

city is asked to pay the damages sustained by the plaintiff, in consequence of the acts of individuals merely.

Can there be any doubt that the aldermen who did this work alone are liable? This was an unauthorized personal act for which they and they alone are liable.

*Cole, Chief Justice, in Uren vs. Walsh, 57 Wis. 98, says:*

"The general principle of law is, if officers of a corporation do not act within the scope of their authority, the corporation is not liable for their unlawful acts. Where however, the corporation directs the unlawful act to be done or receives the benefit of it; or where public officers, having competent authority to act on the general subject matter, perform the act, not knowing it to be unlawful at the time, with an honest view to secure for the public some benefit or advantage—there a different rule obtains. But the facts stated in the complaint, take the case out of any exception to the general principle; for the defendants must have known there was no lawful highway at the *locus in quo*, if the fence had been kept up and maintained as a lawful fence for more than ten years when they gave the order for its removal. They were then acting clearly without authority in the matter, and for their trespass the town would not be responsible."

So in this case the aldermen of the Sixth Ward must have known that they had no right to do the grading in question, must have known that the charter provisions had not been complied with, and for their trespass the defendant is not liable.

We respectfully submit that the judgment of the Circuit Court is correct and should be affirmed.

D. H. FLETT,

Respondent's Attorney.

## STATE OF WISCONSIN, SUPREME COURT.

OLYMPIA BROWN,

Plaintiff,

vs.

ALBERT L. PHILLIPS,  
JAMES W. PALMER, and  
ALEXANDER BURCH,

Defendants.

CASE.

APPEAL FROM CIRCUIT COURT FOR RACINE  
COUNTY.

This is an appeal from an order of the Circuit Court, of Racine County, overruling a demurrer to the amended complaint of the respondent herein.

The amended complaint is as follows:

"The above named plaintiff complaining of the defendants and each of them, respectfully shows to this Court and alleges:—

First, That said plaintiff is a woman above the age of twenty-one years, and was on the 5th day of April, A. D., 1887, and has been continuously for nine years last past,

and is now, a citizen of the United States and of the State of Wisconsin.

Second, That said plaintiff is a resident of the Second ward of the City of Racine, in the State of Wisconsin, having resided at number 941 Lake Avenue, in said Second Ward of said city, continuously and without interruption for the period of nine years last past, and still resides at said number, 941 Lake Avenue.

Third, That at the general election which was held on 2 the Tuesday next succeeding the first Monday in November A. D. 1886, as plaintiff is informed and verily believes, the question whether the act known and described as "An Act relating to the exercise of the right of Suffrage by Women upon school matters," and further known as Chapter 211 of the laws of 1885, State of Wisconsin, shall go into effect or in any manner be in force, was submitted to the people of said State of Wisconsin at their usual places of holding elections in said state; that the votes cast upon 3 said question were by separate ballots, having printed on each of them, either the words "For Woman Suffrage in School matters," or "Against Woman Suffrage in School matters;" that, as plaintiff is informed and verily believes, the ballots so cast upon said question were canvassed and returned as required by said act, and that a statement of the result thereof, was published in "Wisconsin State Journal," a newspaper printed at Madison, in said state, as required by said act; and that said statement was communicated to the 4 legislature of said state at the commencement of its session for 1887; and that said question was approved by a majority of all the votes cast on that subject, to-wit, a majority of four thousand five hundred and eighty-three votes, the number of votes cast "For woman suffrage in school matters" being 43581, and the number of votes "Against woman suffrage in school matters" being 38998.

Fourth, Plaintiff further alleges that on the 5th day of

April, 1887, the annual municipal election for and in said City of Racine, was held in the several wards of said city, at which election candidates for the following offices were 5 voted for, to-wit: 1st, mayor; 2nd, city clerk and comptroller; 3rd, justice of the peace; 4th, assessor; 5th, city marshal; 6th, an alderman for each ward of said city, to be voted for in said ward, and 7th, a supervisor for each ward of said city, to be voted for in said ward.

Fifth, Plaintiff further alleges upon information and belief, that said annual municipal election for said City of Racine, held on said 5th day of April, 1887, was an election pertaining to school matters.

Sixth, Plaintiff further alleges upon information and 6 belief, that the defendants are the inspectors of elections in and for said Second Ward, in said City of Racine, duly appointed and qualified to act as such inspectors, and did act as such inspectors by virtue of said appointment at said annual municipal election, held on said 5th day of April, 1887, at the usual polling place, in and for said Second Ward of said city, and that said Second Ward constitutes one of the election districts in said City of Racine.

Seventh, Plaintiff further alleges that on said 5th day of April 1887, she was a legally qualified elector at said municipal election and possessed none of the disabilities enumerated or referred to in Chapter 211, laws of 1885, and was entitled to vote in the Second Ward at said election, and that within the prescribed hours for voting at said voting place in said Second Ward, and for said Second Ward, she did offer publicly to said inspectors, the defendants herein, they each of them being present, a ballot of which the following is a copy:

## "CITIZENS UNION TICKET.

For Mayor,  
D. A. OLIN.

8 For Clerk and Comptroller,  
L. H. COLEMAN.

For Justice of the Peace,  
JOHN T. WENTWORTH.

For Assessor,  
JOHN LICHTER.

For City Marshal,  
HANS ANDERSEN.

SECOND WARD.

For Alderman,  
SANDS M. HART.

For Supervisor,  
S. B. PECK."

which said ballot said inspectors acting as such, did refuse to receive, and did reject the same. That said inspectors at the same time did refuse and neglect to administer to the plaintiff the oaths prescribed by Sections 36 and 38, and each of them of the Revised Statutes of Wisconsin of 1878; that she, said plaintiff, at the time she offered to vote  
9 as aforesaid, did deliver to said inspectors her affidavit together with the affidavits of two freeholders, a copy of all of which is hereunto annexed, marked exhibit "A" and made a part of this complaint, which said affidavits said inspectors did also refuse to receive; that thereupon said plaintiff did read her said affidavit to said inspectors, after which said inspectors did still refuse to receive said ballot from the hands of said plaintiff, and did refuse to permit said plaintiff to vote at said election, to the damage of the plaintiff five thousand dollars.

10 Wherefore, plaintiff demands judgment against said

defendants in the said sum of five thousand dollars, together with the costs of this action.

Dated, May 26th, 1887.

I. C. SLOAN of Counsel.

ROWLANDS & ROWLAND,  
*Plaintiff's Attorneys.*

STATE OF WISCONSIN }  
Vernon County } ss

Olympia Brown being first duly sworn on oath, says that she is the plaintiff above named, and makes the foregoing amended complaint that she has read said complaint, and knows the contents thereof, and that the same is true of her own knowledge, except as to matters therein stated upon information and belief, and as to those matters she believes it to be true. 11

Subscribed and sworn to before }  
me this 2nd day of June, 1887. } OLYMPIA BROWN.

(Seal) D. A. STEELE,  
Notary Public, Vernon County, Wis.

## EXHIBIT "A."

STATE OF WISCONSIN }  
Racine County. } ss

Olympia Brown being duly sworn, says she was not a qualified elector at the time of the last registration, but she has, since the completion of said registration, become a qualified elector at any election and at all elections where officers are voted for, whose duties pertain to school matters, by reason of the passage by the state legislature of 1885, of the "School Suffrage Law," and its subse- 12

quent ratification at the last general election by a majority of the qualified electors voting thereon, and that she now resides at No. 941 Lake Avenue, Racine, Wisconsin.

Subscribed and sworn before me }  
this 31st day of March, 1887. } OLYMPIA BROWN.

(Seal) WILLIAM W. ROWLANDS,  
Notary Public, Racine Co., Wis.

STATE OF WISCONSIN }  
Racine County. } ss

Shelton Hall being duly sworn, says that he is a freeholder and elector in the Second ward, in the City of Racine, in said county; that he resides at No. 933 Lake Avenue, said city; that he is personally acquainted with Olympia Brown, whose name appears subscribed to the foregoing affidavit; that he knows of his own knowledge that said Olympia Brown has resided in this state for one year next preceeding this date; that said Olympia Brown now resides in said election district, at number 941 Lake Avenue, Racine, Wisconsin, and that the statements of the said Olympia Brown in her foregoing affidavit are true.

Subscribed and sworn to before }  
me March 31st, 1887. } S. L. HALL.

