineteen hundred and twelve the order for discharging the rule to show cause in the above entitled cause.

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Your petitioner respectfully shows that this is in diminution, and that it is necessary to bring up the record in said case, to wit the petition and order to show cause, the proof of service of the order to show cause; the stipulations of facts agreed upon, and the specification of determination filed in the office of the said Supreme Court.

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Your petitioner therefore prays that the writ of certiorari be issued out of this honorable court directed to the Justices of the Supreme Court of the State of New Jersey, directing them to send up to this court the above described papers.

Your petitioner will ever pray, etc.

MARY PHILBROOK,

*Counsel for Plaintiff in Error.*

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*Petition for Writ of Certiorari.*

STATE OF NEW JERSEY, }  
 COUNTY OF ESSEX. } ss.

Mary Philbrook, being duly sworn according to law, on her oath says, that she is counsel for Harriet F. Carpenter, and has read the foregoing petition and the same is true.

MARY PHILBROOK.

10 Subscribed and sworn to before me,  
 this 28th day of May, 1912.

WM. J. BLAIR,  
*Attorney at Law of New Jersey.*

Filed, May 29, 1912,

DAVID S. CRATER,  
*Clerk.*

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*Writ of Certiorari.*

Writ of Certiorari.

NEW JERSEY, ss.

The State of New Jersey, to our Jus-  
(L. S.) tices of our Supreme Court, GREETING:

We being willing, for certain reasons, to be certi-  
fied of a certain judgment of the New Jersey Supreme  
Court, rendered at the February term of said New 10  
Jersey Supreme Court in the year of our Lord, one  
thousand and nine hundred and twelve, whereby a  
judgment of Supreme Court in the suit of Harriet  
F. Carpenter, plaintiff, and Charles A. Cornish, Fred-  
erick Richter, Arthur N. Swenson and Walter  
Holmes, members of the Board of Registry and Elec-  
tions in Passaic Township, southern division were  
defendants,

We do command you, that a transcript of the rec- 20  
ord in said case in the Supreme Court on file in the  
New Jersey Supreme Court, to wit, the petition of, or  
the writ of mandamus; the order to show cause grant-  
ed thereon and the proofs of service thereof; the stip-  
ulation of facts agreed upon, the specification of de-  
termination filed therein and the order discharging  
the rule to show cause made by said Supreme Court,  
together with all things touching and concerning the  
same, as fully and entirely as before you they re-  
main, to our Justices of the said Court of Errors and  
Appeals, at Trenton, on the fifth day of June, you 30  
certify and send together with this writ that therein  
may be done, what of right and according to the laws  
of this state, should be done.

Witness our chancellor and president judge of our  
said Court of Errors and Appeals, at Trenton afore-  
said, the twenty-eighth day of May, nineteen hundred  
and twelve.

DAVID S. CRATER,

*Clerk.*

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*Writ of Certiorari.*

(SEAL) I do herewith send to the Court of Errors and Appeals the proceedings as within commanded under the seal of Supreme Court of New Jersey, and my hand.

Dated, May 31st, 1912.

WM. RIKER, JR.

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*Petition for Mandamus.*

Petition for Mandamus.

NEW JERSEY SUPREME COURT.

*To Honorable Charles W. Parker, Justice of the New Jersey Supreme Court:*

The petition of Harriet F. Carpenter respectfully shows that she is now, and has been, for the past five years and upwards, a resident of Stirling, in the Township of Passaic, Morris County, New Jersey, and that she is the owner in her own right of real estate at Stirling aforesaid, above the value of one thousand dollars, and that she has paid all the taxes due on said property.

10

That on the thirty-first day of October last, she applied to Charles A. Cornish, Walter Holmes, Frederick Richter and Arthur H. Swenson, the members of the Board of Registry and Elections in the district wherein she resides, to be registered as a qualified voter, and that said members of said Board of Registry and Elections refused to comply with said request.

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Your petitioner further shows that her right to register and vote is based upon the provisions of the Constitution of New Jersey of 1776, and the Constitution of the United States. That the Constitution of New Jersey of 1776, gave to all inhabitants possessing fifty pounds proclamation money, the right to vote for members of council and assembly and for all other officers elected by the county at large; that pursuant to the provisions of said constitution the legislature from time to time passed laws carrying into effect the provisions of said constitution, and in 1790, specifically mentioned the voters as "he" and "she." That women voted extensively throughout the state.

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Your petitioner further shows, that on the 16th day of November, 1807, and on the first day of June, 1820,

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*Petition for Mandamus.*

and on the 12th day of November, 1839, the legislature passed certain laws regulating elections and declared that only white male citizens should have the right to vote.

Your petitioner further shows, that she is advised that such acts of the legislature were unconstitutional.

Your petitioner further shows, that on or about  
 10 the 1844, the legislature passed  
 an act entitled, "An act to provide for the election  
 of delegates to a convention to prepare a constitution  
 for the government of this State, and for submitting  
 the same to the people thereof, for ratification or re-  
 20 jection," and provided in said act that "An election  
 for delegates to meet and frame a constitution for  
 the government of this State, on the 18th day of  
 March next \* \* \* provided that every male citizen of  
 the United States, above the age of twenty-one years,  
 \* \* \* shall be entitled to vote for delegates to said  
 convention. \* \* \* For the purpose of ascertaining the  
 sense of the people as to the adoption or rejection of  
 the constitution \* \* \* an election shall be held \* \* \*  
 and every person qualified to vote for delegates to the  
 convention authorized by this act, shall be entitled to  
 vote at such election"

Your petitioner further shows, that the exclusion of  
 women from voting for such delegates and for a rati-  
 30 fication or rejection of the constitution, was clearly  
 illegal, in that it excluded a large class of voters quali-  
 fied under the existing constitution to vote for it.

Your petitioner further shows that pursuant to  
 said act, however, delegates were elected, a conven-  
 tion was held, and the constitution framed by it was  
 submitted to the vote of male citizens, and declared  
 ratified.

Your petitioner further shows, that the suffrage  
 clause of the constitution so adopted in 1844, by the  
 vote of the male citizens, provides that "every male  
 40 citizen shall have the right to vote" and the right of

*Petition for Mandamus.*

petitioner therefore to register has been denied because of that provision.

Your petitioner further shows that said clause amends the old constitution, and that the delegates to said convention exceeded their authority in making any amendments to the old constitution; that they were instructed to "frame" a constitution, and not to alter, revise or amend it.

Your petitioner further shows that she is advised that the suffrage clause in the constitution of 1844, giving to every male citizen the right to vote does not exclude women; that it is expressly stated in the preamble to the constitution that the intention of the people was to transmit unimpaired, the rights so long enjoyed by the people. And it further provides that the rights and privileges therein mentioned, shall not be construed to impair or deny others retained by the people.

Your petitioner further shows that all the election laws pretending to carry into effect the provisions of the constitution, are illegal so far as they exclude women from the right to vote.

Your petitioner further shows that she is advised that by virtue of the provisions of the Constitution of the United States, the electors for members of the House of Representatives shall have the qualifications of electors of the most numerous branch of the state legislature; that at the time of the adoption of the United States Constitution, women had the right to vote for members of Congress, and that that right could not be altered by any act of the State.

Your petitioner further shows, that she is advised that the right to vote has been taken away from women, if at all, without due process of law.

Therefore, this petitioner prays that a writ of mandamus may issue out of and under the seal of this court, directed to Charles A. Cornish, Walter Holmes, Frederick Richter and Arthur N. Swenson, command-

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*Petition for Mandamus.*

ing them and enjoining them to allow her to register as a qualified voter, pursuant to the laws in such case made and provided.

And your petitioner will every pray.

HARRIET F. CARPENTER.

MARY PHILBROOK,  
*Attorney.*

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STATE OF NEW JERSEY, }  
MORRIS COUNTY. } *ss.*

Harriet F. Carpenter, of full age, being duly sworn according to law upon her oath says, that she has read the foregoing petition and the same is true.

HARRIET F. CARPENTER.

Sworn and subscribed to before me  
this 2nd day of Nov., 1911.

E. BERTRAM MOTT,  
*Attorney at Law of New Jersey.*

Filed, Nov. 13, 1911,  
WM. RIKER, JR.,  
*Clerk.*

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*Order to Show Cause.*

Order to Show Cause.

NEW JERSEY SUPREME COURT.

THE STATE, *ex rel*,

HARRIET F. CARPENTER,

*vs.*

CHARLES A. CORNISH, WALTER  
HOLMES, FREDERICK RICHTER  
and ARTHUR H. SWENSON,  
Members of the Board of Reg-  
istry and Elections of Passaic  
Township, Southern Division.

*On Motion  
for  
Mandamus.*

*Rule to  
Show Cause.*

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Upon reading and filing the petition and affidavit of Harriet F. Carpenter in the above stated cause, it is ordered by the court that the therein named Charles A. Cornish, Walter Holmes, Frederick Richter and Arthur H. Swenson, the members of the Board of Registry and Elections of Passaic Township, southern district, do show cause before this honorable court, at the State House in the City of Trenton, on Wednesday, the eighth day of November instant, at ten o'clock in the forenoon of that day, why a peremptory or alternative writ of mandamus should not be issued out of and under the seal of this honorable court, commanding and enjoining them, the said Charles A. Cornish, Walter Holmes, Frederick Richter and Arthur H. Swenson, constituting such board, to allow said Harriet F. Carpenter to be registered in said election district as a qualified voter, to the end that the said Harriet F. Carpenter may be duly entitled to vote, if otherwise qualified for that purpose, at a primary convention to be held for delegates to

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*Order to Show Cause.*

the National Convention in May next, and at a primary election for the nomination of other officers, to be held in September next.

And it is further ordered that both parties hereto have leave to take affidavits.

Dated Nov. 2, 1911.

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On motion of

MARY PHILBROOK,  
*Attorney for Relator.*

Let this rule be entered.

C. W. PARKER,  
*J. S. C.*

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*Affidavit of Service.*

**Affidavit of Service.**

STATE OF NEW JERSEY, }  
 ESSEX COUNTY. } ss.

Mary Philbrook, being duly sworn according to law upon her oath says that she served a copy of the within order to show cause on Charles A. Cornish and Frederick Richter personally, and on Arthur H. Swenson and Walter Holmes, by leaving a copy of said order at their residences, with a member of their family, over the age of fourteen years, that all of said service was made on November 4, 1911.

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MARY PHILBROOK.

Sworn and subscribed to before me  
 this 6th day of November, 1911.

CLARENCE S. BIDDLE,  
*Supreme Court Commissioner.*

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Endorsed:

"Filed Nov. 13, 1911,  
 WM. RIKER, JR.,  
*Clerk.*"

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*Proofs.*

Proofs.

## NEW JERSEY SUPREME COURT.

10	THE STATE, <i>ex rel</i> , HARRIET F. CARPENTER, <i>vs.</i> CHARLES A. CORNISH, <i>et als</i> , <i>Defendants.</i>	} <i>On Petition</i> } <i>for</i> } <i>Mandamus.</i>
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Affidavits of witnesses produced on the part of re-  
 lator taken before me, Ralph W. Skinner, a Supreme  
 Court Commissioner, on Friday, the twenty-fourth  
 day of November, 1911, at three o'clock in the after-  
 noon of said day at my office, in the Prudential Build-  
 ing, No. 763 Broad Street in the City of Newark, N. J.,  
 by consent of the above named relator, and by consent  
 and in the presence of the defendants, Charles A.  
 Cornish, Frederick Richter, Arthur H. Swenson and  
 Walter Holmes, in the above entitled cause pursuant  
 to the rule to show cause granted by Charles W.  
 Parker, a Supreme Court Justice, on the second day  
 of November, 1911, and to the further leave granted  
 by this court in open court on the tenth day of No-  
 vember, 1911.

RALPH W. SKINNER,  
*Supreme Court Commissioner.*

*Proofs.*

## NEW JERSEY SUPREME COURT.

THE STATE, *ex rel*,  
 HARRIET F. CARPENTER,  
*vs.*

CHARLES A. CORNISH, *et als*,  
*Defendants.*

*On Petition,  
 &c., for  
 Mandamus.*

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Notice having been given to the defendants herein of the taking of affidavits under the rule to show cause and by leave of the court granted at the hearing in this matter before Thomas Anderson, Esquire, on the twenty-fourth day of November, 1911, at his office No. 800 Broad street, in the City of Newark; and it being made known to us that said Thomas Anderson is sick and unable to attend the taking of said affidavits, and in order to avoid a further attendance in order to take said affidavits, we do hereby consent that the affidavit of Harriet F. Carpenter and of Charles A. Cornish, on the part of relator, be taken on said day before Ralph W. Skinner, Esquire, a Supreme Court Commissioner, at his office in the Prudential Building, 763 Broad Street, Newark, N. J. We further consent that these affidavits be made a part of the record, as if filed within the time allowed by law under the rule to show cause granted herein.

And we further consent that Harriet F. Carpenter may amend her petition in this suit or annex thereto a new affidavit verifying at length the facts stated in said petition, in order that the affidavit may verify the facts stated therein, and that these consents are given in order to facilitate the proceedings and in

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*Proofs.*

order that the records and proofs may be properly  
before the court.

Dated November 11, 1911.

CHARLES A. CORNISH,  
FRED RICHTER, Jr.,  
WALTER A. HOLMES,  
ARTHUR H. SWENSON.

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*Proofs.*

Harriet F. Carpenter, the relator being first duly sworn according to law, deposes and says: That I reside at Stirling in Passaic Township, Morris County, New Jersey; that I am the owner of real property at Stirling aforesaid worth more than one thousand dollars, consisting of about ten acres of grounds and two dwelling houses situated thereon; that all of my taxes were paid on said property on the second day of November last; that on the thirty-first day of October last I applied to Charles A. Cornish, Frederick Richter, Arthur H. Swenson and Walter Holmes, members of the Board of Registry and Elections of Passaic Township, southern division, for leave to register as a qualified voter; that said Board of Registry and Elections refused me the right to register because I am a woman; that I thereupon demanded that they make a minute of said application of the register, which I saw Mr. Charles A. Cornish do, and that I requested to him to state that I made such application by virtue of my right to vote under the Constitutions of the State of New Jersey and of the United States. That deponent lives in the southern division election district of Passaic Township.

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HARRIET FRANCES CARPENTER.