(Seal) W. W. ROWLANDS,  
Notary Public, Racine, Wis.

STATE OF WISCONSIN }  
Racine County. } ss

J. H. Willis being duly sworn, says that he is a

freeholder and elector in the Second Ward, in the City of Racine, in said county; that he resides at No. 941 Lake Avenue, Second Ward, Racine; that he is personally acquainted with Olympia Brown whose name appears subscribed to the foregoing affidavit; that he knows of his own knowledge, that said Olympia Brown has resided in this state for one year next preceeding this date; that said Olympia Brown now resides in said election district, at 941 15 Lake Avenue, Second Ward, Racine, Wis.; that the statements of the said Olympia Brown in her foregoing affidavit are true.

Subscribed and sworn to before }  
me, April 4th, 1887. } J. H. WILLIS.

(Seal) W. W. ROWLANDS,  
Notary Public, Racine, Wis."

The demurrer is as follows:

"And now come the defendants, Albert L. Phillips, James W. Palmer, and Alexander Burch, and each of them, by D. H. Flett, their attorney, and demur to the amended complaint of the plaintiff in the above entitled action upon 16 the ground and for the reason that it appears on the face thereof that said amended complaint does not state facts sufficient to constitute a cause of action against said defendants or either of them.

D. H. FLETT,  
*Defendants' Attorney.*"

The issue was tried at the October term of court and the following order made and entered herein:

"This action having been brought to trial on the issue of law joined herein, at the regular October term of said court, to-wit: on the 8th day of November, 1887, and after

17 hearing Mr. D. H. Flett in the support of the demurrer and Rowlands & Rowland and I. C. Sloan in opposition:

It is ordered that said demurrer be, and the same is hereby overruled, and that plaintiff have judgment thereon; but with leave to the defendants to withdraw their demurrer and put in an answer within twenty days after service on defendants' attorneys of a copy of this order on payment of costs.

Dated November 8th, 1887.

By the Court,

JNO. B. WINSLOW, Judge."

## STATE OF WISCONSIN.

### SUPREME COURT.

OLYMPIA BROWN,

Respondent,

vs.

ALBERT L. PHILLIPS,  
JAMES W. PALMER, and  
ALEXANDER BURCH,

Appellants.

Appellants' Brief.

### APPEAL FROM CIRCUIT COURT FOR RACINE COUNTY.

This is an appeal from an order of the Circuit Court, of Racine County, overruling a demurrer to the amended complaint of the respondent herein.

The amended complaint is as follows:

"The above named plaintiff complaining of the defendants

and each of them, respectively shows to this court and alleges:—

“First, That said plaintiff is a woman above the age of twenty-one years, and was on the 5th day of April, A. D., 1887, and has been continuously for nine years last past, and is now, a citizen of the United States and of the State of Wisconsin.

Second, That said plaintiff is a resident of the Second ward of the City of Racine, in the State of Wisconsin, having resided at number 941 Lake Avenue, in said Second ward, of said city, continuously and without interruption for the period of nine years last past, and still resides at said number, 941 Lake Avenue.

Third, That at the general election which was held on the Tuesday next succeeding the first Monday in November A. D., 1886, as plaintiff is informed and verily believes, the question whether the act known and described as “An Act relating to the exercise of the right of Suffrage by Women upon school matters,” and further known as Chapter 211 of the laws of 1885, State of Wisconsin, shall go into effect or in any manner be in force, was submitted to the people of said State of Wisconsin, at their usual places of holding elections in said state; that the votes cast upon said question were by separate ballots, having printed on each of them, either the words “For Woman Suffrage in School matters,” or “Against Woman Suffrage in School matters;” that, as plaintiff is informed and verily believes, the ballots so cast upon said question were canvassed and returned as required by said act, and that a statement of the result thereof, was published in “Wisconsin State Journal,” a newspaper printed at Madison, in said state, as required by said act; and that said statement was communicated to the legislature of said state at the commencement of its session for 1887; and that said question was approved by a major-

ity of all the votes cast on that subject, to wit, a majority of four thousand five hundred and eighty-three votes, the number of votes cast “For woman suffrage in school matters” being 43,581, and the number of votes “Against woman suffrage in school matters,” being 38,998.

Fourth, Plaintiff further alleges that on the 5th day of April, 1887, the annual municipal election for and in said City of Racine, was held in the several wards of said city, at which election candidates for the following offices were voted for, to-wit: 1st, mayor; 2nd, city clerk and controller; 3rd, justice of the peace; 4th, assessor; 5th, city marshal; 6th, an alderman for each ward of said city, to be voted for in said ward, and 7th, a supervisor for each ward of said city, to be voted for in said ward.

Fifth, Plaintiff further alleges upon information and belief, that said annual municipal election for said City of Racine, held on said 5th day of April, 1887, was an election pertaining to school matters.

Sixth, Plaintiff further alleges upon information and belief, that the defendants are the inspectors of elections in and for said Second Ward, in said City of Racine, duly appointed and qualified to act as such inspectors, and did act as such inspectors by virtue of said appointment at said annual municipal election, held on said 5th day of April, 1887, at the usual polling place, in and for said Second Ward of said city, and that said Second Ward constitutes one of the election districts in said City of Racine.

Seventh, Plaintiff further alleges that on said 5th day of April, 1887, she was a legally qualified elector at said municipal election, and possessed none of the disabilities enumerated or referred to in Chapter 211, laws of 1885, and was entitled to vote in the Second Ward at said election, and that within the prescribed hours for voting at said voting

place in said Second Ward, and for said Second Ward, she did offer publicly to said inspectors, the defendants herein, they each of them being present, a ballot of which the following is a copy:

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For Mayor,  
D. A. OLIN.

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~~For Justice of the Peace,  
JOHN T. WENTWORTH.~~

~~For Assessor,  
JOHN LICHTER.~~

~~For City Marshal,  
HANS ANDERSEN.~~

SECOND WARD.

For Alderman,  
SANDS M. HART.

For Supervisor,  
S. B. PECK."

which said ballot said inspectors acting as such, did refuse to receive, and did reject the same. That said inspectors at the same time did refuse and neglect to administer to the plaintiff the oaths prescribed by Sections 36 and 38,

and each of them, of the Revised Statutes of Wisconsin of 1878; that she, said plaintiff, at the time she offered to vote as aforesaid, did deliver to said inspectors her affidavit together with the affidavits of two freeholders, a copy of all of which is hereunto annexed, marked exhibit "A" and made a part of this complaint, which said affidavit said inspectors did also refuse to receive; that thereupon said plaintiff did read her said affidavit to said inspectors, after which said inspectors did still refuse to receive said ballot from the hands of said plaintiff, and did refuse to permit said plaintiff to vote at said election, to the damage of the plaintiff five thousand dollars.

Wherefore, plaintiff demands judgment against said defendants in the said sum of five thousand dollars, together with the costs of this action."

Which said complaint was duly verified.

Exhibit "A" annexed to the complaint consisted of affidavits by Olympia Brown and others, with reference to her qualifications as an elector, and will be found in full on pages 7 and 8 of case.

To this complaint the defendants interposed a general demurrer.

The issue of law was tried at the October term of the Circuit Court for Racine County, and an order entered overruling said demurrer.

ARGUMENT.

The appellants claim that the Circuit Court erred in overruling said demurrer for the following reasons:

First: Chapter 211 of the laws of Wisconsin for 1885

does not confer the right of suffrage upon women, except in elections pertaining *directly and exclusively* to school matters.

Second: The legislature has no power under the constitution to confer the right of suffrage upon women.

Third: An inspector of election is not liable to an action for damages to a person claiming to be an elector, for refusing to receive his vote in a new and doubtful case, in the absence of proof of malice.

*First; Chapter 211 of the laws of Wisconsin for 1885 does not confer the right of suffrage upon women except in elections pertaining directly and exclusively to school matters.*

Chapter 211 aforesaid reads as follows:

"AN ACT relating to the exercise of the right of suffrage by women upon school matters.

The people of the state of Wisconsin, represented in senate and assembly, do enact as follows:

Section 1. Every woman who is a citizen of this state of the age of 21 years, or upwards, except paupers, persons under guardianship, and persons otherwise excluded by section 2, of article 3, of the constitution of Wisconsin, who has resided within the state one year, and in the election district, where she offers to vote, 10 days next preceding any election pertaining to school matters, shall have a right to vote at such election.

Section 2. At the general election to be held on the Tuesday next succeeding the first Monday in November, A. D. 1886, at all the usual places of holding elections in this state, for the election of all officers required by law then to be elected, the question whether this act shall go into effect or in any manner be in force, shall be submitted

to the people, and if the same shall be approved by a majority of all the votes cast on the subject, it shall go into effect and be in force from and after the date of said election, otherwise it shall not go into effect, or in any manner be in force.

Section 3. The votes cast upon the subject specified in the last preceding section, shall be by separate ballot, and shall have written or printed on each of them the words, "For Woman Suffrage in School Matters," or "Against Woman Suffrage in School Matters," which words shall indicate the vote of the elector for or against the approval of this act, and the ballots so cast shall be canvassed and returned in the same manner as the votes cast for state officers are required by law to be canvassed, and the secretary of state shall immediately on the completion of said canvass, publish a statement of the result thereof, in some newspaper printed at the seat of government, and shall communicate the same to the next legislature at the commencement of its session.

Section 4. This act shall take effect and be in force from and after its publication.

Approved April 1, 1885."

Not only the title of the act, but also the language in the body thereof must at once convince every intelligent mind that it was the intention of the legislature in enacting the law, to confer only a *limited* right of suffrage upon women, and the only ground upon which a practically *general* right of suffrage can be claimed, is that the legislature by the misuse or inapt use of words or terms in the law, conferred a right entirely beyond their intent and purpose.

At this point it will perhaps be well to allude to a rule in the construction of statutes which is also important in other branches of the argument to be considered hereafter.

This rule is contained in the maxim, "*Expressio unius est exclusio alterius*," the express mention of one thing implies the exclusion of other things not mentioned.

Applying this maxim to the law in question, it follows that the legislature did not intend to give a right of suffrage to women in other than school matters.

In considering the true scope and intent of this law, it will at once suggest itself to any one familiar with our system of government and with the duties imposed upon the various officers of the state, counties, cities, towns, and villages, that the regulation and management of school matters, in a more or less remote degree, is confided to nearly all the different officers in each one of the foregoing divisions of the governmental system; that is to say: in the performance of their duties by these various officers, they have official connection with or touch at some point the common school system.

All laws emanate from the legislature; every amendment to the statutes, relating to common schools must be passed by each house of the legislature, therefore it may be argued that this law authorizes women to vote for the members of each branch of the legislature. The Lieutenant Governor as presiding officer of the senate would of course come in the same category with members of the legislature.

All laws to be operative must be signed by the governor, he appoints the board of regents of the State University and Normal Schools and is himself *ex-officio* a member of the latter board.

The Secretary of State, State Treasurer and Attorney General are made by law the trustees of certain school funds and securities.

The duties of Superintendent of Public Instruction relate entirely to school matters.

So it would seem upon the liberal construction of the law adopted by the Circuit Court, that the only state officers for whom women cannot vote are the commissioners of Insurance, Railroads and Immigration.

Of the county officers the Sheriff is the *general* county executive; the Register of Deeds is custodian of all the records relating to land titles, births, marriages, etc., the County Treasurer is custodian and disburser of all county funds, including certain school funds; the County Clerk has charge of the records and is clerk of the board of supervisors—the county legislature—and has charge of all evidences of tax titles and redemption moneys; the Board of Supervisors are by law required to impose certain school taxes and to equalize all taxes, including those for school purposes, upon the different cities, towns and villages; and the various town officers have similar duties within the territorial limits of their towns.

As to the municipal officers of cities, it is claimed in this case, that the mayor and aldermen of the various wards, comprising the common council, having the appointment of the members of the Board of Education, and the appropriation of school moneys, etc.; the comptroller and treasurer having control of the disbursements of school moneys, are within the purview of the law.

If therefore this latitudinarian view of the law is to be taken, the legislature have failed to restrict this new and radical extension of the elective franchise as to any but the most minor and inferior and exceptional officers.

But the language of the law is "*at any ELECTION*" pertaining to school matters.

Now if voting for these officers, or some of them, is voting at an election pertaining to school matters, then it is an election at which women have a general right to vote,

and it carries with it the right to vote for all officers to be voted for at such election.

This will still more clearly appear when we come to consider later on that there is no machinery provided by law for separately receiving, counting, canvassing or returning the votes cast for the various offices at such elections.

If by this law then, the general characteristics of an elector are given to women, it follows as a necessary sequence that women have been made eligible to every office in the state, however high, or whatever its functions.

By section 6, article 4—section 2, article 5—and section 10, article 7, of the constitution, the fact of being an elector is made *the test* of the right to hold office, with certain limitations, and indeed in the absence of these express provisions of the constitution, there could be little doubt of the eligibility of any qualified elector to hold any office under our system of government; and farther by section 2524 R. S. all persons who are citizens of the United States and qualified electors of the state are liable to be drawn as jurors, so that we have by this construction of the law introduced the female element into the jury system, and all this by legislative inadvertence.

It might be well at this point to state our view pure and simple as to the extent of the elective right intended to be and in fact conferred by the law under discussion.

Our view is, that the only privilege conferred upon women by this law, is the right to vote at such elections and on such matters as come before those quasi-municipal organizations, created under our statutes under the designation of school districts.

Any other construction makes the carrying out of the law impracticable and is in utter conflict with its evident meaning and spirit. In interpreting a law which under-

takes to enlarge existing privileges, or to extend them to a new class of persons, if any doubt arises, it is eminently proper to consider the history of any agitation leading up to the law, and prior adjudications of the courts in reference to the subject matter of the law and the right of parties under prior existing statutes. It is a matter of common knowledge, that certain zealous women all over this country have been striving for many years to secure a general extension of the elective franchise, so as to remove the limitation on the ground of sex.

The women suffragists have been clamoring in the legislative halls of every state in the Union, and in the national legislature year after year for half a century, and yet in no state have they been able to secure legislation which involves so radical a change of policy, not only in the management of the government but in social life. It is safe to say that an overwhelming preponderance of sentiment in this country is against general female suffrage, and our own legislature time after time has pronounced emphatically against it, either by an overwhelming adverse vote, or by declining to give the question any serious consideration.

The same reasons which would dictate and enlist opposition to granting the general right of suffrage to women, would exist and be of equal potency against any enlargement of this right of suffrage, which was not kept within the limits sought to be marked out by this new law. To the opponents of female suffrage the voting of women at the town and city elections is obnoxious to the same objections as voting for state officers and members of the state legislature; but within the compass of the school district, the exercise of the voting power is upon a different plan, under a different system and amid different surroundings.

And this distinction has been well recognized by the courts long prior to the passage of the law in question.

Under these decisions, it has been held that voting in a school district meeting did not make the individual so voting an elector, nor were votes so cast within the constitutional regulations of the elective franchise, and therefore, that the legislature was not violating the constitution by giving to women the right to vote at *school district meetings*.

In considering this question in Massachusetts the Court in its opinion, say, that an examination of the constitution will convince any one that the provisions in regard to electors were not intended to apply to school districts, that that the organization of school districts is one of the modes by which the State provides for the education of its youth, that women are successful educators, and that the common law permitted them to fill such offices as those pertaining to school districts. They therefore held a law allowing women, with proper qualifications, to vote at school meetings, constitutional.

Opinion of Judges 115 Mass., 602.

To the same effect and upon similar reasoning, like decisions have been made in Kansas and Nebraska.

Wheeler vs. Brady 15 Kansas 26.

State vs. Cones 19 N. W. R., 682.

The constitutions of those states, like our own, does not recognize the school district as a subdivision in the governmental system. In the three states referred to, no power is conferred upon the legislature to grant the right of suffrage to persons not distinctly specified in the constitution.

Our own legislature had also, prior to the act of 1885, recognized the propriety of allowing women to participate in school district management, as an exceptional and peculiar public matter to which the ordinary objections to women taking part in politics did not apply.

By Section 513 R. S., every woman of full age may be elected to distinctively school offices in school districts, towns, cities, and counties, and without having any of the constitutional qualifications of voters, except that she shall be of full age.

There is, however, this unanswerable objection to construing the words of this statute so liberally as to give the right to vote at general charter or town elections, that the act fails to furnish any method or machinery for carrying out its provisions with that construction, unless we accept the conclusion that the act confers *an unqualified and unlimited right of suffrage* upon women for every officer and upon every subject.