Sworn and subscribed to at Newark,  
N. J., this twenty-fourth day of  
November, nineteen hundred and  
eleven, before me

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RALPH W. SKINNER,

*Supreme Court Commissioner.*

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*Proofs.*

Charles A. Cornish, a witness produced on the part  
 of the relator, being duly sworn according to law  
 upon his oath says: I am a member of the Board  
 of Registry and Elections of Passaic Township,  
 southern division, and was judge of said board of  
 the thirty-first day of October last; that Harriet F.  
 Carpenter, a resident of Stirling in said township  
 and in said election district, applied to said Board  
 of Registry and Elections for leave to register as a  
 qualified voter in said township and district; that said  
 board refused said Harriet F. Carpenter the right  
 to register because she was a woman; that thereupon  
 I made a minute of said request of Harriet F. Car-  
 10      penter upon the register of said Board. I know Miss  
 Harriet F. Carpenter personally, and that she is the  
 owner of property at Stirling, Passaic Township,  
 southern division aforesaid. I hereby consent to the  
 20      taking of this affidavit and that of Miss Harriet F.  
 Carpenter and the other members of the Board of  
 Registry and Elections of Passaic Township, southern  
 division, before Ralph Skinner, Esquire, a Supreme  
 Court Commissioner, instead of Thomas Anderson,  
 Esquire, owing to the fact that Thomas Anderson is  
 ill and unable to take the same. I further consent  
 that these affidavits, and that of Harriet F. Carpenter  
 be made a part of the record in this case, as if they  
 have been regularly taken within the time required  
 by law under the rule to show cause.

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CHARLES A. CORNISH.

Sworn and subscribed to at Newark,  
 N. J., this twenty-fourth day of  
 November, nineteen hundred and  
 eleven, before me.

RALPH W. SKINNER,  
*Supreme Court Commissioner.*

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*Agreed State of Facts.*

Facts Agreed Upon.  
NEW JERSEY SUPREME COURT.

THE STATE, <i>ex rel</i> , HARRIET F. CARPENTER,  <i>vs.</i> CHARLES A. CORNISH, <i>et als</i> ,  <div style="text-align: right;"><i>Defendants.</i></div>	}	<i>On Petition for Mandamus. Stipulation as to Facts.</i>	10
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It is hereby stipulated and agreed between the parties hereto that the following statement of facts be filed with this court in the above entitled matter, as of the eighth day of November instant.

That on the 31st day of October, 1911, Harriet F. Carpenter made application to the said Charles A. Cornish, Frederick Richter, Walter Holmes and Arthur H. Swenson, members of the Board of Registry and Elections of Passaic Township, southern division, for leave to register as a qualified voter; that said members of said board refused said Harriet F. Carpenter the right to register because she was a woman; that thereupon, at the request of said Harriet F. Carpenter, a minute of said application was made upon the register, to the affect that said Harriet F. Carpenter made such application and that she claimed her right under the Constitution of New Jersey and of the United States, and that said Board refused her the right to register.

Dated November 24, 1911.

CHARLES A. CORNISH,  
 FRED RICHTER, JR.,  
 WALTER A. HOLMES,  
 ARTHUR H. SWENSON,  
 and MARY PHILBROOK,  
*Attorney for Harriet F. Carpenter.*

Filed December 5, 1911.

WM. RIKER, JR.,  
*Clerk.*

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*Opinion.*

Opinion of Court.

NEW JERSEY SUPREME COURT.

November Term, 1911.

10	HARRIET F. CARPENTER, <div style="text-align: right;"><i>Relator,</i></div> <div style="text-align: center;"><i>vs.</i></div> CHARLES A. CORNISH, <i>et als,</i> <div style="text-align: right;"><i>Defendants.</i></div>
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Argued at November Term, 1911. Decided, April 11, 1912.

20 1. Prior to the adoption of the constitution of 1776 of the State of New Jersey, women had no legal claim to vote.

2. No right to vote was conferred on females by the constitution of 1776.

3. Even though the act of 1797 permitted females to vote, it was subsequently repealed by the statute of 1807.

30 4. The act of 1807 and subsequent statutes excluding females from the right to vote are not in contravention of the constitution of 1776.

5. The act of 1844, calling for a constitutional convention and which excluded women from voting for delegates thereto, was neither in contravention of the letter, nor of the spirit of the constitution of 1776.

40 6. The constitution of 1844 having been submitted to the vote of the people, in pursuance of the act of 1844, and adopted, is the fundamental law of this state until supplanted either by a new constitution

*Opinion.*

adopted, as that was adopted, or by amendment in the manner therein provided.

On rule to show cause why a peremptory mandamus should not issue.

Before Justices Trenchard and Kalisch.

For the relator, Mary Philbrook.

The opinion of the court was delivered by  
KALISCH, J. 10

Harriet F. Carpenter seeks to obtain a writ of mandamus to be directed to the members of the Board of Registry and Elections of Passaic Township, Southern District, requiring her to register her name, that she may be qualified to vote.

It is admitted that her application came too late to enable her to vote at the last November election, but she insists that her application should receive consideration so as to qualify her, by having her name upon the list to vote at the primaries in September of this year. 20

This presents the question of the right of women, who are in other respects qualified as to citizenship and residence, to vote in New Jersey. It is clear that under the constitution of 1844 women cannot vote. The argument advanced by the relator in behalf of the right of women to vote, notwithstanding the constitutional impediment, is that the constitution of New Jersey of 1776 gave to "all inhabitants" possessing certain qualifications, the right to vote; that certain statutes relating to elections subsequently passed, including the laws of 1790, in referring to those persons who are entitled to the right of suffrage mentioned them as "he" and "she"; and that women voted extensively throughout the state until 1807, when the first act was passed, depriving women of the right to vote. That the statute of 1807 and the subsequent statute passed in 1820 and 1838 depriving women of the right to vote are unconstitutional, and that the 30 40

*Opinion.*

act of the legislature, P. L. of 1844, page 111, provided for the election of delegates to the convention to frame a constitution, and excluding women from voting for such delegates, were also unconstitutional, in so far as it excluded women, and that therefore the provisions of the constitution of 1844 giving to every male citizen the right to vote cannot be held to exclude women, and that the election laws passed since the  
10 adoption of the constitution of 1844 are unconstitutional, in so far as they exclude women from the right to vote.

The premises upon which this argument rests are inaccurate and fallacious. There is nothing in the constitution of 1776 which confers on women the right to vote. The fourth clause of the constitution declares: "all inhabitants of this colony of full age, who are worth fifty pounds proclamation money, clear  
20 estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives in Council and Assembly; and also for all other public officers that shall be elected by the people of the county at large."

The contention of the relator is that the term "all inhabitants" in this clause includes the females as well as the male sex. And it is from this constitutional declaration that it is insisted by the relator  
30 that women derive the constitutional right to vote.

A careful reading of the clause demonstrates that the framers of the constitution had in view a particular class of inhabitants and that the inference drawn by the relator from the use of the term "all inhabitants" cannot be justified when the context is considered.

It is of material significance that the constitutional provision after declaring, "all inhabitants of this colony of full age, who are worth fifty pounds proclamation money, clear estate in the same" is followed by  
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*Opinion.*

this qualification: "and have resided within the county in which they claim a vote, for twelve months immediately preceding the election shall be entitled to vote," etc.

The plain and obvious meaning of this provision is that all inhabitants who are qualified as required by the constitutional provision and who have been legal voters before the adoption of the constitution and who claim a vote in the county in which they reside shall be entitled to vote in such county provided they have a residence therein for twelve months preceding the election. The term "all inhabitants" must be limited to those legally entitled to vote in this state before the adoption of the constitution and who have qualified under it. If it were not for this constitutional limitation referred to it might well have been maintained that the term "all inhabitants" included females of full age as well as males. In the absence of such a constitutional limitation there would have existed no good reason for excluding aliens, and negroes who were in a state of servitude, from exercising the elective franchise.

It is essential to observe that this constitutional provision is a simple declaration that those inhabitants of this state, who claimed a right to vote prior to the adoption of the constitution shall be entitled to vote, provided they are otherwise qualified, as prescribed therein. The words "claim a vote" must be understood to mean a lawful claim to vote, at the time of the adoption of the constitution. A fair reading of the constitutional clause makes it plain, that it is an affirmance of a privilege which was enjoyed by a certain class of inhabitants at the time of its adoption, and which will more clearly appear by a reference to the laws pre-existing the adoption of the constitution. It was not intended to confer the right to vote on all inhabitants irrespective of their sex, condition or servitude. The constitution dealt with the legal voter

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as then known and understood, and it was not intended to create a new and additional class of voters. The constitutional clause must be construed in the light of the conditions which existed at the time it was framed and by contemporaneous legislation. Due regard must also be had to the context in order to ascertain whether the term "all inhabitants" was used in a general or restrictive sense. It is manifest from the context of the constitutional clause that the term "all inhabitants" was used and intended to be understood in a restrictive sense, but to what extent can only be determined when it is ascertained what class of persons had a lawful claim to vote at the time of its adoption. It does not appear that before the adoption of this clause of the constitution women did exercise the right of suffrage. No such right was conferred on them by the law of the land. It appears conclusively that prior to the adoption of the constitution of 1776 the right to vote was exercised exclusively by the male inhabitants. Grants and Concessions of New Jersey (Leaming and Spice), p. 154, Sect. 111; Allison's Laws, p. 6, Chap. X, Sect. 1; p. 306, Sect. 1, pp. 69 & 70, Sects. 1 and 5.

It thus appearing that the male sex was the class who exercised the right and had a claim to vote from the earliest period of legislation in this state up to the time of the adoption of the constitution of 1776, leads us to the inevitable conclusion that the use of the term "all inhabitants" in said constitution, did not confer on women the right to vote.

Since this right to vote claimed by the relator did not exist prior to the constitution of 1776, and although females are not by express terms of its provision excluded from exercising the elective franchise, no right to exercise such franchise can be predicated upon it. It must be conceded that it was the intention of the framers of the constitution, in order to prevent a chaotic condition in the government of this state,

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to keep alive and in full force the laws which were in force at the time of the adoption of the constitution, in so far as they were consistent with the new form of government which had been created and which were not altered by the constitution.

The 21st paragraph of the constitution of 1776, reads: "That all the laws of this Province, contained in the edition lately published by Mr. Allison, shall be and remain in full force, until altered by the legislature of this colony (such only excepted as are incompatible with this charter) and shall be, according as heretofore, regarded in all respects by all civil officers, and others, the good people of this Province." 10

We have been dealing with the law as it was prior to and stood at the time of the adoption of the constitution of 1776, in order to ascertain the true purport and meaning of the paragraph therein relating to the class of inhabitants who shall exercise the right to vote. The first pronouncement of the legislature upon that subject and which may be regarded as a contemporaneous exposition by the legislature of the meaning of the mooted clause of the constitution because it was the very first legislative act passed concerning the subject in this state after the colonies had achieved their independence, is the act of 1783. Wilson's Laws, p. 346. 20

The seventh section of this act, on page 348, is in exactly the same language as that of the constitutional provision, with the exception that there is added thereto the following: "except such as may be hereinafter excluded for offenses committed against the State." 30

The eighth section provides: "That if any person's vote shall be objected against, it shall not be received until *he* shall have taken the oath of abjuration and allegiance prescribed by an act entitled, "An Act for the security of the Government of New Jersey, passed the nineteenth day of September, 1776," etc. 40

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Not until 1790, fourteen years after the adoption of the constitution, do we find any material change in this constitutional provision. See *Blauvelt's Laws*, Ed. 1790, p. 672, Sect. 11; and *Pat. Laws, 1797*, pp. 230 & 231, Sects. 9 & 11.

10 The material changes of the constitutional provision are to be found in the 11th section, which substitutes "all free inhabitants" for "all inhabitants" and omits the words "clear estate in the same" after the words "proclamation money" as contained in the original, and has added to it the following proviso: "and no person shall be entitled to vote in any other township or precinct, than that in which *he* or *she* doth actually reside at the time of the election"; and the 9th section which recites: "that every voter shall  
20 openly, and in full view, deliver his or her ballot (which shall be a single written ticket), containing the name of the person or persons for whom *he* or *she* votes," etc.

It can hardly be claimed that Section 11 of the Act of 1790 and which we incorporated in the Act of 1797 was in any sense contemporaneous legislation expounding the true meaning of the debated constitutional clause, when it is considered that the legislature, by omitting the words "clear estate in the same" contained in the constitution after the words "proclamation money," must have deliberately designed, re-  
30 gardless of the constitutional provisions, to give to those married women the right to vote who, though worth fifty pounds proclamation money, could not by reason of their marital relation under the then existing state of the law relating to married women, have a clear estate therein.

It is very likely, as has been urged by counsel for the relator, that after the passage of the acts of 1790 and 1797, some women availed themselves of the privilege to vote, but after all it was nothing more than a  
40 privilege emanating from a legislative act, which a

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subsequent legislature had a right to repeal, and later did repeal.

As had been said, it is manifest that the constitutional clause does not in express terms exclude women from voting, yet it is to be inferred from a fair reading of it, and from the state of the law as it was before its adoption, and the construction given it by the Act of 1783, that the right to vote was conferred only on the male inhabitants. 10

It was evidently due to the failure, of the clause of the constitution to limit the right to vote, in express terms, to male inhabitants, that gave rise to the uncertainty which existed in the public mind even after the passage of the Acts of 1790 and 1797 as to whether women were entitled to vote. The history of subsequent legislation reveals that the legislative construction given to the constitutional provision, by section 11, was challenged, and not generally acquiesced in. 20

In 1807, the legislature passed an act entitled, "An Act regulating the election of members of the legislative council and general assembly, sheriffs and coroners in this state; passed at Trenton the twenty-second day of February, one thousand seven hundred and ninety-seven," the preamble of which recites as follows: "Whereas doubts have been raised and great diversities in practice obtained throughout the state in regard to the admission of aliens, females, and persons of color, or negroes to vote in elections, as also in regard to the mode of ascertaining the qualification of voters in respect to estate. And whereas it is highly necessary to the safety, quiet, good order and dignity of the state, to clear up the said doubts by an act of the representatives of the people, declaratory of the true sense and meaning of the constitution, and to ensure its just execution in these particulars, according to the intent of the framers thereof; therefore: 30

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Sec. 1. Be it enacted by the council and general assembly of this state, and it is hereby enacted by the authority of the same,

That from and after the passing of this act, no person shall vote in any state or county election for officers in the Government of the United States or of this state, unless such person be a *free, white, male* citizen  
10 of the age of twenty-one years, worth fifty pounds proclamation money, clear estate," etc.

This act contains a repealer, repealing all conflicting sections therewith. Bloomfield's Laws, p. 33.

It is conceded that from the time of the passage of the Act of 1807, up to the adoption of the constitution of 1844; females did not claim any legal right to vote. The constitutionality of the Act of 1807, which gave a settled meaning to the constitution of 1776, relating to the exercise of the right of suffrage, went  
20 unchallenged and so remained for more than a century. But even if it was admitted that under the constitution of 1776, women were entitled to vote, and that subsequent legislation deprived them of that right, we are unable to perceive any foundation for the present application, since it appears that in 1844 the people of this state adopted a constitution which limited the right of suffrage to male citizens that had attained the age of twenty-one years. The attack  
30 upon the legislative act of 1844, which called for the constitutional convention and excluded women from the right to vote for the delegates to that convention upon the ground that it is unconstitutional, is a result of the fallacy of the position of counsel for the relator, in assuming that such an act could only be justified by constitutional authority; but this is not so. It required no constitutional authority. It was the exercise of the sovereign power of the people. It provided, as a matter of course, that the constitution framed by the delegates should be submitted to the vote of the  
40 people. The constitution of 1844 was so submitted to

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the vote of the people. The constitution, therefore, rests for its validity upon the public will and being adopted in that manner is the fundamental law of the land until supplanted either by a new constitution adopted as that was adopted, or by amendment in the manner therein provided.