But the latter proposition cannot be tolerated. It cannot be said that when the manifest intent of the law by express words of limitation, purports to give only a *restricted* right, that the Courts shall construe out of that an *unlimited* right. Nor upon principle, is this law entitled to so very liberal a construction in favor of those who claim privileges under its provisions. The law must be looked at from more than one aspect.

In so far as it creates a new class of voters, it detracts from the value and importance of the votes of those to whom the right of suffrage has been from time immemorial committed. The class of voters existing at the passage of this law have a right to a strict construction of a legislative provision which undertakes to place upon a par with them, a new body of voters, almost, if not entirely, equal to them in numbers.

Just as in the construction of a law which involves the impairment of a long existing political right, a strict interpretation will be adopted in favor of the continuance of such right, so a law which involves a radical extension of political rights in a direction hitherto unrecognized, will be held to a similar rule of strict construction.

It follows then, that if in the practical execution of the law we are met with two alternatives: that we must either allow a new factor in the political economy to have a voice in matters not within the intent of the law, or exclude this new factor from a voice in that which is within the intent of the law, it is better to choose the latter alternative. In other words, if this new right cannot be exercised without the exercise also of other rights, not embraced within its meaning and purpose, then such new rights cannot be exercised at all, and the new legislation must fail because of imperfection in its frame work and structure.

The practical difficulties in the way of carrying out the law unless confined within the limits insisted upon by the appellants, are insurmountable. Under the existing provisions of law with reference to the conduct of elections, all of the officers to be voted for at a general, charter or town election, are to be voted for upon one ballot, and no separate ballot boxes or ballots are provided for votes on different officers. Under the constitutional method of voting by ballot, which includes the right to have the contents of such ballot secret, and under Section 32 R. S., which forbids the inspection of the contents of any ballot, it is impossible to know in advance of the depositing of any ballot, whether the person casting it has undertaken to vote for only some or for all of the officers to be voted for at such election. The marking of ballots, except in case of general challenge is also opposed to the spirit and letter of our laws, consequently there is no possible method by which the election officers, in counting and canvassing the vote, can determine whether or not the women voters have confined themselves within the limits of a restricted right of suffrage. The elements of accuracy and certainty in arriving at an honest result of an election would be entirely wanting. The result would depend solely upon the conscience of the female voter without any legal check or restraint. All of the forms and machinery of the law

for securing the integrity of the ballot box, would be rendered nugatory so far as this new element in the voting population is concerned, which, as we have said, is capable of casting as many votes as the total of all previous electors.

There are confessedly some state officers, such as we have before mentioned, and some officers of a lower grade, which, allowing the respondent the broadest latitude of construction, cannot be said to have any official connection with school matters. The plaintiff herself recognized this obvious fact by her proffered ballot, made an exhibit in this case, from which she erased the printed names of candidates for Justice of the Peace, Assessor and City Marshal; yet, under the law, the inspectors had no possible way of determining whether or not she was undertaking to vote for such officers.

The first and best rule to be applied in construing a statute is, that it should be given a common sense, ordinary interpretation, and so that each of the words used shall be allowed a proper significance. It should be assumed that the legislature in describing a particular thing, used terms that would separate it and distinguish it from other things, and such a construction should not be given to the language of a law that other and entirely different forms of expression, of different meaning, would as well be applicable to the thing described. In other words, if in this case, the election at which the plaintiff sought to vote might as well be called an election pertaining to the assessment and collection of taxes, pertaining to the care of highways and bridges, etc., then the expression "*an election pertaining to school matters*" does not describe the election at which the plaintiff sought to vote.

Furthermore, the election in question cannot under the broadest interpretation be said to be "*an election pertaining to school matters*" within the meaning of the law.

This was the ordinary municipal election, at which were to be elected the following city officers, to wit: A mayor, a city clerk and comptroller, a justice of the peace, an assessor, a city marshal, one alderman and one supervisor from each ward, and no others.

Not a single officer balloted for at that election is, by virtue of his office, directly interested in or concerned with school matters.

By the city charter, the public schools are under the supervision and management of the board of education, consisting of two commissioners from each ward. The board of education have full control of all school moneys; they employ all teachers; enter into all contracts relating to school matters; build and repair all school houses; purchase all school supplies; purchase and sell (with the consent of the common council) real estate, and in short, have in all respects the supervision, management and control of the public schools, and of all persons and property connected therewith.

Chapter 313, Laws of Wisconsin for the year 1876,  
Title 15.

The mayor, it is true, appoints the members of the board of education, and this is the whole extent of his official connection with the public schools.

The common council confirm the appointments of the mayor with respect to members of the board of education; on the advice and suggestion of the board of education, levy certain taxes for the support of the schools, and in conjunction with the board of education, buy and sell real estate needed or used for school purposes.

The only duties of the city clerk and comptroller are to audit the warrants drawn by the school board of education upon the city treasurer, and to countersign contracts entered into by said board.

The duties of assessor, justice of the peace and supervisor

respectively, are defined by the general statutes of the State, while the duties of the city marshal are substantially the same as a constable, and none of these officers have any official connection with school matters.

*Second. The legislature has no power under the constitution to confer the right of suffrage upon women.*

In considering the question of the constitutionality of this law, in so far as it attempts to make electors of women, we again refer to the maxim quoted in the early part of this brief, which is applied as well in the interpretation of constitutional as statutory law.

Our State constitution Article 3, Section 1, reads in its first paragraph as follows:

"Section 1. Every male person, of the age of twenty-one years or upwards belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote, such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election.

1. Citizens of the United States.
2. Persons of foreign birth, who shall have declared their intention to become citizens conformably to the laws of the United States, on the subject of naturalization.
3. Persons of Indian blood, who have once been declared by law of congress to be citizens of the United States, any subsequent law of congress to the contrary notwithstanding.
4. Civilized persons, of Indian descent, not members of any tribe; provided, that the legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all votes cast at such election; and provided further, that in incorporated cities and villages, the legislature may provide for the reg-

istration of electors, and prescribe proper rules and regulations therefor."

We hardly think that counsel for respondent will seriously contend that in the absence of the proviso of subdivision 4. of the above section, which confers upon the legislature the *qualified* right to extend the right of suffrage to other classes than those enumerated under the above general provision, the legislature could confer the right of suffrage upon persons not included within such general provision.

The doctrine that when the constitution prescribes the functions of departments of the government, or of its officers, or territorial limits for governmental subdivisions, or qualifications for the exercise of political rights, that thereby there is secured to the public, protection from legislative change, enlargement or circumscription of such departments, functions or rights, is settled by abundance of authority, and lies at the foundation of the virtue and value of written constitutions.

This Court has held that a statute incapable of harmonious exposition with the constitution must fail.

Goff vs. Dorsey, 27 Wis. 131.

No one would be bold enough to claim that a statute conferring the right of suffrage upon females, was capable of harmonious exposition with the constitutional provisions which, prescribing the qualifications for suffrage, names *male* persons as those by whom it should be exercised.

Again, this Court has held that the delegation of a power limits its exercise to the persons or tribunals to which it is delegated.

Van Slyke vs. Ins. Co., 39 Wis. 390.

It has also been held, that as the constitution vests judicial power in certain courts, the legislature cannot confer it upon any other court.

Chandler vs. Nash 5, Mich. 409.

It has also been held in the following cases in this state, that constitutional officers whose functions are recognized by the constitution, cannot have such functions curtailed or affected by legislation which seeks to confer such functions upon other officers.

State vs. Hastings, 10 Wis. 525.

McCabe vs. Mazzuchelli, 13, Wis. 534.

State vs. Brunst. 26 Wis. 412.

State ex Rel. Wood vs. Goldstucker, 45 Wis. 124.

This Court has also held that a law which attempted to confer upon the mayor of a city the powers of a justice of the peace, was unconstitutional and void.

Attorney General vs. McDonald 3 Wis., 805.

Another Court of high authority uses this language "A legislative act evading the terms and frustrating the necessarily *implied* provisions of the constitution, is void."

People vs. Albertson, 55 N. Y. 50.

In Page vs. Allen 58 Pa., St. 338, the Chief Justice uses this language, quoted with approval by this Court in Dells vs. Kennedy 49 Wis 556, "These are the constitutional qualifications *necessary* to be an elector. They are *defined, fixed* and enumerated in that instrument. No constitutional qualifications of an elector can in the least be abridged, added to or altered by the legislature on the pretense of legislation."

In the above case of Dells vs. Kennedy, Orton, Judge, writing the opinion of the Court says: "These qualifications (in the constitution) are *explicit, exclusive* and unqualified by any exceptions, provisions or conditions."

In the case of Minor vs. Happersett 21 Wall. 163, the Supreme Court of the United States considers the force and effect of the clause in the constitution of the state of Missouri, which ordains as follows: "Every male citizen of the United States shall be entitled to vote."

The Chief Justice in delivering the opinion of the court,

starts out in the first paragraph with the statement that this provision of the constitution "confines the right of suffrage to men alone." In the second paragraph of the opinion, the same proposition is reiterated. Again on page 170 of the opinion, they assume in discussion that the clause of the Missouri constitution before quoted, confines the right of suffrage to men.

On page 172 of the opinion, speaking of the constitutions of the several states at the time of the adoption of the federal constitution, they say: "Upon an examination of those constitutions we find that in no state were all citizens permitted to vote." They then quote at great length the provisions of the various constitutions with regard to the right of suffrage, in none of which, except New Hampshire, do the terms of the constitution inhibit any class from voting, but only specify, enumerate and prescribe who or what persons shall have the right to vote.

And yet, they say that under such provisions all citizens were not permitted to vote, meaning of course, that only such as were designated, were permitted to vote.

At the conclusion of their summary of these constitutional provisions, the court further says: "In this condition of the law in respect to suffrage in the several states, it cannot for a moment be doubted that if it had been intended to make *all citizens* of the United States voters, the framers of the constitution would not have left it to implication."

Cooley in his work on constitutional law, uses the following language: "As elections are the means whereby the people express their sovereign will, the qualifications for taking part therein are usually prescribed by constitution, that they may not be subject to continual changes from year to year by legislators of differing views. When the qualifications are once fixed by the constitution, it is not in the power of the legislature to add or to modify them,

but they must remain until the constitution is revised or amended, and whoever claims the right must show that he comes within the intent of the existing law."

Cooley Constitutional Law, page 251.

Discussing the constitutional restraints upon the legislature, Denio, Chief Justice, says: "I do not mean that the power (in the legislature) must be expressly inhibited, for there are but few positive restraints upon the legislative power contained in the instrument, (the constitution). The first article lays down the ancient limitations which have always been considered essential in constitutional government, whether monarchical or popular; there are scattered through the instrument a few other provisions in restraint of legislative authority. But the affirmative prescriptions and the general arrangement of the constitution are far more fruitful of restraints upon the legislature. Every positive direction contains an implication against everything contrary to it, or which would frustrate or disappoint the purpose of that provision."

People vs. Draper 15 N. Y. 543.

And these limitations are created and imposed by express words or may arise by necessary implication.

Judge Cooley in his work on Constitutional Limitations says: "The legislatures of the American States are not the sovereign authority, and though vested with one branch of the sovereignty, they are nevertheless, in wielding it, hedged in on all sides by important limitations, some of which are imposed in express terms, and others by *implications* which are equally imperative."

Cooley Constitutional Limitations (4th. Ed.) 104.

In Page vs. Allen *supra*, speaking of the inhibitions of the constitution, this language is used: "They are equally effective and not less to be regarded when they are so *by implication*, and this is the case when the legislative pro-

vision is repugnant to some provision of the constitution." Citing,

9 Watts 200.

5 Watts & S. 424.

12 Sar. & R. 330."

They also in this case quote the foregoing maxim, and say it expresses a principle of the common law, applicable to the constitution.

In *State vs. Hastings, supra*, this court says: "Every positive delegation of power to one officer or department, implies a negation of its exercise by any other officer, department or person. If it did not, the whole constitutional fabric might be undermined and destroyed.

Treating it then as established that the general provision of Article 3, of our constitution, before quoted, confines the right of suffrage to male persons with such qualifications as are embraced in the first general clause of said article, we come to the consideration of the extent of the legislative power to extend the elective franchise, as conferred or recognized by the proviso to subdivision 4.

Article 3 of our constitution is entitled "Suffrage," and the first and second sections thereof read as follows:

"Section 1. Every male person of the age of twenty one years or upwards, belonging to either of the following classes, who shall have resided in the state for one year next preceding any election, and in the election district where he offers to vote, such time as may be prescribed by the legislature, not exceeding thirty days, shall be deemed a qualified elector at such election.

1. Citizens of the United States.

2. Persons of foreign birth, who shall have declared their intention to become citizens conformably to the laws of the United States on the subject of naturalization.

3. Persons of Indian blood, who have once been declared by law of congress, to be citizens of the United

States, any subsequent law of congress to the contrary, notwithstanding.

4. Civilized persons, of Indian descent, not members of any tribe; provided, that the legislature may at any time extend, by law, the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election; and provided further, that in incorporated cities and villages, the legislature may provide for the registration of electors, and prescribe proper rules and regulations therefor.

Section 2. No person under guardianship, *non compos mentis*, or insane, shall be qualified to vote at any election, nor shall any person convicted of treason, or felony, be qualified to vote at any election, unless restored to civil rights."

The proviso of Subdivision 4, of Section 1, under which the law in question was passed, it will be observed, provides that the legislature may at any time extend, by law, the right of suffrage to persons not herein *enumerated*, but no such law shall be in force until submitted to vote, etc.

The vital question in determining the construction of this law, if it should be held to create a new body of electors, is as to the meaning and relation of the word "*enumerated*" as contained in the above proviso.

In answer to this question, it will be well to find and give, if possible, an accurate meaning to the word "enumerate," and also to consider the appositeness of the word so defined with reference to what precedes it in the section. Enumerate is defined by Webster as "to number, to tell off, or count by numbers." Using this definition in connection with the preceding parts of the section, we observe that four classes of persons have been distinctively numbered, or told off, in subdivisions 1, 2, 3, 4. We also find that

this numbering into classes is all within the bounds and limits of the first and general description.

If we were to use the technical terms of natural history, we might treat the first general description as a *genus*, and each of the subdivisions as *species* within it. The genus always embraces the species, but the converse is not true. We are to determine whether the power granted to the legislature in the proviso, permits them to *change* the genus or to *add to* the species.

If the legislature may abrogate an implied limitation as to the sex of the voter, it may also as to the age of the voter, or his length of residence in the state or election district.

Our construction of the constitution has just been recognized by the legislature and the people, by passing a constitutional amendment by which an express power has been vested, within certain limits, to fix the necessary time of residence of any voter in his election district.

It seems entirely plain that the framers of the constitution intended that certain qualifications of sex, residence in the state, and age should be indispensable and that those things, as regulated by the constitution, concurring, the legislature might enlarge the classes within the dictates of their judgment, when endorsed by a ratification of popular vote, as experience and change of circumstances might indicate to be wise.

The fundamental qualifications that the legislature may not violate or infringe have been recognized in the policy of all of the states, almost without exception, and of the United States from the beginning; that is, that the voter shall be a male person, shall have a permanent domicile in the commonwealth, and shall be of full age. As to all of the minor qualifications embraced in the subdivision, the constitutions of the states have been varied and diverse. The rule which we apply to the interpretation of the con-

stitution and of the statutes, is one which is universally and with equal propriety applied to secure an intelligent understanding of all writing and composition. We can only arrive at the true meaning of a material and significant word, phrase or expression, by examining the context and interpreting it, and applying it with reference to what has preceded. The difficulty in this case is not great. If, instead of the word "enumerated" the word "specified," "mentioned," "named," or other similar word had been used, its relation back might be more obscure. But the primary and natural reference of the word "enumerated" must be to something which has been designated by numerical or equivalent preceding division.

On the argument in the Circuit Court, counsel for the respondent attempted to turn the maxim before quoted, against us by calling the court's attention to Section 2 of Article 3, *supra*, by which it is expressly ordained that no person under guardianship, *non compos mentis*, or insane, shall be qualified to vote. The fallacy of this argument is patent. That this prohibition has reference only to such persons and classes as are before spoken of, is almost too plain to dwell upon. To illustrate the unsoundness of the counsel's application of the maxim, let us apply it for a moment to statutory interpretation. Our statutes with reference to the organization of corporations, provides that three or more adult persons, residents of the state, may organize themselves into a corporation. Suppose that immediately following this provision a section had been enacted that no person under guardianship, or who was not a tax payer or free holder, in this state, should be one of the organizers of a corporation, would the counsel claim that such secondary provision would overthrow the evident purpose of the first clause and that because of it, persons under age and non residents could organize themselves

into a corporation? It would seem to be idle to multiply illustrations or arguments on this point.