The rule to show cause will be discharged.

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*Assignment of Errors.*

## Assignment of Errors.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	HARRIET F. CARPENTER, <i>Plaintiff in Error,</i> <i>vs.</i> CHARLES A. CORNISH, <i>et als,</i> <i>Defendants in Error.</i>	}	<i>Assignment of Errors.</i>
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20      Afterwards, to wit, that is to say, on the second day of May, nineteen hundred and twelve, before this honorable court here, comes the plaintiff in error, Harriet F. Carpenter, by Mary Philbrook, her attorney, and says that there is manifest error in the record and proceedings in the above stated cause, before the said New Jersey Supreme Court and in the giving of judgment in discharging the rule to show cause in said Supreme Court.

30      That it is therein adjudged that said Harriet F. Carpenter is not a qualified voter under the constitutions and laws of the State of New Jersey, and is not entitled to be registered as such in the Township of Passaic, Southern Division, whereas by the law of the land, judgment ought to have been given for said Harriet F. Carpenter, and a writ of mandamus should have been granted directing Charles A. Cornish, Frederick Richter, Arthur N. Swenson and Walter Holmes, members of the Board of Registry and Elections in Passaic Township, Southern Division, to allow her to register as a qualified voter.

40      All which matters and things were to the great wrong and injury of the said plaintiff in error, by means whereof the said order of the said Supreme

*Assignment of Errors.*

Court is erroneous and contrary to law; and the said plaintiff in error prays that the said order discharging the rule to show cause be reversed, set aside and for nothing holden as to her and that she the said plaintiff in error, may be restored to all things which she may have lost by reason of said order discharge said rule to show cause.

MARY PHILBROOK,  
*Attorney of Plaintiff in Error.*

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Filed June 1, 1912.

DAVID S. CRATER,  
*Clerk.*

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*Notice of Argument.*

Notice of Argument.

NEW JERSEY COURT OF ERRORS AND  
APPEALS.

10	HARRIET F. CARPENTER, <i>Plaintiff in Error,</i>
	<i>vs.</i>
	CHARLES A. CORNISH, <i>et als,</i> <i>Defendants in Error.</i>

20 To Charles A. Cornish, Frederick Richter, Arthur N. Swenson and Walter A. Holmes, members of the Board of Registry and Elections in Passaic Township, Southern Division.

Please take notice of the argument in this cause before the Court of Errors and Appeals, of New Jersey, to be held at Trenton, at the State House, on the third Tuesday of June next at ten o'clock in the forenoon, or as soon thereafter as the said court can attend the same.

Dated May 21, 1912.

Yours respectfully,

30 MARY PHILBROOK,  
*Attorney.*

Filed June 1, 1912.

DAVID S. CRATER,  
*Clerk.*

# New Jersey Court of Errors and Appeals

HARRIET F. CARPENTER,

*Plaintiff,*

*vs.*

CHARLES A. CORNISH, *et als.*,

*Defendants.*

*On Mandamus.*

## **Brief for Plaintiff.**

The facts in this case are as follows:

Harriet F. Carpenter, a woman of full age, and a resident and taxpayer of Stirling, in the Township of Passaic, southern division, New Jersey, applied to the Board of Registry and Elections of that district on the thirty-first day of October last, for leave to register as a qualified voter. She was refused the right to register because she was a woman.

The plaintiff claimed the right to register under the provision of the Constitution of 1776, which reads as follows: "All inhabitants of this colony of full age, who are worth fifty pounds proclamation money, clear estate in the same, and have resided within the county in which they claim a vote for twelve months immediately preceding the election, shall be entitled to vote for representatives, in council and assembly and for all other officers elected by the county at large."

In 1787, the United States Constitution was adopted, and the clause providing for the election of members of the house of representatives, is as follows: "The house of representatives shall be composed of members chosen every second year by the people of the several states; and the electors in each state

shall have the qualifications requisite for the most numerous branch of the state legislature."

On November 18, 1790, the New Jersey Legislature, passed an act as follows: "An act to regulate the election of members of the Legislative Council and General Assembly, Sheriffs and Coroners in the counties of Bergen, Monmouth, Burlington, Gloucester, Salem, Hunterdon and Sussex," and in this law the voters were spoken of as "he" and "she." See Section 11.

On February 22, 1797, the legislature of the State of New Jersey, passed another act entitled, "An act to regulate the election of members of the Legislative Council and General Assembly, Sheriffs and Coroners in this State;" and in this law the voters were again spoken of as "he" and "she."

At that time women voted extensively throughout the state. Every history relates this fact.

On November 16, 1807, the legislature passed a law, declaring that the Constitution of 1776 did not mean that women and aliens and negroes should be included in the grant of suffrage, and it passed an act purporting to take their right away, and provided that in the future only "white male citizens" shall have the right to vote.

Subsequent election laws, the revision of 1820 and 1839, exclude women from the right to vote.

On February 23, 1844, the legislature of New Jersey passed a law providing as follows: "An act to provide for the election of delegates to a Convention to prepare a constitution for the government of this state, and for submitting the same to the people thereof, for ratification or rejection." This act provided that only white male citizens should have the right to vote for delegates to the convention, and only white male citizens should have the right to vote for the ratification or rejection of the constitution, when framed.

Pursuant to the provisions of this act an election was held; delegates were elected to the convention and

the convention framed a constitution which was submitted to the "white male citizens," and declared adopted. The suffrage clause in the Constitution thus adopted provides as follows: "Every male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this state one year, and of the county in which he claims his vote five months, next before the election, shall be entitled to vote for all officers that now are, or hereafter may be elective by the people."

The election law of 1846, following the making of this Constitution, restricts the right to vote at elections to male citizens.

In 1876 the act to regulate elections, does not specifically fix the right of suffrage, but says: "Every person who is entitled to vote under the Constitution of this state shall have the right to vote in the precinct wherein he resides, and not elsewhere." The revision of the election law (1898), which is now in force, is worded likewise.

Neither the election law of 1898, nor the law of 1876, fixed the qualification of voters of presidential electors, although such elections are provided for in the act.

In acts relating to municipalities, where it is required that certain laws must be submitted to the people for adoption, no qualifications are fixed for the voters, and those entitled to vote are simply mentioned as "legal voters."

The points relied upon by plaintiff are as follows:

1. That the provisions of the suffrage clause in the Constitution of 1776, which gave all inhabitants the right to vote, included women, and is still operative.

2. That the act of November 16, 1807, was unconstitutional, because the legislature had no authority to amend the Constitution of 1776, or abridge the

rights of citizens. That subsequent election laws depriving women of the right to vote were also unconstitutional.

3. That the Act of 1844, which provided for the election of delegates to form a convention for framing a constitution, and for submitting the same, when framed, to the vote of white male citizens, was unconstitutional and void in so far as it deprived women of the right to vote; and the constitution, adopted pursuant thereto, in so far as it deprived women of the right to vote, is void and of no effect.

4. That the Act of 1844, providing for the constitutional convention, the election of delegates to the convention, and the adoption of the constitution of 1844, was a legal procedure and subject to the rule which forbids taking away property or liberty without due process of law.

5. That the adoption of the Constitution of 1844 was not a revolutionary measure.

6. That the Constitution of 1776 was a contract, and the right to vote was a grant which the Constitution of 1844 could not impair without violating the United States Constitution.

7. That even though the Constitution of 1844 was declared properly adopted, or could be considered a revolutionary measure, it did not deprive women of the right to vote for members of Congress, such right having been granted by the United States Constitution to those who had the right to vote for the most numerous branch of the state legislature.

8. That the adoption of the Constitution of 1844, in so far as it deprived women of the right to vote, was a violation of the United States Constitution, which guaranteed to every state a republican form of government.

9. That neither the legislature nor by Constitution can abridge the rights of citizens.

10. That the Constitution of 1844, if it defeated at all the right of women to vote, only deprived them of the right to vote for such "officers" as are mentioned under the title "civil officers" in the Constitution.

11. That the Constitution of 1844, does not fix the qualifications of voters for: a. Members of the Senate and Assembly; b. Municipal officers; c. Questions referred to the people; d. Presidential electors; e. Primary elections; f. Election of delegates to the national and state conventions; and in the absence of any qualifications fixed by the constitution, the right to vote at such elections belongs to the people—women as well as men.

12. That all laws providing for elections of any other "officers" than those mentioned in the Constitution under the title of "civil officers," or for elections wherein the qualification of voters are fixed by the legislature, do not exclude women from the right to vote.

In the decision handed down by the Supreme Court, Mr. Justice Kalisch gives as his first reason for denying the application of Miss Carpenter to register, that the phrase "All inhabitants," in the Constitution of 1776 did not include women in its suffrage clause. His conclusion is based on the allegation: (1) That women did not vote prior to the adoption of the Constitution of 1776, and therefore the right cannot be predicated upon it; (2) That the phrase "all inhabitants" could not mean women, otherwise it would mean "negroes and aliens"; (3) That it could not mean women because married women were restricted in the use of their property, and consequently could not have a clear estate; (4) That the right of suffrage granted to "all inhabitants" must be constructed as restricted to such voters as were qualified under the common and statute law of England, as prescribed in Leaming and Spicer, and Allison's Laws.

In forming these conclusions, the Supreme Court has utterly ignored the legislative history of New Jersey, as well as such judicial decisions of the State and United States Supreme Court, as bear on this point. This opinion of the Supreme Court brings to mind the reasoning in the Dred Scott case, which Lincoln shattered in his famous speech on the Dred Scott decision. Lincoln quoted Justice Douglas, who upheld Justice Taney, as follows:

“No man can vindicate the character, motives, and conduct of the signers of the Declaration of Independence, except upon the hypothesis that they referred to the white race alone, and not to the African, when they declared all men to have been created equal; that they were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain,” and in reply Lincoln says:

“My good friends, read that carefully over some leisure hour, and ponder well upon it; see what mere wreck-mangled ruin it makes of our once glorious Declaration. They were speaking of British subjects on this continent being equal to British subjects born and residing in Great Britain. Why, according to this, not only negroes, but white people outside of Great Britain and America were not spoken of at all in that instrument. The English, Scotch and Irish along with the white Americans were included, to be sure, but the French and Germans, and other white people of the world are all gone to pot along with the Judge’s inferior races. I had thought the Declaration promised something better than the condition of British subjects; according to that it gave no promise that, having kicked off the King and lords of Great Britain, we should not be saddled by a King and lords of our own. I had thought the Declaration contemplated the

progressive improvement in the condition of all men everywhere."

The people believed Lincoln was right and he voiced the sentiments of the people.

Now, our Supreme Court, nearly one hundred and fifty years after the making of our own State Constitution, says practically the same thing Justice Taney said in the Dred Scott case; that the Constitution of the State of New Jersey, made in 1776, gave the right to vote only to British subjects, and such as were qualified under the English government.

Let me submit our facts, which to a candid mind, must disprove the statements and conclusions of Justice Kalisch, that our Constitution did not include women, negroes and aliens in providing for the right to vote.

The earliest trace in New Jersey of the right of suffrage is found in the grant to Berkeley and Carteret in 1664 and much of the early history has been obtained from the History and Gazeteer of New Jersey by Thomas J. Gordon, 1834, and the Civil and Political History of New Jersey by Mulford, 1858; and from Leaming and Spicer. The facts are as follows:

Toward the close of the seventeenth century the civil, political and religious liberty of the people were engaging the attention of thoughtful people in England and elsewhere. The Quakers were prominent in these agitations; but the people who had already settled in the colonies had become more advanced in their theories than those who lived across the seas. Berkeley and Carteret understood the needs of the people, and as an inducement to people to come and live in the new territory they offered them a liberal government. They invited people to inhabit their province, and they prepared a constitution which they published under the title of "The Concessions and Agreement of the Lords Proprietors of New Jersey to and with all and every of the adventurers and all as shall

settle and plant there." It provided that all who swore allegiance to the King and faithfulness to the Lords Proprietors should be admitted to plant and become freemen of the Province, and that the inhabitants being freemen or chief agents to others, should have the right to choose 12 representatives to unite with the Governor and Council in making laws; and that as soon as the proper territorial divisions should be made, that the inhabitants or freeholders thereof should have the right annually to elect representatives. They offered tracts of land to all persons who had already adventured or should transport themselves to the colony, provided they came armed with a musket, 10 pounds of powder and 20 pounds of bullets, with bandeliers and matches and with six months' provisions. "To the master and mistress and to every freeman or freewoman that shall arrive armed before the first of January, 1665, 120 acres and like quantity of an able bodied male servant taken with them or by them; and for other servants or slaves as above, 60 acres for servant's own use when able, and 45 acres when of the weaker class." If the women came armed and took up these grants, can it be doubted that they were entitled to vote?

In 1673 Lord Berkeley sold his share in the Province to the Quakers, Fenwick and Byllinge, and West Jersey was then established under a separate government. In 1676 the Proprietaries granted concessions similar to those granted by Berkeley and Carteret. They provided that thereafter upon further settlement of the Province the proprietors, freeholders and inhabitants, resident upon said Province shall assemble and elect of and amongst themselves 10 honest and able men fit for government. They further agreed upon a charter or fundamental laws, and expressly stipulated that the assembly should make no laws in the least to contradict, differ or vary from the fundamentals. In these fundamentals women were subject to arrest for debt, showing that they controlled their own property.

Gordon tells us that all men immigrating to America sought not only religious and civil freedom, but also security which they could receive in the form of permanent records or constitutions. "Under this government the most entire liberty of conscience was established and the political power was emphatically in the people; the right of suffrage was universal, the personal liberty of the citizen was cherished." What he meant by universal suffrage is hard to tell, but as women were induced to come and come armed, and the Quakers believed in equal rights for women, it is not unlikely that women engaged in the affairs of government. The power of government went with the soil. The grants were broad enough to concede it.

In 1681 the Assembly of West Jersey enacted certain fundamentals and in them provided "that there shall be a general assembly for the province aforesaid, chosen by the *free people* of the province \* \* \* to make and ordain such acts and laws for the good government of and prosperity of the free people of said province." The whole of West Jersey was then taken up by the Quakers.

In 1683 East Jersey adopted a fundamental constitution for the government of the province; it provided for a great council, to consist of four and twenty proprietors and 144 to be chosen by the freemen of the province. "The persons qualified to be freemen that are capable of choosing and be chosen in the Great Council, shall be every planter and inhabitant dwelling and residing within the Province, who has acquired rights to and in possession of 50 acres of ground \* \* \* in boroughs who have a house and 3 acres \* \* \* or have a house and land only hired if he can prove that he has 50 pounds in stock of his own."

In these fundamentals they agree not to vote for persons guilty of certain crimes, one of which crimes is so wholly applicable to women as to leave no doubt

that women were qualified to take part in the Government.