See Attorney General vs. McDoneld 3 Wis. 805.

Even in the absence of Section 2, the persons therein enumerated would not have a right to vote.

"A provision giving the right *generally* to persons possessing certain qualifications, must be understood as excluding idiots and insane persons, even though not expressly mentioning them as exceptions, since these persons are incapable of exercising legal voting."

Cooley Con. Law, 251.

Cooley Con. Lim. (4th. Ed.) <sup>752</sup>753.

McCrary Am. Law of Elections, Sec. 4, 50, 73. <sup>475</sup>2

Furthermore, the history of the proviso annexed to Subdivision 4 and of the whole of Article 3 of the constitution, conclusively shows that the framers of the constitution in inserting this proviso, fully intended to limit the power of the legislature within the provisions of the first paragraph of Section 1; in other words, all electors were to be *male* persons, twenty-one years of age or upwards, and residents of the state for one year next preceding any election, but the legislature might extend the right of suffrage to persons not enumerated in the four subdivisions, provided such persons had the general qualifications above mentioned.

In the constitutional convention of 1847-48, the one subject connected with Article 3 of the constitution upon which there was any serious disagreement, was the question of granting the right of suffrage to negroes (having the general qualifications above specified.)

On the 24th of December, 1847, the committee having the matter of suffrage in charge, reported a draft of an article on that subject in which the elective franchise was limited to "free, white, male persons of the age of twenty-one years or upwards."

Various amendments, all designed to secure the same

rights to negroes, were proposed and rejected, chiefly on the ground that if the term "negro" or its equivalent was used, there was great danger that the constitution would be rejected by the people of the state, and also by congress.

On the 4th of January, 1848, and as a compromise measure, Mr. Gale, of Walworth County, offered an amendment authorizing the legislature to submit to the people the question of extending the right of suffrage to colored persons, and providing that if the majority of the voters should favor such extension, then "All male citizens, of African blood *possessing the qualifications required by the first section of the article on suffrage,*" should be qualified electors

On the following day, Mr. Kilbourn, of Milwaukee, offered a substitute for the above proviso, which (with a slight verbal change), was finally adopted, and is the proviso of the present constitution; and in offering this substitute, the author thereof observed that the substitute embraced the substance of the amendment above referred to, but did not contain the words "colored suffrage," and he believed it would be more acceptable to the people.

Thus it most clearly appears that the framers of the constitution intended to grant to the legislature, power and authority to extend the right of suffrage to no persons other than those having the general qualifications prescribed in the first paragraph of section one.

*Third, An inspector of election is not liable to an action for damages to a person claiming to be an elector, for refusing to receive his vote in a new and doubtful case, in the absence of proof of malice.*

If it were not for the decision of this Court in Gillespie vs. Palmer 20 Wis., 586, the above proposition would certainly have been stated and insisted upon by us more broadly. The rule of liability of inspectors of election, for rejecting an offered vote, might now be said to be settled by uniform course of decision in nearly every state of the

Union, except qualifiedly, Ohio and Massachusetts, and possibly one or two other states.

This rule is, that inspectors of election are *quasi* judicial officers, and that no action will lie against them in favor of a voter for rejecting his vote, in the absence of an averment of willfulness or malice.

Such is the rule in New York, Pennsylvania, Kentucky, Indiana, Michigan, New Hampshire, North Carolina, Tennessee, West Virginia, Delaware, Louisiana, Maryland, Missouri and the United States Courts.

Jenkins vs. Waldron 11 Johns. 114.

Wickerly vs. Geyer 11 S. & R. 35.

Caulfield vs. Bullock 18 B. Mon. 495.

Morgan vs. Dudley 18 B. Mon. 693.

Carter vs. Harrison 5 Blackf. 138.

Gordon vs. Farrar 2 Doug. 411.

Peavey vs. Robbins 3 Jones 339.

Rail vs. Potts 8 Humph. 225.

Fausler vs. Parsons 6 W. Va. 486.

State vs. McDonald 4 Harr. 555.

Dwight vs. Rice 5 La. Ann. 580.

Bevard vs. Hoffman 18 Md. 479.

Zeiler vs. Chapman 54 Mo. 502.

U. S. vs. Gillis et al, 2 Cranch C. C. 44.

The rule is also settled the same way in England, the earlier opinion in *Asby vs. White* Ld. Raym. 938, which is perhaps responsible, in part, for the Massachusetts and Ohio decisions, having been entirely overruled by later cases.

However, referring to the case of *Gillespie vs. Palmer*, in this state, it ought to be sufficient to say that the sole reasoning upon which the decision of this question is founded, is inapplicable to the case at bar.

In the argument of this case, we may attack the opinion of the court in *Gillespie vs. Palmer* with the less hesitation, in view of the fact that it has been subjected to the animadversion of this court, on more than one occasion,

In *Sawyer vs. Dodge Co.* Mi. Co. 37 Wis. 524, Chief Justice Lyon speaks of it as having been subjected to the criticism, that it had been decided in accordance with the logic of the war rather than with the logic of the law.

In *Bound vs. Wis.* C. R. R. Co. 45 Wis. 579, Chief Justice Ryan places it with a class of cases which he says 'have long been made a reproach to the court, as judgments proceeding upon policy rather than upon principle.'

We insist that the opinion in *Gillespie vs. Palmer* is unsound in assuming that an inspector of election has none but ministerial powers. In that case there was little if any aid that could be furnished the inspectors of election by subjecting the individual, claiming the right to vote, to the tests under oath provided by the statutes, in the case of the challenge of a voter, and such tests under oath were even less applicable, pertinent or serviceable in the case at bar.

In the present case, at least, a woman seeking to vote might answer satisfactorily and truly every question that could be put to her under the law, without any danger of a prosecution for perjury, and the statutory tests as to the qualifications of a voter were entirely inefficient and useless in her case. On the other hand, the fact upon which the absence of the right to vote was grounded, was apparent and recognized by all parties, namely, the fact that the person offering to vote was *not* a male person.

Here was a new law, *prima facie* at least, not authorizing a woman to vote for the general municipal officers. Can it be said that an election officer must, at his peril, no question of good or bad faith arising, determine whether or not a statute granting an extension of political rights is to have a strict or liberal construction, a natural interpretation, or one enlarged by implication, inference and indirection? If so, are not inspectors of election in the position of certain animals mentioned in the Bible, with his Satanic majesty on one side and the deep sea on the other?

Section 4545 R. S. subjects to a severe penalty of fine or imprisonment any inspector of election "who shall receive or consent to the reception of the vote of any person knowing that such person has not the requisite qualification of a legal voter, or who shall refuse to make the oath required by law."

"By the terms of this penal enactment, the legislature recognizes the existence of cases where inspectors must not receive a vote, even though the oath be made, because the offense is not limited to excluding the vote of the person who shall refuse to take the statutory oath, but, primarily, the offense is receiving knowingly, the vote of a person who is disqualified.

In a prosecution, under this section, an inspector could not plead ignorance, because the sex of the voter was of common knowledge and undisputed. Therefore, the inspector must sit in judgment upon the meaning of a new legislative enactment and decide at his peril, however obscure or uncertain its terms.

We think the court ought and will avail itself of this opportunity, to remove from our body of judicial law, the reproach of Gillespie vs. Palmer, so far at least, as this branch of it is concerned.

D. H. FLETT,  
*Appellants' Attorney.*

T. W. SPENCE of Counsel.

# STATE OF WISCONSIN.

## SUPREME COURT.

OLYMPIA BROWN,

Plaintiff and Respondent,

vs.

ALBERT L. PHILLIPS, JAMES  
PALMER and ALEXANDER  
BURCH,

Defendants and Appellants,

### RESPONDENT'S BRIEF.

The act known as chap. 211, Laws of 1885, and section 1 thereof reads as follows:

"Every woman who is a citizen of this State, of the age of twenty-one years or upwards, except paupers, persons under guardianship, and persons otherwise excluded

by section 2. of article 3, of the constitution of Wisconsin, who has resided within the State one year, and in the election district where she offers to vote, ten days next preceding any election pertaining to school matters, shall have a right to vote at such election."

This act was properly and duly submitted to a vote of the people of this state at the general election held in 1886, and received a majority of all the votes cast at said election on that subject.

See Amended Complaint, folios 2, 3, 4.

On the 5th day of April 1887, the annual municipal election for the City of Racine was held in the respective election districts thereof for the election of officers, which election respondent alleges was an election pertaining to school matters.

Amended complaint, folios 4, 5.

Respondent being in all respects duly qualified attempted to cast her ballot for Mayor, Clerk and Comptroller, alderman and supervisor in the election district where she had resided continuously for several years, which ballot the inspectors, acting as such, refused to receive, and also refused to administer the usual oaths prescribed by the statutes of this state.

Amended complaint folios 1, 7, 8, 9.

For such refusal respondent as plaintiff below brought suit against said inspectors, who are the aforementioned defendants. To respondents' amended complaint the appellants, as defendants below, demurred on the ground that said complaint did not state facts sufficient to constitute a cause of action. From an order of the circuit court in and for Racine county, overruling said demurrer the defendants below have appealed to this court.

## ARGUMENT.

This demurrer raises four questions only, first, has respondent suffered a legal wrong at the hands of the inspectors, or in other words had she a right to cast her ballot at the municipal election held in Racine in April 1887, for any of the officers voted for then and there? Second, will the law redress such wrong? Third, has respondent pursued the proper remedy? Fourth, does the amended complaint make all necessary averments to establish the wrong and to connect defendants therewith.

Bliss on Code Pleading §413.

Suffrage is defined to be participation in the government, and is said to be a privilege conferred.

Cooley on Const. Law, p. 249.

1 Story on Const. (4th ed.) §580.

Pomeroy on Const. Law, (6th ed.) §535.

Mr. Justice Story in commenting upon the question of suffrage uses the following language. "And yet it would be extremely difficult, upon any mere theoretical reasoning, to establish any satisfactory principles upon which the one-half of every society has thus been systematically excluded by the other half from all right of participating in government, which would not, at the same time, apply to and justify many other exclusions."

And in referring to the reasons and considerations which men might urge in favor of their right to participate in the government, he adds, "what is there in these considerations, which is not equally applicable to females, as free, intelligent, moral, responsible beings, entitled to equal rights and interests and protection, and having a vital stake in all the regulations and laws of society. And if

an exception from the nature of the case could be felt in regard to persons who are idiots, infants and insane, how can this apply to persons, who are of more mature growth, and are yet deemed minors by the municipal law."

And further, this learned jurist continues, "the truth seems to be that the right of voting, like many other rights, is one which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations as a strictly civil right, derived from, and regulated by, each society according to its own circumstances and interests."

1 Story on Const. (4th ed.) §§579 and §580.

Regarding the suffrage therefore as based not upon theory and principle, but rather as based upon practice, let it be considered in the light of the fundamental principles of our government, and of our constitutions of government both national and state.

*In whom is the power to extend suffrage vested?*

The sovereign power under our form of government resides in the people of the United States as a nation. A portion of this power was delegated by the people to the national government, which is therefore a government of enumerated powers. These enumerated powers are contained in the constitution of the United States, in which instrument are also contained certain prohibitions imposed by the sovereign people upon the future action of the states.

Article X of the amendments to this constitution provides: "The powers not delegated to the United States by the constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."

Power reserved is all power not delegated. As the doctrine of implied powers grows naturally out of the

latter, so also the doctrine of constitutional limitations flows as naturally from the former.

"This amendment is a mere affirmation of what upon any just reasoning is a necessary rule of interpreting the constitution. Being an instrument of limited and enumerated powers it follows irresistibly that what is not conferred is withheld and belongs to the state authorities, if invested by their constitutions of government in them; and if not so invested it is retained by the people as a part of their residuary sovereignty."

2 Story on Constitution, § 1907, (4th ed.)

Pomeroy on Const. Law, §§100 and 101, (6th ed.)

In re Booth, 3 Wis. 157, (p. 193.)

The constitution of the United States fully defines citizenship, (14th amendment,) but in no part does it create any class of voters. United States citizenship does not imply the right of suffrage, and "what the several states may do in this respect is a matter entirely for their own consideration."

Pomeroy on Const. Law, §§208, 209.

1 Story on Const. §§580, 581 and 582.

Cooley on Const. Law, pp. 250, 266.

In our investigations therefore we are limited to the state, its powers, constitution, and laws. In whom or in what department of the state is the power to extend suffrage vested?

The object and office of a state constitution is to regulate the action of the various departments of the government, and to secure and guarantee the rights of the people against encroachments by the government.

Preamble to Const. of Wisconsin.

1 Story on Const. §462.

This is to be kept constantly in mind when we are seeking in the constitution a prohibition, restriction, or limitation upon the legislative power of the state, unless the prohibition, restriction, or limitation is *clearly* and *expressly* stated in terms. Implied prohibitions must be encroachments upon individual rights or acts in violation of fundamental principles of our government. This follows logically from language used by Mr. Justice Cooley in his work on Constitutional Law: "the Court will not listen to an objection made to the constitutionality of an act by one whose rights are not affected by it, and who consequently can have no interest in defeating it. \* \* The statute is assumed to be valid until some one complains of it whose rights it invades. The power of the court can be invoked only when it is found necessary to secure and protect a party before it, against an unwarranted exercise of legislative power *to his prejudice.*"

Cooley on Const. Law, p. 147 \* 4.

Wellington Petitioner, 16 Pick. 87 (96.)

State vs. Rich, 20 Mo., 393.

To protect the rights of the people, and to prohibit, restrict, and limit legislative power are the same in effect and purpose. The object of the latter is to protect the former.

"It is a common statement that the state government has all the powers possessed by the English Parliament, except so far as it is restrained either by the state or national constitution. The object of a state constitution is not so much to confer power as it is to restrict and define that which already exists."

Article on "constitution" in Johnson's Cyclopaedia by Theodore W. Dwight.

See also Atty. Gen'l ex. rel. Taylor vs. Brown, 1 Wis. 442, (p. 451.)

In *Bushnell vs. Beloit*, (Cole, J.) the court say: "We suppose it to be a well settled principle that the constitution of the state is to be regarded not as a grant of power, but rather as a limitation upon the powers of the legislature, and that it is competent for the legislature to exercise all legislative power not forbidden by the constitution or delegated to the general government or prohibited by the constitution of the United States. The legislature subject to a qualified veto of the executive possesses all the legislative power of the state."

*Bushnell vs. Beloit*, 10 Wis., 155, (p. 168.)

*Jensen vs. Polk Co.*, 47 Wis., 298, (p. 308.)

*Mason vs. Waite*, 4 Scam. 134.

*Field vs. The People*, 2 Scam. 79.

*Sawyer vs. Alton*, 3 Scam. 127.

*The People vs. Wall*, 88 Ill. 75.

*Harris vs. Whiteside Co.*, 105 Ill. 445.

*Hawthorne vs. The People*, 109 Ill. 107.

*Sedgwick on Stat. Constr.*, p. 549, and note from Story.

Cooley on Const, Lim. pp. 107, 195, 200, 204 n. 1.

Cooley on Const, Law, pp. 150, 151.

*People ex rel. vs Flag*, 46 N. Y. 401.

*People ex rel. vs Bigler*, 5 Cal. 24.

41 Cal. 148.

"A State constitution is not a grant but restriction upon the powers of the legislature, and hence an express enumeration of legislative powers is not an exclusion of others not named unless accompanied by negative terms."

*Ex parte McCarthy*, 29 Cal. 395.

That the national and state constitutions impose *the only* limitations upon the legislative power of the state follows logically and irresistibly from the well recognized fact

that in order to warrant a court in declaring an act of the legislature void and of no effect, there must be a conflict between said act and these fundamental instruments, and such conflict must be clear and free from reasonable doubt.

*Morton vs Rooker*, 1 Pin. 195, (p. 204.)

citing 12, S. & R., 330 and 3 id. 169.

*Dixon vs The State*, 1 Wis. 110.

*Smith vs Mariner*, 5 Wis. 551, (p. 580.)

citing 4, Wheat, 625.

*State ex rel. vs Merriman*, 6 Wis. 17 (\*p. 23.)

*In re Oliver*, 17 Wis. 703.

*Mills vs Charlton*, 29 Wis. 400, (p. 410.)