In 1698 we find an Act declaring what the rights and privileges were of his Majesty's subjects within the Province of East Jersey, and it is declared that all freeholders and inhabitants of the respective towns or divisions within the province shall choose freeholders \* \* \* to be the representatives. By this act women were allowed to sell their property without the consent of their husbands, the only condition being that they should acknowledge the deed before a Court of Right and be secretly examined to learn if they freely signed it.

Later the "actual inhabitants" of the Town of Burlington, who were seized in fee simple of a house and land, were given the power to elect an officer as first magistrate, who with the consent of the majority of the freeholders inhabiting said town had the power to make laws.

About 1698 the people of East and West Jersey surrendered their right of Government to the Crown, and in the instructions by the Crown to Lord Cornbury, the Assembly of New Jersey was to consist of 2 members elected by the inhabitants, householders of Perth Amboy, 2 by the inhabitants, householders of Burlington, 10 by the freeholders of East New Jersey and 10 by the freeholders of West New Jersey.

Even at this period the right of suffrage was practically universal. During this whole period there was no exclusion of women from governmental affairs. If women did not vote it was because they did not care to exercise their right, not because the laws were too narrow for such interpretation. The right of government went with the land, and taxation without representation was too deeply imbedded in their hearts to deny such a right.

Later the right of suffrage was restricted to freeholders. The right to vote in New Jersey had never

been a common law right nor governed by the statute of Great Britain. The right to govern went with the soil and only after the surrender by the proprietors in 1698 could it be said it was controlled at all by English customs. From the time Lord Cornbury assumed the governorship of the Province there was constant dissatisfaction. The people chafed under the fact that they had surrendered their right to govern and grew bitter at being taxed without representation. The first crisis came in 1774, when the "Inhabitants," not only the then qualified voters of the several counties, nominated deputies to meet in convention for the purpose of electing delegates to Congress. This convention consisted of 73 members and met at New Brunswick. It elected Stephen Crane, chairman; Jonathan Sergeant, clerk, and nominated James Kinsey, William Livingston and Joseph De Hart, Stephen Crane and Richard Smith as members of Congress, and also nominated other prominent men of that body as committee of correspondence. In 1775 this committee of correspondence issued a call for a second Provincial convention, which consisted of the leading men of the times. This convention when organized elected Hendrick Fischer president, Samuel Tucker vice-president, Jonathan D. Sergeant secretary, William Paterson and Frederick Frelinghuysen as assistant secretaries. It adopted a form of an association in order that it might be signed by the inhabitants. The opening clause provided as follows:

"We, the subscribers, freeholders and inhabitants \* \* convinced that the preservation of the rights and privileges of America depends under God on the firm union of its inhabitants; do with hearts abhorring slavery and ardently wishing for a reconciliation with our parent state on constitutional principles \* \* solemnly associate and resolve \* \* endeavor to support and carry into

execution whatever measures may be recommended by the continental and our Provincial Congress for defending our constitution and preserving the same inviolate."

Could there be more conclusive proof that in the design of our state government that "all inhabitants" meant others than the "Freeholders" who had the right to vote under the English government? "Inhabitants" unquestionably meant all who wanted to come under the new government.

This Provincial Congress reassembled in August, 1775 and provided by ordinance for another Provincial Congress, and inhabitants qualified to vote for representatives in the Assembly were given the right to vote to organize the Provincial Congress. This Congress was dissolved and subsequently an election was held for the purpose of forming still another Provincial Congress. When this last Congress was organized, they immediately drafted an ordinance, numbering the inhabitants, including negroes and mulattoes. On page 429 of the Proceedings of the Provincial Congress we find an ordinance extending the qualification of electors, as follows: Whereas, the Ordinance for the regulation of the election of Deputies to serve in the Provincial Congress of this Colony doth not sufficiently answer the good purposes intended.

And whereas, at this particular period it appears to be reasonable and expedient to extend the qualifications of electors to persons possessing certain degrees of property as well personal as real, and to the end that elections, upon which the safety of the people so much depend may not be corruptly managed or obtained;

Be it enacted that all freeholders, qualified to vote for representatives in General Assembly in this colony who have signed the General Association recommended by this Congress; and all other persons of full age, who immediately preceding the election shall have

resided for the space of one year in any county of this colony and who are worth at least fifty pounds proclamation money clear estate, and have signed the General Association aforesaid, shall be admitted to vote in the county wherein he resides for deputies to serve in the Provincial Congress.

The Provincial Congress which passed this ordinance was the same body which drafted the Constitution of 1776. Having extended the right of suffrage to all persons, can it be doubted that the term "all inhabitants" in the Constitution of 1776 did not mean all inhabitants and not as Justice Kalisch claims, British subjects who had the right to vote under the English Government? The Provincial Congress was made up as follows:

John Demarest, Jacobus Post, John Van Buskirk, Jacob Quackenbush, Daniel I. Brown, Abraham Clark, Lewis Ogden, Caleb Camp, Robert Drummond, Stephen Crane, John Wetherill, John Dunn, Azariah Dunham, Jonathan D. Sergeant, Moses Bloomfield, John Combs, Jacob Drake, Silas Condict, Ellis Cook, William Woodhull, Jacob Green, Hendrick Fisher, Jacob R. Hardenbergh, James Linn, William Paterson, Frederick Frelinghuysen, John Witherspoon, Ephriam Martin, Thomas Potts, Isaac Van Campen, Casper Shever, John Cleves Symmes, Samuel Tucker, John Mehelm, John Hart, Philemon Dickinson, John Allen, Edward Taylor, John Covenhoven, Joseph Holmes, James Mott, Josiah Holmes, Peter Tallman, Thomas Reynolds, Thomas Fennimore, Charles Read, Caleb Shreve, John Cooper, Joseph Ellis, Elijah Clark, John Sparks, Joseph Hugg, Andrew Sinnickson, Joseph Shinn, Whitten Carps, Samuel Dick, John Holone, Theophilus Elmer, Jonathan Ayers, Ephriam Harris, John Buck, Jonathan Bowen, Jesse Hand, Elijah Hughes, Thomas Leaming, Jr., Joseph Savage, Hugh Hathorn.

They elected Samuel Tucker as President and William Paterson as Secretary. The committee appointed

to draft the constitution consisted of Jacob Green, John Cooper, Jonathan D. Sergeant, Lewis Ogden, Elijah Hughes, John Covenhoven, John Cleeves Symmes, Silas Condict and Samuel Dick.

In looking back over the list of men who formed the several Provincial Congresses, and particularly those men who formed the Congress which framed the constitution in 1776, can it be doubted that they were ~~not~~ taking into consideration the extent of the term "all inhabitants?" They were learned men with a vast knowledge of law and customs, and a thorough insight into the subject under consideration. They had previously, by ordinance, extended the right of suffrage beyond that ever enjoyed under the laws of Great Britain, and it is <sup>unreasonable</sup> ~~folly~~ to say that they used a term they did not mean. They abhorred slavery and in providing for suffrage they meant to "declare a right so that the enforcement of it might follow as fast as the circumstances would permit."

No men have ever left so deep an impression upon our people as the men who took part in those conventions. Many of them were afterwards sent to Congress. William Paterson distinguished himself as one of the makers of the United States Constitution.

Lord Chatham, in Parliament, declared that though he had studied and admired the free states of antiquity, yet "for solidity of reasoning, force of sagacity, and wisdom of conclusion no body of men could ever stand in preference to this Congress. The Americans say that we have no right to tax them without their consent, and they say truly, Taxation and Representation must go together. They are inseparable. The Americans, do not hold the language of slaves, they speak out; they do not ask a repeal of our laws as a favor, they claim it as a right; they demand it; they say they will not submit to them; and I tell you the acts must be repealed; you cannot enforce them."

Following the making of the Constitution of 1776 we find in every legislature for many years after-

wards men who took part in framing that Constitution. In 1790, when the election law was passed, in which the voters were spoken of as "he and she," we find in the Legislature Joseph Ellis, William Woodhull, Frederick Frelinghuysen, James Linn and Ellis Cook, five of the men who made that constitution, and in which constitution all inhabitants were given the right to vote. We find in that year William Paterson as Governor, who must have ~~sanctioned~~<sup>sanctioned</sup> the law. He knew what the Constitution meant, he knew the legislature could not pass such a law. He knew the legislature could not fix the qualifications of voters for members of the legislature. He was a master of constitutional law, and would not have abused the confidence of the people.

In that same legislature (1790) were Jonathan Dayton, who helped draft the United States Constitution, and other prominent men and lawyers—Peter Vroom, Peter Vredenburg, Robert Stockton and John Lambert, afterwards Governor.

Can any honest mind doubt the sincerity<sup>and accuracy</sup> of those men when they incorporated in the election law of 1790 the words which made it conclusive that all inhabitants meant women as well as men? Could a legislature composed of men of such qualities be accused of giving to women by mere legislative grant, the right of suffrage? They knew that the term "all inhabitants" meant what it said, and they were honest in their interpretation of it. The men who made that constitution did not want to limit the right of suffrage. They did not want to define negatively who should not vote. They lived amongst men who believed in equal rights for women. They were prepared for development.

Livingston's first speech as Governor demonstrates this, when he says:

"In fine, gentlemen, whilst we are applauded by the whole world for demolishing the old fabric, rotten and ruinous as it is, let us unitedly

strive to approve ourselves master builders, by giving beauty, strength and stability to the new. Let us by precept and practice encourage a spirit of economy, industry and patriotism, and that public integrity and righteousness, which cannot fail to exalt a nation; setting our faces at the same time like flint against that dissoluteness of manners and political corruption, which ever must be the reproach of any people."

But if the above facts are not conclusive, that "all inhabitants" included women, let us look at the law of 1797 which is also an election law, and in which the voters are again spoken of as "he and she." In the Senate at that time were George Anderson, Samuel Ogden, John Condict, Joseph Cooper, Aaron Kitchell, John Lambert and James Linn, all of whom served in the Legislature of 1790. And we also find other names, who were leading men of our State, such as Silas Condict, Andrew Kirkpatrick, William S. Pennington and many others. Silas Condict and James Linn were both members of the convention which drew the constitution, and Silas Condict actually took part in drafting it, being one of the committee appointed for that purpose. Legislation by such men entitles it to the weight of a judicial construction of the constitution.

John Lambert, who served as Senator from Hunterdon County in 1790 and 1797, afterwards became Governor of New Jersey.

Should not our State <sup>*prime before accepting*</sup> the decision of the Supreme Court, which a hundred years later declares that those men did not put a practical construction on that constitution; that these acts were legislative grants of suffrage only, and that they could be taken away at the will of the legislators? Could those men be so ignorant of fundamental law?

"The men who made the constitution decided this same constitutional question in our favor

long ago—decided without division among themselves, when making the decision, without division among themselves about the meaning after it was made, and so far as any evidence is left, without basing it upon any mistaken statement of facts.”

But in order to add another bit of proof to show the frailty of Judge Kalisch's contention, I want to refer not only to the dissenting opinion of Justice Curtis in the Dred Scott case, in which he emphatically states that negroes not only had the right and did take part in the early government of our State, but I wish to refer particularly to the case of *State vs. Middlesex, Coxe*, 292. The charter of the City of New Brunswick provided for local elections and declared that elections shall be conducted in all respects in the same manner and under the same regulations as the election of members of the Assembly.

The suit in question was brought to the Supreme Court on *certiorari* to set aside an election held in New Brunswick, and among other things the election was objected to because “a negro man voted, who had no legal residence; and his declaration that he had been manumitted in another state, was received as sufficient proof of his being entitled to vote.” The objection was not the right of a negro to vote, but that he did not establish sufficient proof of his residence. In discussing the case Justice Kinsey seemed to think the bare word of one man that he was qualified, the affirmance of a black man that he had been manumitted ought not to be sufficient. Not a hint was given as to the inability of a negro to vote who had been a resident. It was assumed a negro had the right to vote. The case was tried in 1794, and Justice Kinsey who heard the case was a member of one of the Provincial Congresses of 1775. He knew negroes had the right to vote, and that the constitutional provision “all inhabitants” did not mean only “white male citizens.”

In the case of *Stewart vs. Foster*, 2 Binney, 119, the Supreme Court of Pennsylvania, in 1809, construed the word "inhabitants" to include aliens and delivered the following ~~opinion~~ *opinion*:

"It is not contended that by the words of this law, there is any disqualification of aliens as voters; but it is said that the law is to be construed by equity; that by its literal expressions women and infants might vote, and that by the principles of the common law, it is as proper to exclude an alien, as a woman or an infant. If there had been no reason to suppose that the case of aliens had been under the consideration of the legislature, and if it did not sufficiently appear by the words of the law, that it was not intended to exclude them, it would be necessary to consider the weight of this argument, derived from the principles of the English common law. But as the case is, I shall only say, that the argument is not so forcible here, as it would be in England, because Pennsylvania, both under the proprietary government, and since her independence, has held out encouragement to aliens, unknown to the principles of the common law. I found my opinion solely on the expression of the act of assembly. When I find the qualifications of the electors and elected, different; when I see that none but citizens can be elected, but that inhabitants who have resided one year, and paid a borough tax within that time may be permitted to vote, I am irresistibly led to the conclusion, that in the view of the legislature, the peace and prosperity of the borough were sufficiently secured, by providing that the officers elected should be citizens, although aliens of a certain description, who from length of residence, and payment of taxes, might be supposed to have a common interest with the other inhabitants, were indulged with the right of voting."

In the case of *Minor vs. Happersett*, 21 Wall., 162, Chief Justice Waite in discussing the early Constitutional provisions for suffrage in the several states, says: "In all save perhaps New Jersey, this right was only bestowed upon men and not upon all of them."

Justice Lucius Q. Elmer, in an article on the Constitution of 1776, read before the Historical Society, Vol. 7, page 25, &c., in 1875, says, "Before the adoption of the Constitution of 1776, the only persons entitled to vote for members of the Assembly were freemen, and only such voted for delegates to the Provincial Congress. But as there were many able-bodied inhabitants who were not freeholders \* \* it was voted that every person of full age \* \* should be admitted to vote." He relates the fact that women were deprived of the right and said the act was considered unconstitutional.

In the case of *Bott vs. Secretary of State*, 33 Vr., 121, Justice Depue discusses the Constitution of 1776 and the act under which the Constitution of 1844 was submitted to the people. "It provided for the election of delegates to the Convention ~~BY A CONSISTENCY~~ *constituency* ~~HAVING OTHER QUALIFICATIONS THAN THOSE PRESCRIBED BY THE CONSTITUTION OF 1776.~~ The property qualification contained in that Constitution was eliminated and in the place of a residence within the county for one year preceding the last election, the act of 1844 conferred the right of suffrage upon citizens who resided within the state for one year, and in the county for five months next preceding said election. Nevertheless, from the time that instrument was promulgated, until 1844, it was the fundamental instrument of government of this state, submitted to by the legislative, executive, and judicial departments of the government, and also by the people of this state, as having the force of a Constitution. The Constitution of 1776 made no provision

for an amendment. During the later years of its supremacy a new constitution was earnestly advocated; but no one supposed that it was competent for the people to inaugurate measures for the adoption of another constitution without legislative action. *The act of 1844 created a constituency for the election of delegates to the convention and for submission to the people with qualifications different from those prescribed by the constitution then in force.*"

Following the organization of the State of New Jersey in 1776, we find comprising the members of the Supreme Court, men who drafted that Constitution. In 1777, when the Supreme Court consisted of Justice Brearly, as Chief Justice and Justices Isaac Smith and John Cleves Symmes as associates, the first case was decided denying the right of the legislature to alter the Constitution. It was the famous case of *Holmes vs. Walton*, which Dr. Austin Scott, President of Rutgers College, has dug from the records and so clearly set forth in his little pamphlet entitled, "*Holmes vs. Walton: the New Jersey Precedent.*" Justice Symmes assisted in drawing up the Constitution and was well fitted to determine this important matter.

Later Justice Kirkpatrick delivered the famous opinion in the case of *State vs. Parkhurst*, in which he clearly defines the powers and duties of the departments of the state, and denies the right of the legislature to pass any laws in conflict with the Constitution. He was in the legislature of 1797, when the words "he" and "she" were again placed in the election law.

It is probable a more careful search would disclose other cases. These cases, however, were accepted as determining the authority of the Supreme Court to pass upon unconstitutional legislation. These Justices lived through the period of the making of the greatest Constitutions the world has even known.

They were lawyers and statesmen. They had studied constitutions before they were made judges; they knew how a Constitution ought to be defended; and they knew its limitations. The judges of that period, if not actual makers of that Constitution were contemporary with the leading men of the time. They knew as Lincoln said, "Its authors meant it to be a stumbling block to all those who after times, might seek to turn a free people back into the hateful paths of despotism. They knew the proneness of prosperity to breed tyrants and they meant when such should reappear in this fair land and commence their avocation, they should find left for them at least one hard nut to crack."

But notwithstanding these decisions, a legislature of much later date, that of 1807, by legislative act, presumed to take from women and aliens and negroes the right to vote. Whether it was done under the assumption that they had the legislative power to do so, or whether they assumed judicial powers to construe the Constitution, it is difficult to tell. Our history is silent on the subject. Whether women voted after that no one knows. All we know is that this law was always considered unconstitutional and provoked a contested election as late as 1837 in Cumberland County, which led to the Broad Seal War.

If such laws were not invalid because they violated the Constitution, they were invalid because they abridged the rights of citizens. They were invalid because the legislature never had any power to determine the qualifications of those who elect them. Such a usurpation of power was tyrannical. The drafters of the Constitution of 1776 realized, that, while still only members of the Provincial Congress, they must enlarge the right to vote to all persons; they realized, that in the making of a new government, all inhabitants formed a part.

Justice Kalisch explains the words "he" and "she" and "his" and "her" in the election laws of 1790 and 1797 as legislative grants of suffrage, which could be taken away by legislative act; and that they were taken away by the act of 1807. If he infers the legislature had the right to grant suffrage to women, does he not reverse the decision of the Supreme Court rendered in the cases of *Holmes vs. Walton* and *State vs. Parkhurst*, which held the legislature could not amend the constitution of 1776? If these decisions settled the question of the authority of the legislature to amend the constitution, then the only other explanation of the words "she" and "her" in the election laws of 1790 and 1797, is, that they were contemporaneous construction of the constitution, placed there by men, some of whom helped frame the constitution. They could have no other meaning.

If, however, the constitution gave the legislature an implied right to grant suffrage to women, such an act operated as an amendment to the constitution, and being a part thereof, became a vested right which the legislature could not recall, except by consent of the women, or by giving them the opportunity to defend the right. A privilege of this kind once granted may be forfeited, but never withdrawn, otherwise the delegation of such power would invest a legislature with the right to deprive all men of the right of suffrage and to create, if it so desired, an aristocracy, a monarchy or an oligarchy. The history of the making of our constitution is opposed to such a theory, and leaves little doubt that such legislative power was withheld.

A careful examination of the act of 1807, which Justice Kalisch held deprived women of the right to vote, shows that it was not an attack upon the legislative grant of suffrage, but rather a declaration of the meaning of the suffrage clause in the constitution, or perhaps a criticism of the construction placed up-

on the constitution by the legislatures of 1790 and 1797. It failed, however, in its purpose as a repealer, because the legislature could not deprive women of the right to vote for "officers in the Government of the United States" as that was fixed by the United States Constitution; and members of the council and assembly could hardly be termed "state officers." The act failed to mention county officers.

The acts of 1807, 1820 and 1839, depriving women of the right to vote are therefore clearly violation of all fundamental law. They deprived women of property, of rights, without the due process of law which the common law guaranteed them.

"The constitution is certain and fixed; it contains the will of the people, and is the supreme law of the land. The life giving principle and the death doing stroke must proceed from the same hand."

*Van Horne vs. Dorrance*, 2 Dall, 304.

"The fact that statutes have been long in existence is not sufficient reason why the court should not now declare them unconstitutional."

*Sadler vs. Moore*, 34 Ala., 311.

"The definition of the right of suffrage is justly regarded as a fundamental article of republican government. It was incumbent on the convention therefore, to define and establish this right in the constitution. To have it left open for the occasional regulation of Congress, would have been impossible for reasons just mentioned. To have submitted it to the legislative discretion of the states, would have been improper for the same reason; and for the additional reason that it would have rendered too dependent on the state government, that branch of the Federal government which ought to be dependent on the people alone. It must be satisfactory to every state, because it is conformable to the standard already

established, or which may be established by the state itself. It will be safe to the United States, because, *being fixed by the State Constitutions, it is not alterable by the State governments*, and it cannot be feared that the people of the state will alter that part of their constitution in such a manner as to *abridge the rights secured to them by the Federal Constitution.*" The Federalist Ed. by Henry B. Dawson, page 365, 366.

At the time of the adoption of the United States Constitution, the New Jersey Constitution had been in force *eleven* years. The articles in the Federalist were written shortly after the adoption of the United States Constitution, by men thoroughly grounded in constitutional law. If, in their opinion, the right of suffrage was fixed by the State Constitution and alterable only by the people, it is safe to say that it was the intention of the State of New Jersey to make its suffrage clause a fixed institution and not alterable at the will of the legislature.

It can hardly be said that the legislature of New Jersey had any judicial power to construe the constitution. There is no foundation for such a theory.

If the contention be true, that the legislature of New Jersey, acting under the constitution of 1776, could pass no law, altering, amending, revising or construing the constitution of 1776, it had no right to pass the act of November 16, 1807, depriving women of the right of suffrage nor did it have the right to pass the subsequent laws of 1820 and 1839, denying to women the right to vote.

The constitution clearly gave all inhabitants the right to vote. This included women. The fact that it included women is evident from the fact that they voted so extensively. It is also evident from the fact that in the years 1790 and 1797, in acts to regulate elections, voters were spoken of as "he" and "she."

“Contemporary and practical construction is entitled to great weight in the construction of constitutional provisions.”

*State vs. Wrightson*, 56 N. J. L., 126.

Thirty-one years had elapsed between the adoption of the Constitution and the act of the legislature of 1807, denying the right to women, and during all this time women exercised this right. The matter had been judicially settled, in 1790 and 1797, if the legislature had any right to judicially settle such questions. But this theory must be held absurd, for as early as 1804, in the case of *State vs. Parkhurst*, 9 N. J. L., 427, Chief Justice Kirkpatrick goes very thoroughly into the question of the right of the legislature to alter the constitution, and the separation of the judicial and legislative functions of the state, as follows:

“According to the great rule of construction applied to all the American Constitutions, and to our own among the rest, the several departments of government are to exercise certain defined powers, which can neither be amplified nor extended by implication or construction; that all that is not expressly given is retained by the sovereign people; \* \* \* Can the legislature change or alter it? What is a constitution? According to common acceptance of the word in the United States it may be said to be an agreement of the people, in their individual capacities, reduced to writing, establishing and furnishing certain principles for the government of themselves. Among these provisions, one of the most important in all our constitution, is to prescribe and limit the objects of the legislative power. The people are sovereign and they are supreme in power. The legislature acts by delegation and circumscribed authority, circumscribed as to its objects, circumscribed as to its extent over these objects.

Now to say that the legislature can alter or change such a constitution, that they can do away with that very principle which at the same time gives and limits their power, is in my view a perfect absurdity. It is making the creature greater than the creator. It is establishing despotism without limitation and control. No, it is a principle, never yielded by the people, never claimed by the legislature, without reason, without foundation. This is a question which of late years has been considerably agitated in these United States. It has enlisted many champions on both sides. It is a question equally arising out of every constitution where the legislative power is limited and where there are certain rights or powers reserved in the hands of the people themselves, over which the legislature has no control. We may fairly avail ourselves therefore not only of the sentiments and decisions which have prevailed in our own state upon this subject, but also of those which have prevailed in our sister states. At an early period of our government, while the minds of men were yet unbiased by party prejudices, this question was brought forward, in the case of *Holmes vs. Walton*, arising on what was called seizure laws. There it had been enacted that the trial should be by a jury of six men, and it was objected that this was not a constitutional jury, and so it was held. In later days, in *Taylor vs. Reading*, it was held certain laws were *ex post facto* laws and as such unconstitutional."

This question has been decided in the case of *Allison vs. Blake*, 57 N. J., 6; which says:

"The class of voters at official elections being thus defined by the constitution it is not competent for the legislature either to enlarge or diminish such class. The authorities are believed

to be unanimous to this effect, and cites Cooley's Const. Limitation, p. 64."

This last case decided the question of enlarging or diminishing the right of suffrage under the present constitution, still its principle is applicable to all constitutions, and must be the guide in determining the right of the legislatures of 1807, 1820, 1839, and any others to enlarge or diminish the right of suffrage.

But apart from the decisions in our own state, all constitutional authorities agree that constitutional grants can only be taken away by the authority which gave them. This theory is so elemental it can hardly seem necessary to go into the question further.

If then, the acts of the legislature of 1807, 1820 and 1839, and any other up to that time denied the right of women to vote, what must be said of the act of the legislature of 1844, providing for a constitutional convention, which denied women the right to vote either for delegates to the convention or for the ratification or rejection of the constitution?

"It is clearly settled that a state can no more deprive a man of life, liberty and property through the medium of a constitutional convention, than through an act of the legislature." *Clark vs. Mitchell*, 69 Mo., 627.

"The people of the United States erected their constitution and forms of government to establish justice, to promote the general welfare, to secure the blessings of liberty and to protect their persons from violence. The purposes for which men enter into society will determine the nature and terms of the social compact; and as they are the foundations of the legislative power, they will decide what are the proper objects of it. This fundamental principle flows from the very nature of our free Republican government, that

no man should be compelled to do what the laws do not refuse; nor to refrain from acts which the laws permit. These are acts which federal or state authorities cannot do without exceeding their authority. There are certain vital principles in our free Republican government which will determine and overrule an apparent and flagrant abuse of legislative power; as to authorize manifest injustice by positive law; or to take away that security for personal liberty, or private property for the protection whereof the government was established. An act of the legislature (for I cannot call it law) contrary to the first principles of the social compact, cannot be considered a rightful exercise of legislative authority. The obligations of a law, in governments established on express compacts, and on Republican principles, must be determined by the nature of the powers on which it is founded. A law that takes property from A and gives it to B is against all reason and justice for people to intrust a legislature with such powers, and therefore it cannot be presumed that they have done it. The genius, the nature and the spirit of our state governments amount to a prohibition of such acts of the legislature, and the general principles of law and reason forbid them. The legislature cannot violate the right of an antecedent lawful private contract, or the right of property. To maintain that our federal or state legislature possess such powers if they had not been expressly restrained, would in my opinion be a political heresy, altogether inadmissible in our free Republican form of government. \* \* \* It is not presumed that the federal or state legislature will pass laws to deprive citizens of rights vested in them by existing laws unless for the benefit of the whole community, and in making

full satisfaction." Justice Chase, *re Calder vs. Bull*, 3 Dall., 301.

"The right of suffrage is regarded with jealous solicitude by a free people and should be so viewed by those invested with the mighty power of guarding and vindicating their sovereign right. Such a construction of law as would permit the disenfranchisement of large bodies of voters, because of an error of a single officer, should never be adopted when the language in question is clearly susceptible to any other." *Bowers vs. Smith*, 111 Mo., 45; *Wells vs. Stanforth*, 16 Q. B. D., 244.

If the right of suffrage was a privilege granted by the sovereign authority, it is quite clear only that sovereign authority can take it away. It is also quite clear that in order to take it away, it must be done by due process of law. This principle has been with us from time immemorial. It antedates the Magna Charta. It was fully established by the Constitution of New Jersey in 1776, in the preamble to the constitution, in which it says:

"Whereas, all the constitutional authority ever possessed by the Kings of Great Britain, over these colonies \* \* \* was by compact, derived from the people, and held of them for the common interests of the whole society; allegiance and protection are, in the nature of things, reciprocal ties, each depending upon the other \* \* \* And whereas, in the present deplorable condition of these colonies \* \* \* some form of government is absolutely necessary, not only for the preservation of good order, but also the more effectually to unite the people and enable them to *exert their whole force* in their own necessary defense \* \* \* we \* \* \* have after mature deliberation, agreed upon a set charter of rights, and form of a constitution."

It is further established in this early constitution by declaring "the common law of England, as well as so much of the statute law as have been heretofore practiced in this colony, shall still remain in force, until they shall be altered by the future laws of the legislature."

The legislative power is not omnipotent in regard to those public rights which appertain to the citizens generally, it cannot make such disposition of common property as entirely to defeat the citizens in their common right.

*Attorney v. Stevens, Sax., 369.*

The Constitution of 1776 did not meet the needs of the State fifty years after it was made. The State needed a larger legislature, a more extensive judiciary, and changes in its administration. On January 10, 1844, Governor Haines, in his message to the legislature, calls the attention of the legislature to this demand and says: "You will allow me to remind you that the formation or alteration of the fundamental law of the State is the province of the people in their highest sovereign capacity, and not the duty of the legislature, who are delegated to act in obedience to the fundamental law." The legislature of 1844 knew by this message that all who had the right to vote under the Constitution of 1776, had the right to vote to change that Constitution. The time had come when the legislature decided it did not have the power to change the Constitution by legislative act. It was the strongest pronouncement that could be made against the validity of the laws of 1807, 1820 and 1837, depriving women of the right to vote. But it is evident that the Legislature of 1844 decided to pursue the same procedure of depriving women and negroes of the right to vote—of the right to protect their own interests. Our state had practically abolished slavery, and yet by the act of 1844 providing for the election of delegates to the constitutional convention,

limiting the right to vote for delegates, and for the ratification or rejection of the constitution when framed to white male citizens, it placed women and negroes and aliens, even though they were property holders, in a condition of subjection such as never had been known in the Province of New Jersey; and while placed in that condition of subjection, their most valuable rights were taken away. *The rights taken away were some of the inducements which made women and negroes and aliens settle in New Jersey.*

Was this a legal procedure, or was it a revolution?

The method of adopting the constitution of 1844 must have been a legal procedure, because women were taxed as well as men to defray the cost of the election of delegates to that convention, as well as to pay the cost of the convention, and the election held to ratify or reject the Constitution. Every woman in the state who owned property was taxed, but denied the right of representation and the right to protect her property and her franchise. It was done under color of law, and was such a procedure as called for the just observance of those constitutional rights which had been handed down to all men, even antedating the *Magna Charta*. To take away property without due process of law was such a violation of fundamental rights, as to leave no doubt but that it must be restored. To be taxed for procedure which took it away, was tyranny far more grave than any our forefathers suffered, and which made them cry against taxation without representation.

The constitution protects property from arbitrary seizure or divesture, not by legal process, and on compensation made. *Bonaparte vs. Camden, Bald., 205.*

The grant of power to manage and improve property of another, without his consent, and contrary to his judgment, even if exclusively for his benefit, is an infringement of the rights of acquir-

ing, possessing and enjoying property guaranteed to every one by the constitution. *Coster vs. Tide Water*, 3 C. E. Gr., 54.

It was early decided in this state that private property cannot be taken for public use. *Den vs. Morris*, 4 Zab., 587.

In other states: *Bowman vs. Middletown*, 1 Bay., 252.

Could the legislature have annulled these articles respecting religion, the right of conscience, and election by ballot? Surely no, the authority was purposely withheld and reserved to the people themselves. *Van Horn vs. Dorrance*, 2 Dall., 304.

The test of lawful interference with property is that vested rights are abridged or taken away. They are vested when the right to enjoyment, present or prospective has become the property of some particular person, as a present interest. *Cooley's Cons. Lim.*, Stud. Ed., 351.

The law refers to certain fundamental rights, which have always been regarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by due process of law. *Brown vs. Levee*, 50 Miss., 468.

The elective franchise is a right which the law protects and enforces as jealously as it does property in chattels and lands. It matters not by what name it is called—the right to vote, the elective franchise or privilege of the franchise, the person under the constitution and laws of the state, who is entitled to it, has a property in it, which the law maintains and vindicates as vigorously as it does any right of any kind which may be had and enjoyed. The rules which guard against depriving or injury to the right of persons in corporal property are alike, and equally applicable to the elective franchise; and alike equally guaranteed to

persons invested with it, against deprivation or injury to it. Persons invested with the elective franchise, cannot be deprived of it otherwise than by "due process of law." *State vs. Staten*, 6 Cold. Tenn., 230.

In 1752, a protest was made against the change of the constitution then existing in New Jersey by the "humble memorial of the proprietors of the Western Division of the Province of New Jersey," which complains that Lord Cornbury has changed qualifications for voters, alleging that trading men were given the right to vote whereas they could not be electors, because they had not 100 acres. The complaint set forth it was a standing and unalterable part of the constitution, that it should not be changed.

The term due process of law and law of the land operates as a restriction on each branch of the civil government. *Re Ziebold*, 19 Rep. (U. S. Cir.), 742.

In all the states the power to amend their constitution resides in the great body of people as an organized body politic. But the people in the legal sense are those who by the existing constitution are clothed with the political rights.

#### H

*Lutten vs. Borden*, 7 ~~How.~~ How., 1.

*Wells vs. Bain*, 75 Penn. St., 39.

Was there any intention to confiscate the property of women? If it be construed that women are excluded under the present constitution, does it not amount to a confiscation of their property? They were denied the right of defending their suffrage which was their property. It was not the intention of the people to deprive women of these inestimable rights.

The question might here be raised, was the adoption of the constitution of 1844, by white male citizens, a revolution?

This subject was so fully discussed in the case of *Wells vs. Bain*, 75 Pa. St., 39; that the following references have been taken out at length.

“Since the Declaration of Independence in 1776, it has been the axiom of the American people that all just government is founded in the consent of the people. An existing lawful government of the people cannot be altered or abolished unless by consent of the same people. The people are meant the whole, those who constitute the entire state, male and female, citizens, infants and adults. A mere majority of those people who are qualified as electors are not the people, although where they have authority to do so, they may represent the people.

The only method known by which the whole people can give their consent are recognized by three modes:

1. The mode provided in the constitution.
2. A law, as the instrumental process of raising the body for revision and conveying it to the power of the people.
3. Revolution.

The first two are peaceful means through which the consent of the people to alteration is obtained, and by which the existing government consents to be displaced without revolution. The government gives its consent, either by pursuing the mode provided in the constitution, or by passing a law to call a convention. If consent be not so given by the existing government, the remedy of the people is in the third mode—revolution.

When a law becomes the instrumental process of amendment, it is not because the legislature possess any inherent power to change the existing constitution through a convention, but because it is the only means, through which an authorized consent of the whole people, the entire state, can be lawfully obtained in the state of peace. Irregular action, whereby a certain number of the people, assume to act for the whole, is evidently

revolutionary. The people, that entire body called the state, can be bound as a whole, only by an act of authority proceeding from themselves. In a state of peaceful government, they have conferred this authority upon a part to speak for the whole, only at an election, authorized by law. It is only when an election is authorized by law, the electors, who represent the state, or whole people, are bound to attend, and if they do not, can be bound by the expression of the will of those who do attend. The electors who can pronounce the voice of the people, are those alone who possess the qualifications sanctioned by the people, in order to represent them, otherwise they speak for themselves only, and do not represent the people.

It is not pretended that the late convention sat as a revolutionary body, or in defiance of the existing government, and it did not proceed in the mode provided for amendment in the constitution. It was therefore the offspring of law.

Without this legislation, the convention had not existed; and to exist on terms now found in or contrary to the law, is to seek for a grant of powers to be found nowhere else, except in a state of revolution, and therefore do not exist in this peaceful process of amendment."

Justice Kalisch, states that the constitution of 1844 was submitted to the people, adopted by the people and it must stand.

The people at that time, entitled to vote, were those who had the right to vote under the first constitution. The fact that the first constitution did not provide a means for amendment, distinctly shows the people reserved that right to themselves. The destruction of vested rights belonging to a class restrained from protecting them, even though carried by a majority of the people, demands that this court pronounce against such action.

If it were a legal procedure, then justice demands a restoration of the right which was so arbitrarily destroyed. If it were not a legal procedure, then we must admit the destruction of the right of suffrage in 1844, which was property, was the result of a revolution—a peaceful revolution, if you call it such—but nevertheless an uprising of men against women, whereby men confiscated the property of women. Does New Jersey want that stain upon the history of the State? Does New Jersey foremost in the administration of justice, want vital rights of minorities ruthlessly destroyed, with no excuse in law, nor foundation in fact, under the pretense that there was in the state a peaceful revolution in 1844?

If there were a peaceful revolution in New Jersey in 1844, it only consisted in the battle of men against women, the robbing of wives by their husbands, mothers by their sons, sisters by their brothers and daughters by their fathers, of fundamental rights, the highest gift in the state. Nowhere in the Constitution of 1844 do we find the suggestion of a revolution. Its preamble clearly asks God's blessing for transmitting the government unimpaired to succeeding generations. All rights, claims and demands were protected. Not another right of the people was abridged. But not only do we find in our constitution all rights which formerly existed fully protected, but our courts have since upheld grants which were made prior to the adoption of the constitution of 1844. I refer to the charter of the Morris Canal and Banking Company. If the constitution were adopted by the people, in 1844, or there were a revolution, why was not the charter of the Morris Canal and Banking Company confiscated? Wherein lies the justice of protecting that right against invasion and destroying the property values and privileges of women? In protecting the charter rights of the Morris Canal and Banking Company in the case of *Lehigh vs. McFarlan*, 31 Eq., 709,

the court held "This charter is irrevocable and created a contract which is incapable of alteration or repeal by the legislature except by mutual consent. It is unaffected by the provisions of the Constitution of 1844 which interdicts the taking of property by private corporations for public use upon compensation. A State constitution is a law within the meaning of that clause of the Constitution of the United States, which ordains that no state shall pass a law impairing the obligations of a contract. The Company's charter and the powers and privileges therein granted, continue notwithstanding the change of policy adopted by the Constitution of 1844, and possesses equal vitality with respect to acts done by the Company under it after the Constitution of 1844 became the fundamental law, as if it were done before its adoption of that instrument."

Were not the Constitution of 1776, and the laws of 1790 and 1797, carrying into effect the Constitution, a contract?

The constitution of 1776 recognizes the fact that all constitutional authority is held by compact. This is set forth in its preamble. It is also set forth that the people have *agreed* upon a set of charter rights. Is not a charter and a compact, a contract? It was an agreement by the people to conform to certain rules and regulations, and in consideration of that, they were guaranteed that their rights and privileges should be protected. It was an inducement to people to come and live under those laws, to acquire and possess property, and it offered them and guaranteed them protection in these rights. People did come to live under these laws and acquired property, and among them came women. And, according to this agreement it allowed women to acquire property, and as a further inducement made suffrage an incident to it. It guaranteed in other words, that any woman who lived in New Jersey, possessing certain property

qualifications should have the right to vote. That guarantee meant she should have an equal protection of the laws. It was therefore a contract with all inhabitants (including women). In *re State vs. Parkhurst*, *ibid.*, Chief Justice Kirkpatrick says it is an agreement of the people, reduced to writing.

Daniel Webster says it is not a mere compact—it is the result of a contract.

In the case of *Traphagen vs. West Hoboken*, 10 Vr., 235, it is said “the nature of the Supreme Court can only be modified by the constitution itself. Under this guarantee, the powers which inhered in the court at the formation of the constitution, must be unassailable, by the legislature.” Here a constitution is spoken of as a “guarantee.”

If the constitution is a contract, it is a well settled principle of law that rights and privileges acquired under that contract cannot be divested.

It is a well settled rule by the adjudication of this court, that a state constitution can no more impair the obligation of a contract than by passing a law. The idea of the validity of a contract, and of the remedy to enforce it, are inseparable and both are parts of the obligation which is guaranteed by the constitution against invasion. Whenever a state, in modifying any remedies to enforce a contract, does so in a way to impair substantial rights, the attempted modification is within the prohibition of the constitution and to that extent void.” *White vs. Hart*, 13 Wall., 647.

“When then, a law is in its nature a contract when absolute rights have vested under that contract, a repeal of the law cannot divest those rights.” *Fletcher vs. Peck*, 6 Cranch, 87.

In this state the legislature cannot destroy either the contract or the remedy. *S. vs. Belleville*, 10 Vr., 526.

When the people associated and entered into a compact for the purpose of government, that compact, whatever may be its provisions, or in whatever language it may be used is the constitution. *Bates vs. Kimball*, 2 D., Clip., 77-84.

Every state constitution is a compact, and the Constitution of the United States is likewise a compact. *Chisholm vs. Georgia*, 2 Dall, 419, 471.

A constitution is a written charter. *Lynn vs. Polk*, 76 Tenn.

A state constitution is undoubtedly a law within the meaning of this prohibition. *R. R. vs. McClure*, 10 Wall, 511.

The legislature cannot pass any law impairing vested rights. *Boston vs. Condict*, 19 N. J. L., 394.

Rights once vested, privileges once granted or sanctioned by the law of the state, if within the constitutional limits, may be forfeited, but can not be divested or withdrawn by any future legislature. When a certain rule for the exercise of the right of suffrage has become part of the fundamental law of the land, the right can only be extended or restricted in a democratic form of government by the consent of the majority of those who already possess it, or by revolution. *Cooley's Cons. Lim.*, 30.

The State cannot change it, except by change in its fundamental law. *Cummings vs. Missouri*, 4 Wall., 277.

A change of constitution cannot release a state from contracts made under a constitution which permits them to be made. The inquiry is, is the contract permitted by the existing constitution. If so, and that cannot be denied in this case, the sovereign which ratified it in 1802 was the same sovereign which made the constitution of 1851, neither having more power than the other to im-

pair a contract made by the State legislature with individuals. The moral obligation never dies. If broken by states and nations though the terms of reproach are not the same which we are accustomed to designate the faithlessness of individuals, the violation of justice is not the less. *Dodge vs. Westcott*, 18 How., 331.

Property is indeed, in some sense, created by the public will, but it is by one of these fundamental acts which constitute society. Sir Jas. McIntosh, *Vind. Gal.*, 48.

Compact is an agreement or contract, usually of the more formal or solemn kind; a contract or engagement between nations or states, or the individuals of a community. *Burrills Law Dictionary*.

“It is true there is an obligation which a compact carries with it, equal in point of conscience to that law; but then the original of the obligation is different. In compacts we ourselves determine and promise what shall be done, before we are obliged to do it. It is the original contract of society. The whole should protect all its part and that every part should pay obedience to the will of the whole, or in other words that the community should guard the rights of each individual member, and that in return for this protection each individual should submit to the laws of the community.”

A charter is a grant made by the sovereign, either to the whole people or to a portion of them securing certain rights. *Bouvier*, cited in 37 N. J. L., 228.

The terms agreement or compact taken by themselves are sufficiently comprehensive to embrace all forms of stipulations, written or verbal, and relating to all kinds of subjects. It is a familiar rule of the construction of terms to apply to

them the meaning naturally attaching to them from their context. Compacts or agreements, and we do not perceive any difference in the meaning, is generally used with reference to more formal and serious engagements—cover all stipulations affecting the conduct or claims of the parties. The compact or agreement will then be within constitution or without it. *Virginia vs. Tenn.*, 148 U. S., 543.

If women had the right to vote for members of Congress because they voted under the Constitution of 1776, could the Constitution of 1844 abridge that right without a hearing? It is doubtful if a state can lawfully abridge the rights of its citizens, particularly where the right is granted by the Federal Constitution. In the case of *Yarborough*, 110 U. S., 651, the United States Supreme Court, says: "The State is prescribing the qualifications of voters for the most numerous branch of its own legislature, do not do this with reference to the election of members of Congress. Nor can they prescribe the qualifications for voters for those *eo nomine*. They define who are to vote for popular branch of their own legislature, and the United States Constitution says that the same persons shall vote for members of Congress in that State. It adopts the qualifications thus furnished as the qualifications of its own members. It is not true, therefore, that electors for members of Congress owe their right to vote to the state law in any sense which makes the exercise of the right depend exclusively on the law of the state. The United States Constitution adopts as the qualifications for voters for members of Congress that which prevails in the state where the voting is done. The right of suffrage was to be considered of supreme importance to the national government, and was not intended to be left within the exclusive control of the states." Even if the adoption of the Constitution of 1844 deprived women of the right to

vote, under the Federal Constitution they had acquired a right, and it is doubtful if our Federal Government would permit that right to be destroyed without the opportunity given to them to defend it.

The Federalist discusses the method of electing members of Congress, and it leads us to believe that the United States Constitution protected the voters against an abridgement of this right. "It will be safe to the United States, because, being fixed by the State Constitution, it is not alterable by the State Government, and it cannot be feared that the people of the state will alter that part of their constitution in such manner as to abridge the rights secured to them by the Federal Constitution."

Undoubtedly the Federal Government would not allow a large class of people to be deprived of this privilege without their consent, for such a procedure deprives the state of a republican form of government. In the case of *Minor vs. Happersett*, 21 Wall, 162, Chief Justice Waite indicates that the procedure which took away the right of women to vote in New Jersey, might demand the intervention of the United States, because it did not guarantee a republican form of government. He says: "In all save perhaps New Jersey this right (the right of women to vote) was only bestowed upon men and not upon all of them. On the contrary as is claimed in the argument, the right of suffrage was withdrawn from women as early as 1807 in the State of New Jersey without any attempt to obtain the interference of the United States to prevent it." "The Federalist" defines a republican government and states "It is essential to such a government that it be derived from the great body of the society, not from an inconsiderable proportion, or a favored class of it."

When New Jersey adopted the Constitution of the United States it agreed to give the people a republican form of government, and the United States guaran-

teed to the people of the state that they should have a republican form of government. "The purpose of the guarantee was to protect a union founded upon republican principles against aristocratic and monarchical invasions." *Cooley's Constitutional Limitations* cited in *Eckerson vs. Des Moines*, 115 N. W., 117.

States cannot commit wrongs without control, and this provision in the United States Constitution was inserted to meet just such an emergency as this.

When New Jersey deprived its women of the right to vote, the provision of the United States Constitution forbidding a state to abridge the rights of its citizens, while not then a part of the written Constitution, was written in the hearts of the people, and formed just as much a part of our constitution as though it were written therein. It was not incorporated in the fundamental law for the reason that it was not anticipated any state would pass a law which would abridge the rights of its citizens. Women would not have voted to abridge their own rights. Even William Penn claimed this was part of the English Constitution when he and others made their protest to England against taxation without representation. He says, "Tell us the title by what right or law are we thus used that ~~we~~ may a little mitigate our pain. To give up the power of making laws is to change the government; to sell or rather, to resign, ourselves to the will of another; and that for nothing. For under favor we buy nothing of the Duke if not the right of an undisturbed colonizing, and that as Englishmen with no diminution but expectation of some increase of those freedoms and privileges enjoyed in our own country. What security have we of anything we possess? We can call nothing our own, \* \* \*."

In taking away the right of women to vote, New Jersey placed them in the very same position which William Penn described in that protest. "To give up the power of making the laws is to change the govern-

ment, to resign ourselves to the will of another; what security have we of anything we possess?"

The state courts have full power to declare that an amendment to the constitution has not been properly adopted, even though it has been so declared by the political department of the state.

*Secombe vs. Kittleston*, 29 Minn., 555.

*State vs. Young*, 29 Minn., 474.

*State vs. McBride*, 40 Mo., 305.

*State vs. Swift*, 69 Ind., 505.

*Collier vs. Frierson*, 24 Ala., 100.

A proposed amendment to the constitution, to become part of that constitution, must be ratified by the votes of a majority of the electors of the state.

*State vs. Swift*, 69 Ind. 505.

If it can be shown that these amendments or any of them had not been made in accordance with the rules prescribed by the fundamental law, every principle of public law and sound policy requires the court to pronounce against them.

*Trustees vs. Uvers*, 72 N. C., 76; cited in *Bott vs. Secy. State*, 63 N. J. L., 295.

See also article in *Federalist* above referred to.

Perhaps it was not the purpose of the people of the State of New Jersey in 1844 to alter their constitution in any fundamental particular. In searching for evidence to support this suggestion we find no other diminution of rights, we only find an increase in the powers of the different branches of government that had become necessary by the growth of the state, and the incorporation into the constitution certain long established and cherished principles of the common law. The preamble to the constitution is sufficient alone to support this view. It defines the purposes clearly when it says:

"We, the people of New Jersey, grateful to Almighty God for the civil and religious liberty

which He hath so long permitted us to enjoy, and looking to Him for a blessing upon our endeavors to secure and transmit the same unimpaired to succeeding generations, do ordain and establish this constitution."

It further proceeds with a bill of rights, and says, "All men are by nature free and independent, and have certain natural and inalienable rights, among which are those of enjoying and defending life and liberty, acquiring and possessing and protecting property, and of pursuing and obtaining safety and happiness."

"This enumeration of rights and privileges shall not be construed to impair or deny others retained by the people."

What were some of the rights retained by the people? Was not the right of women to vote one of them? Was the right up to that time ever lawfully taken away? How then can it be said that the suffrage clause, giving to "every male citizen the right to vote," excludes women?

The bill of rights in American Constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation, they are conservatory instruments rather than reformatory. *Wemier vs. Bunbury*, 30 Mich., 201.

The constitution goes even further. It provides in order:

"That no inconvenience may arise from the change in constitution in this state \* \* \* it is hereby declared that the common law and statute laws now in force, not repugnant to this constitution, shall remain in force \* \* \* and all \* \* \* claims and rights of individuals \* \* \* shall continue."

What were the rights of individuals at that time, particularly the rights of women? They were the

right to hold property, the right to vote—which was an incident to the ownership, and which was property itself.

Are women therefore deprived of these rights because the suffrage clause appears to exclude women?

“The object of construction is to give effect to the intent of the people in establishing the Constitution; it is the intent of the lawgiver that is to be found in the instrument itself.” *People vs. Purdy*, 2 Hill, 35.

It can hardly be said that it was the intent of the people to deprive women of the right of suffrage, when they, as part of the people, were unlawfully excluded from a voice in the ratification or rejection of the proposed deprivation.

Does the constitution intend to deprive any particular class of the right to property?

“Property which the law protects is anything of value which the law recognizes as such, and in respect to which the owner is entitled to a remedy against any one who may disturb him in the enjoyment of it. It is immaterial whether the property be tangible or intangible. A franchise is property. *Cooley’s Const. Lim.*, 369, Stud. Ed.

“The deduction is that life, liberty and property are placed under the protection of known and established principles which cannot be dispensed with either generally—either by courts or executive officers or legislators themselves. *Story’s Cons.*, 1943-1946.

“Constitutions are not made to create rights, but in recognition of, and in order to preserve them, and that if any are specially enumerated and specially guarded, it is only because they are peculiarly important or peculiarly exposed to invasion. *Cooley’s Const. Lim.*, 37; Stud. Ed.

“The framers of a Constitution and the people who adopted it must be understood to have em-

ployed words in their natural sense, and to have intended what they said." *Gibbons vs. Ogden*, 9 Wheat. 1, 188.

The right to vote has always been regard as property. When it was part of the freehold in ancient times it was jealously guarded, even when the denial of it offered no right to damage.

"Anciently every the least freeholder had as much right to give his suffrage as the great owner of lands in the country. This right was part of his freehold, and inherent in his person by reason thereof. \* \* \*. It is an organized and fundamental right belonging to him as freeholder, and thus the right of election is explained to be a legal right." *Ashby vs. White*, 14 Howard St. Trials, 782.

The provision of the state constitution, which ordains that the right of trial by jury shall remain inviolate, is substantially the same as that upon the same subject contained in the constitution of 1776, and neither was intended to extend the trial by jury to cases where it did not previously attach. *Howe vs. Plainfield*, 8 Vr., 146.

Not only must a constitution be amended in the manner prescribed in the existing constitution, but it is competent for the court, when the amendment does not relate to their powers and functions, to inquire whether the adoption of the amendment, the provisions of the existing constitution had been observed. *Livermore vs. Waite*, 102 Cal., 113. *Kohler vs. Lang*, 60 Iowa, 543.

Are the members of the Senate and Assembly officers within the provision of the constitution giving "every male citizen the right to vote for all officers that now are or shall hereafter be elected by the people?"

Who are officers within that prescription? Members of the senate and assembly are not officers in any

The United States Senate, in the year 1797, in the proceedings to impeach Senator Blount, decided a Senator was not a civil officer, and refused to try the case. This decision established a precedent which has ever since been adhered to. The question was ably discussed on both sides, and the arguments can be found in the Annals of Congress, Sections 2318 and 2319 of that year.

In the case of Yarborough, 110 U.S. 651, the Supreme Court questions whether members of Congress are officers.

sense of the word; neither <sup>are</sup> their election provided for in the suffrage clause. ~~X~~

In stating the qualifications of members of the Senate and Assembly, the constitution declares that they shall be elected by legal voters. The constitution provides that every male citizen shall have the right to vote for "Officers;" it does not state they shall constitute the "legal voters" of the State. Where shall we look for the qualifications of legal voters? We must not find the qualifications by implication, because if any one class has the right to vote, that right must be found in some written law. Are we to look to the old Constitution? If so, who had the right to vote for members of the Council and Assembly? The inhabitants, including men and women. If we are not to look there where does the right reside to elect our delegates to make laws? Does it not reside in the people, as in the beginning—the men and women?

In further support of the contention that the Constitution does not include members of the Senate and Assembly in the suffrage clause, we find in the Constitution a specific clause entitled "Civil officers," article 7, section 2, and a specific clause entitled "Militia officers," article 7, section 1, which leads us to believe that they are the only officers which can be included in the constitutional provision for suffrage?

It cannot be construed that male citizens are the only legal voters because this court has already decided that women may vote at school meetings.

It cannot be construed that men are the only legal voters, because the New Jersey Constitution cannot prescribe who shall be the legal voters for members of the electoral college.

The clause providing for the appointment of Presidential electors is found in Article II, Section 1, part 2, of the United States Constitution. It reads, "Each State shall appoint, in such manner as the legislature

thereof may direct, a number of electors, equal to the whole number of senators and representatives to which the State may be entitled in Congress."

The purpose of the United States Constitution was to grant the power to choose the President and Vice President to a few persons in each state under the authority of the legislature. It evidently intended that the legislature itself should be free to exercise the power to choose the members of the electoral college, and therefore did not hamper it by making the choice depend upon any clause in the state constitution which might restrict the legislative power.

If this be true, a State Legislature has the right to determine who shall be entitled to vote for Presidential electors, irrespective of any provision in the constitution of a state which limits the exercise of the elective franchise to men.

The present election laws make no special reference to the qualifications of voters for Presidential electors, but the general provision, giving to those who have the right to vote under the constitution, the right to vote in the election district in which they reside, might be held to control Presidential elections.

If a state legislature should decide to withdraw from the people the right to vote for members of the electoral college, by repeal of its law providing for the election of Presidential electors by popular vote, all constitutional authorities agree that such an act could not be challenged, thus indicating that a state constitution cannot control the proceeding. The people themselves cannot control it, except as they may control their legislative bodies. It must therefore be conceded that the right of the legislature prevails, and that each state legislature is vested with the sole privilege of choosing or delegating the choice to the people. The right seems to be clearly defined from very early times. The Federalist emphasizes it when it says, "Without the intervention of the state legislature the

President of the United States cannot be elected at all. They must in all cases have a share in his appointment, and will perhaps in most cases, of themselves determine it."

When the United States Constitution was adopted New Jersey had been a state for eleven years, but the legislature took upon itself the election of Presidential electors until 1812, when it gave the right to such voters in the state as had the right to vote for members of the Council and Assembly. In 1812 the legislature took away this right and appointed the electors itself; but in 1813, it passed another act worded as follows: "Whereas, by the Constitution of the United States, the people have the undoubted right of appointing electors of President and Vice President of the United States, and whereas experience proves that the people may more safely trust themselves than their representatives with the exercise of this right, and whereas the people of this state are deprived of the exercise of this right by the act of 1812, therefore said act is hereby repealed." It further provided for the revival of the act of 1807, which gave all who had the right to vote for members of Council and Assembly, the right to vote for Presidential electors.

If women had the right to vote under the Constitution of 1776, they were therefore entitled to vote for presidential electors, and there does not appear to be any legislative act which has since deprived them of that right. Presidential electors are not officers of the state, and were not included in the suffrage clause of the Constitution of 1844.

The point that a state constitution cannot control the action of the legislature, was also very strongly made in the report of Senator Morton, Chairman of the Committee of Privileges and Elections in the United States Senate, 1874. He said, "The appointment of the electors is thus placed absolutely and wholly with the legislatures of the several states,

and it is no doubt competent for the legislature to authorize the governor or the Supreme Court of the state, or any other agent of its will to appoint these electors. This power is conferred upon the legislature of the states by the Constitution of the United States and cannot be taken away from them or modified by the state constitution any more than can their power to elect senators of the United States, whatever provision may be made by statute, or by the state constitution, to choose electors by the people, there is no doubt of the right of the legislature to reserve the power at any time for it can neither be taken away nor abdicated." This theory was quoted in the case of *McPherson*, 146 U. S., 1, and was sustained.

The fact that the suffrage clause in a state constitution excludes women from voting for officers would not make them ineligible as electors of Presidential electors because a state could not limit its legislature in fixing the methods by which their electors are appointed. The distinction between the appointment of the electors and the election by the people might be drawn, but it is evident that the intention was that the state legislatures in the manner of choosing electors should be bound by no law except the supreme law of the land. Even if the right to vote were taken from women would it be lawful to exclude women from the right to vote for Presidential electors, when the right has been given to men? If the legislature is in no way bound by the suffrage clause in the state constitution, and may grant the right to elect Presidential electors to the executive or judicial body, but in the exercise of this power it has determined to grant the right to the people, has it done so by giving male citizens the right to vote for them, thus excluding women? It has been manifestly the intention of the legislatures throughout the country to give the people the choice of these electors. Because men have been regarded generally as

the only people having political power, this right has fallen to men only, with no thought of the legal questions involved, whether or not they have the sole right. In yielding a right to the people, whose agents they are, can the legislature cede it to a part of the people? Legislatures are the agents of both men and women, although they are elected by men. Legislatures are the creation of the people. They are the servants of the people, and the people are the masters; the servants cannot be greater than the masters. If a legislature is entrusted by the people with certain powers, and those powers are not exercised by it and they wish to return the power to the people, by what reason or authority can they return it to part of the people? "Equality of privilege is the constitutional right of all citizens, and equality of protection is the constitutional right of all persons." Being the representatives of the men and women—that is of the people—legislatures are made the agents of the United States Government, to perform a service for the United State. While the United States constitution contemplated the choice being made by the legislature, it is evident that it left the legislature the right to elect other methods, and thereby conferred on them the power to make laws respecting such methods. In giving the legislature such powers, it did not, however, free them from conforming to certain other provisions in the constitution regulating the making of laws, one of which is that no state should deny to any person within its jurisdiction the equal protection of the laws. Does the legislature not do this when it gives to men and denies to women the right to vote for Presidential electors. How can the legislature grant the people the right to elect Presidential electors by restricting the vote to male citizens? What authority does it find in the United States constitution for this arbitrary measure? Legislatures are invested with certain powers and limitations, and it is

doubtful if legislatures are, or ever have been given the right to grant or restrict the right of suffrage even in the states. But the right to elect Presidential electors is wholly governed by the United States Constitution, and with the exception of the negro vote, the United States Constitution does not grant suffrage to any one, and it refrains particularly from so doing. It does insist that no state shall deny any person the equal protection of the laws; therefore in the absence of any authority for granting Presidential suffrage exclusively to men, is not a legislature bound to grant it to all the people?

Nearly all our state constitutions declare that all political power is inherent in the people. In the erection of governments both in the lawmaking, the construction of laws and the execution of the laws, men have been careful to insist that rights not expressly delegated to these departments have been reserved to the people. This, too, they have implanted in the constitutions. In this reservation women must be included. In the election of presidential electors, when the legislature yields its right to the people, and the supreme law demands that the state shall deny no person the equal protection of the laws, can women be lawfully excluded when the right has been given to men? Even the state constitution forbids the granting of any exclusive privilege, immunity or franchise whatever.

Are not laws governing the referendum and primary elections and nominations by petition unconstitutional in so far as they exclude women from voting?

Have legislatures power to grant the right of suffrage to anyone for the purpose of nomination?

The belief that women should not participate in the nomination of candidates is based upon the theory that the state constitution excludes them from voting. A careful study of constitutional rights will reject this theory.

The right to vote in the state is governed by the suffrage clause in the State Constitution which gives to male citizens the right to vote for "all officers."

If a constitution gives to all male citizens the right to vote for "all officers," it does not mean that they shall also have the exclusive right to vote for candidate for nomination, because the right to nominate is distinct from the right to elect, and the right to vote in the constitutional provision is for the election of officers. Primary elections differ widely in their object from an election by the electors for officers.

The courts in several states have held that primary elections are not such elections as are contemplated by the suffrage clause in the state constitutions.

The legislatures have also created the right to nominate by petition and as such nominations were not provided for in the state constitution, this right also cannot depend upon the suffrage clause in the constitution, which excludes women from voting.

"The people have the right freely to assemble together, to consult for the common good to make known their opinions to their representatives and to petition for redress of grievances." This right belongs to women. It is right that they should be allowed to make known their opinions as to nominations.

In most legislation on the subject of primary elections, the laws declare the qualifications of persons entitled to vote at such elections; and all laws where direct primaries are to be held at public expense, also define the qualifications of voters. Such laws give the right to those, who have the right to vote under the constitution. The same restrictions are made in the laws providing for nomination by petition. It has been customary to consider men only as qualified.

The fact that legislatures have fixed the qualifications of voters at primaries might indicate that legislatures could properly extend the right to vote at primary elections and the right to nominate by peti-

tion, to other people besides those qualified to vote under the constitutional provision for suffrage, and therefore the privilege can undoubtedly be extended to women upon the same terms as men. This is based upon the theory that the legislature has plenary power to extend the suffrage to any one for that purpose.

In the absence of primary election laws, the nomination of officers heretofore was conducted by private bodies or by petition of the voters. The machinery of the party was composed of a few men, and was the only tangible thing about it. Party membership consisted of those who believed in the principles of the party. They were scattered, unorganized, and most of them took no part in the proceedings, and only cast their votes on election day. Women were not disqualified from membership. Only habit of thought and custom forbade them taking an active part in party politics. Nothing prevented parties from admitting women upon the same terms as men, and they could have taken part in the nominations. If women had shared in the right to nominate, and the legislature undertook to regulate the party primaries, it would be unlawful for the state to discriminate between the members of such organization and exclude women from voting at primary elections. The state does not regulate primaries in order to give any one the right to nominate, but to give the people of the parties fair play. But the fact that women have never participated in party proceedings, or are not considered legal voters, does not make it lawful for the legislatures to exclude women from voting at direct primaries, if they are affiliated with the parties, because it could not discriminate between the members of the party.

The purpose of state regulation is to further the demand of the people for popular government, and has for that reason developed into a governmental function. The avowed purpose is to protect the people from being "shorn of their choice," and in order to

bring about such a regulation of the affairs of party nominations, the government itself takes charge of the election, and fixes the burden and expense of carrying on such election upon the whole people. It is considered of such vital importance to the people that the state shall control these elections, that it makes all the people contribute to the expense of them, not for the purpose of giving all the people a voice in the election of candidates for nomination, but in order that the male voters should voice the people's selection. It is justified on the ground that the people will be benefited thereby, but it is a flagrant abuse of legislative power to confer important privileges on one part of the people, and hamper, restrict and burden the other part by so doing. This is what happens when men are given the sole power of nomination. It is a violation of the provisions of the United States Constitution, which directs that no state shall deny to any person within its jurisdiction the equal protection of the laws.

A greater violation of the constitution is to deny women the right to petition for the nomination of candidates for elections?

When the legislatures have taken upon themselves the creation of methods of nomination, ostensibly for the interests of the people, can they exclude women from the right to nominate?

The right of suffrage in constitutions relates only to the selection of officers, and not to the nomination. While it is true that the legislatures are the depositories of all legislative power in the states, except where restricted by the organic law, it must be admitted that the organic law in this particular, limits the legislative power.

All political power is inherent in the people, and all that has not been conferred upon the male citizens exclusively, still remains with the people.

When the people framed their constitutions they reserved to themselves the right to choose their candidates for election, while they gave to legal voters the right to elect them. The right to choose candidates is one of the reserved rights of the people, which our constitutions protect. The legislature transcends its authority and usurps the rights of the people when it fixes the qualifications of those who shall choose candidates for nomination, for it cannot take from the people that inherent political power which they expressly retain for the purpose of nomination.

The legislatures may regulate the conduct of primary elections, and petitions for nominations, but there it must stop. To grant to male citizens alone, the right to vote at primaries, or to nominate by petition, is a power beyond the realm of legislative control. The people have not authorized it in the grant of legislative power. They have not granted the legislature the power to define the qualifications of those who elect legislators, neither have the people granted the legislature the power to define the qualifications of those who nominate them. In taking such powers upon itself the legislature finds an indirect way of choosing its own electors.

This same principle is applicable to the referendum. From whence comes the power assumed by the legislature when it gives to male citizens only the right to adopt certain laws? The people never gave the legislature the right to discriminate between the people who shall ratify, or reject legislative acts. The purpose of the referendum is to ascertain the desire of all the people whether certain measures should be adopted, and not the desire of male citizens alone. The legislature cannot delegate its power to a part of the people.

Another question—that of township officers—are they such officers as are prescribed in the suffrage clause? It is true the Supreme Court has determined

school trustees are officers within that provision. In very early times (antedating the first constitution), it was a fixed rule that the legislature had the right to regulate municipal affairs. The first constitution did not change that; neither did the Constitution of 1844. In support of this view, reference is had to the laws of 1846, confirming the charters of townships, and in which law, the right to vote for township officers was given to male citizens. Following so closely upon the adoption of the constitution, this would indicate that the legislature still controlled the right to manage township affairs, and controlled the right to say who were to be the electors of township officers.

In the decision of the Supreme Court, it is intimated that the women have acquiesced in the taking away of their right of suffrage granted by the Constitution of 1776. History tells us that people frequently urged that such legislation was unconstitutional, and Justice Elmer states in a paper read before the Historical Society, that the legislation of 1807, led to the Broad Seal War of 1837. It may be true that no legal action to have the right of suffrage restored, has been instituted; but it is not difficult to understand why action was not taken in the early days with a view to such restoration. The Quakers did not believe in enforcing their rights by legal procedure, and it was folly for women to undertake such a proceeding in view of the fact that the council, which was the upper branch of the legislature, had the right to pass upon the subject as a court of last resort, notwithstanding the fact that the Supreme Court had pronounced against it. It could hardly be expected that the council would reverse its own ruling.

In the proceedings of the Constitutional Convention of 1844, we find a demand for women suffrage noted on the minutes. The subject of this unconstitutional legislation has been commented upon by all who have written histories of New Jersey.

Acquiescence might be set up where private interests are involved, as a bar to the recovery of rights, but it is doubtful if people, by an implied consent to legislation could be deprived of constitutional rights. Every line in the constitution breathes perpetuity; they were made for all time and for all people. Acquiescence could not bind people not born. It could not bind infants; and there are living to-day women who had the right to vote under the Constitution of 1776, who were not old enough to protect their rights in 1884, and no one could acquiesce for them.

“A power is frequently yielded to merely because it is claimed, and it may be exercised for a long period, in violation of constitutional provisions, without the mischief, which the constitution was designed to guard against appearing, or without any one being sufficiently interested in the subject to raise the question; but these circumstances cannot be allowed to sanction a clear infraction of the law.” Cooley’s Constitutional Limitations, cited in *State vs. Wrightson*, 27 Vr., 127.

In the case of the *State vs. Wrightson*, it was urged that the procedure for the election of members of the House of Assembly, which had been used so long, should be deemed a law because of usage, but the court held differently, and cited Cooley as an authority against such a ruling.

In the case of *Bott vs. Secretary of State*, 63 N. J. L., 229, Justice Depue, says:

“If a legislative enactment which may be repealed in a year or an executive act, which affects only a single individual, cannot be allowed to stand if it contravenes the constitution, a change in the fundamental law, which is much more permanent and affects the whole community, should not be permitted a like place in the violation of constitutional mandates. The interest of every

citizen of the state in upholding and protecting the constitution is of the same quality as the interest of the citizen of a municipality."

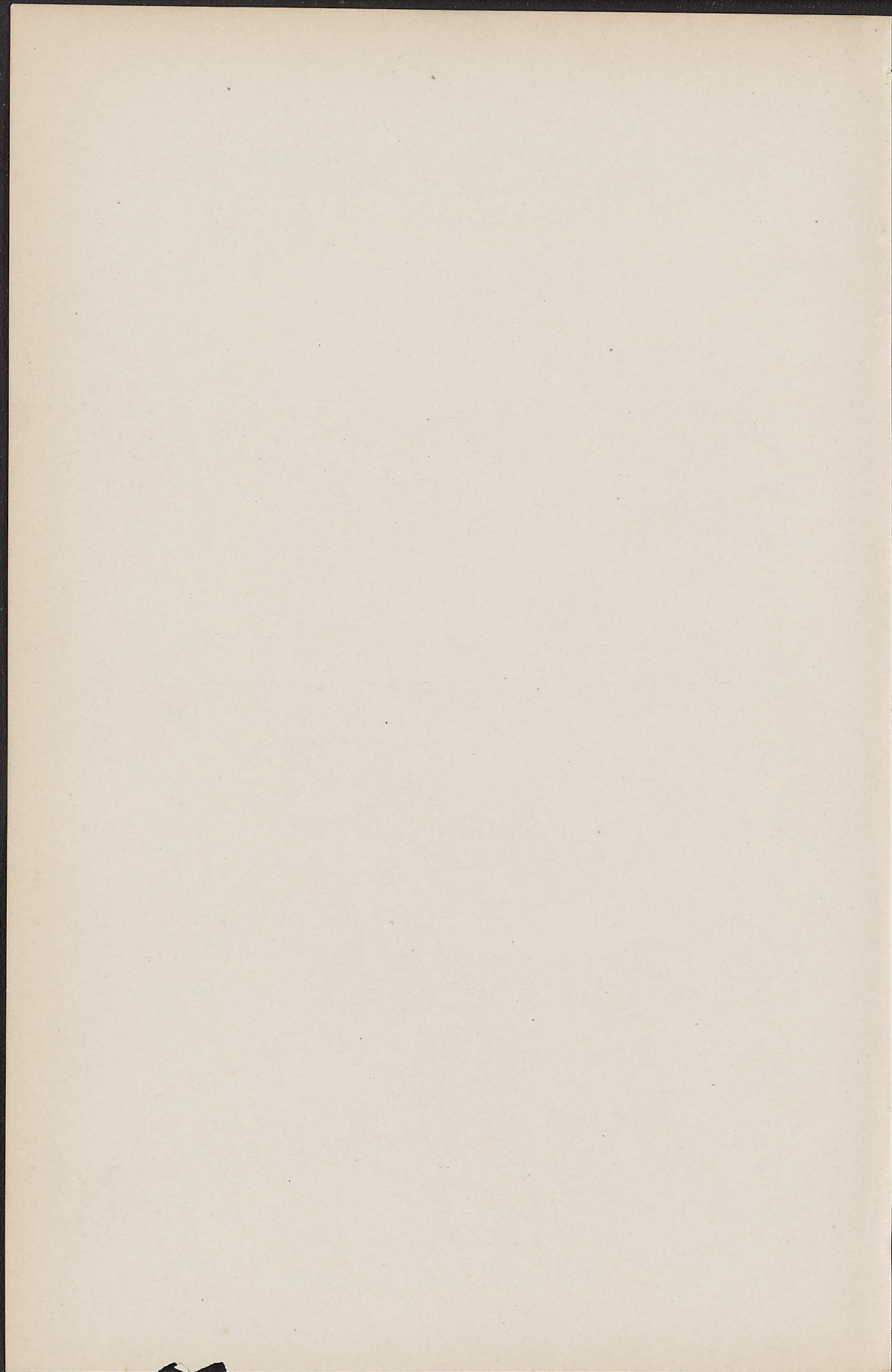
In this case Justice Depue points out the fact that this court has the power to pronounce against the adoption of any amendment to the constitution when not properly made and cites numerous cases giving this court that power.

The fact that women have not heretofore appealed to the courts does not operate as an estoppel to the right. Heretofore, women have not been so well able to make the fight: the need has not been so urgent as it is to-day; the vital social problems which all women are required to meet, the great army of women in industrial life, and the vast property interest controlled by women are attracting the attention of the whole world, to the need of woman suffrage. The subject of women suffrage is one of the momentous questions of the day, and if the women of this state have the present right to vote, we ask that it be so declared.

The people as a body would not have changed their constitution in so important a part, if they had realized they were destroying the very foundation of their constitution. The makers of our constitution knew that the vital rights of minorities were open to attack, and realizing that the tendency of those in power was to limit and define their rights, the people agreed that the constitution should not be changed in any vital particular without the opportunity extended to all that they might exert their whole force in the defence of it. It was an unwritten promise, but it was one which men cherished and wanted to keep, and which all men to-day would keep if they knew their forefathers had made it.

Perhaps one of the most difficult question to deal with in this case is, whether the whole constitution must fall with the suffrage clause, or whether the remainder can stand.

It is submitted that only the suffrage clause is under attack; we cannot say the constitution was not adopted by a majority of the people; we presume that it was; but emphasis is laid upon the fact, that the suffrage clause is the only part of the constitution, which deprived people of former constitutional rights, and it is the only part which can now be attacked. We do not ask that it be wiped out, we only ask that it be held not to exclude women. The adoption of the Constitution of 18~~2~~<sup>4</sup>, must be considered an amendment of the old constitution. The question is not whether the whole constitution was improperly adopted, but whether <sup>the</sup> change in the suffrage clause can stand the test of the application of law and authority with respect to its amendment. It is the destruction of a right which is under attack, the restoration of which will not affect vested interests, or the machinery of government; but on the contrary return to the State of New Jersey its dignity, its honor, and the republican form of government as guaranteed by the United States Constitution.



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