*State ex rel. vs. Main*, 16 Wis. 422, (p. 439.)

citing *Tyler vs The People*, 8 Mich. 333.

41 Cal. 148.

As a necessary construction then of sections 1 and 2 of article 3 of constitution of Wisconsin, it follows that section 1 establishes the pre-existing right of or the right conferred upon all persons mentioned therein, to exercise the elective franchise, and guarantees the same to them. This right the legislature cannot take away, abridge or impair except for crime. But these classes have no right to an exclusive right of suffrage. Section 2, in designating certain classes who shall not vote, deprives the legislature of all power to enfranchise such classes or persons. The proviso contained in section 1, being a part of the constitution confers no power upon the legislature to extend suffrage. This power the legislature ever had and still have, but it is abridged, and such abridgement is the true aim and object of this proviso. In other words, admitting and recognizing legislative authority to enact a law extending the suffrage, the proviso thus provides that "no such law shall be in force until the same shall have been

submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election." Thus it prevents a misconstruction of this article on suffrage contained in the constitution which is the usual office of a proviso contained in a constitution or in a statute.

*Studley vs. Oshkosh*, 45 Wis. 382,

citing *Minis vs U. S.* 15 Peters, 423.

A similar proviso may be found in the constitution (1849) of California, the language being "Provided, that nothing herein contained shall be construed to prevent the legislature," etc. See article 2, section 1.

See also the constitution (1876) of Colorado, where a proviso may be found, doubtless taken from the constitution of Wisconsin (see article on suffrage.) The object and purpose of that contained in the constitution of Colorado were to provide for the submission to the people of the question of woman suffrage separately from the new constitution. This was done by the enacting of a law which was submitted to the people and lost.

And *Dixon, C. J.*, in *Sandford vs Prentice*, 28 Wis. 362, calls the proviso in our constitution "the proviso of section 1, art. 3, of the constitution for the extension of the right of suffrage," and further comments upon it in *Gillespie vs Palmer* as we shall subsequently find.

It is apparent that said Art. 3 of our constitution does not in *express terms* prohibit the legislature from extending suffrage to women. But in order to render Chap. 211, Laws 1885, which was enacted for this purpose, void and of no effect, an *express* prohibition must appear. For, since this law violates or impairs the rights of no one, neither is it contrary to or subversive of the fundamental principles of our government, the Court will not in this case look for implied prohibitions, restrictions, or

limitations upon the legislature. They are not enough, but must be *express and written*.

Cooley on Const. Lim. §§ 208, 214, (4th ed.) and cases cited.

People vs Seymour, 16 Cal, 332.

Ex Parte McCarthy, 29 id, 395.

Bank of Chenango vs Brown, 26 N. Y. 467, (469.)

Cathcart vs Fire Dept. of N. Y. 26 N. Y. 529, (534.)

Newell vs The People, 7 N. Y. 9, (p. 109.)

Sill vs Corning, 15 N. Y. 297.

Sears vs Cottrell, 5 Mich, 251.

Durkee vs Janesville, 28 Wis. 464, (p. 469.)

State ex rel vs Main, 16 Wis. 422.

In *State ex rel Chandler*, Paine J., citing the case of *Tyler vs The People*, 8 Mich. 333, quotes the following: "To warrant us in declaring a statute unconstitutional, we should be able to lay our finger on the part of the constitution violated, and the infraction should be clear and free from reasonable doubt." (p. 439.)

Mr. Justice Cooley says: "We cannot test the validity of any state statute by a general spirit which is supposed to pervade the state constitution, *but is not expressed in words*. \* \* \* And in all these cases it is not the spirit of the constitution that must be the test of validity, but the written requirements, prohibitions and guaranties of the constitution itself."

Cooley on Const. Law, pp. 150-152.

The three branches of the government are independent and co-ordinate, and great deference is shown by each department when reviewing the work of either of the others.

Pomeroy on Const. Law, p. 116, § 181.

Sedgwick on Stat. Constr. p. 412 and cases cited.

As a consequence, courts will not inquire into the motives of legislators in enacting a law, and will not presume improper motives.

Soon Hing vs Crowley, 113 U. S. 703, (710.)

People ex rel vs Bigler, 5 Cal. 24.

25 Mich. 99.

"The legislature in the first instance is to be judge of its own constitutional powers, and it is only when manifest assumption of authority, or misapprehension of it *clearly appears*, that the judicial power will refuse to execute the law."

24 Barb 471.

Adams vs Howe, 14 Mass. 345.

Wellington Petitioners, 16 Pick. 95.

And no law will be declared unconstitutional unless clearly so. Our Supreme Court has decided this over and over again.

Norton vs Rooker, 1 Pinney, 195, (p. 204.)

Smith et al vs Odell, id. 449, (pp. 455.)

Dickson vs The State, 1 Wis. 110.

State ex rel Chandler vs Main, 16 id. 422, (439.)

citing *Tyler vs. The People*, 8 Mich. 333.

Mills vs Charlton, 29 Wis. 400, 410.

State ex rel vs Abert, 32 id. 403, 410.

Atkins vs Fraker, id. 510, 514.

Bound vs Wis. Cent. R. R. Co. 45 id. 543, 561.

Pahns vs Shawano Co. 61 id. 211, 217.

Ex Parte McCullum, 1 Cowen, 550, 564.

A reasonable doubt must be resolved in favor of the legislative action, and the act be sustained.

Cooley on Const. Lim. p. 220.

Kendall vs Kingston, 5 Mass. 524, 533.

- Foster vs Essex Bank, 16 Mass. 245, 269.  
 Norwich vs Hampshire, 13 Pick. 61.  
 N. Y. & Oswego R. R. Co. vs Van Horne, 57  
 N. Y. 473.  
 Coutant vs The People, 11 Wend, 511.  
 State ex rel vs Doron, 5 Nev. 399.  
 19 Ill. 381.  
 Weister vs Hade et al, 52 Penn. St. 477.  
 8 Mich. 320.  
*Weister vs Hade*, cites 2 Rawle, 374.

Such prohibitions upon legislative power must be plain and unequivocal, also because the constitution must be construed so as to conform with the intent of the people, and to effectuate such intent is the object of construction. And a restriction founded on conjecture is wholly inadmissible.

- Cooley on Const. Lim. p. 68.  
 1 Story on Const. §424 and §451.  
 Rawle on Const. chap. 1, p. 31.

For the constitution obtains its force from the people who ratified it, not the convention which framed it.

- Cooley on Const. Lim. p. 81.  
 State vs. Mace, 5 Md. 348 and 350.  
 Manly vs. State, 7 id., 135.  
 60 Ill. 86.  
 76 Ill. 34.

What better index of the intent of the people, who adopted the constitution, can be found than, first, the judgment of the legislature who framed and enacted chapter 211 laws 1885 extending suffrage to women under the proviso contained in section 1 Art. 3 of our constitution; and second, the ratification of this law by the people; third, the statement of Dixon C. J. in Sandford

vs Prentiss *supra* who calls the proviso "a proviso for the extension of suffrage." But see further "Exposition of the Constitution of Wisconsin," by A. O. Wright, and on page 51, where the author uses the following language: "Should the question of giving women the right to vote ever come before the people of Wisconsin, they could get that right by a law passed by the legislature, and voted for at the next ~~annual~~<sup>general</sup> election, by a majority of all who vote on that question." These conclusions have been arrived at from a careful study of the language used. And the intent of the people when the constitution was adopted and ratified is what the words used mean in their obvious and common sense.

- 1 Story on Const. §401, (4th ed.)  
 Cooley on Const. Lim. pp. 68, 72, 81.  
 Sedgwick on Stat. Constr. p. 413.  
 Gibbons vs. Ogden, 9 Wheat, 188.  
 Manly vs. State, 7 Md. 135.  
 Cronise vs. Cronise 54 Penn. St. 255.

Meaning of the constitutional convention, it is true, may be sought, and contemporary construction may aid, but these "can never abrogate the text; can never fritter away its obvious sense; can never narrow down its true limitation; can never enlarge its natural boundaries," and withal they must be resorted to with much qualification and reserve.

- 1 Story on Const. §§406, 407.  
 Sturges vs. Crowninshield, 4 Wheat, 202, 203.  
 Cooley on Const. Lim. pp. 80, 81.

Yick Wo vs. Hopkins, 118 U. S. 356, where the court say that the guaranties of protection contained in the 14th amendment to the constitution of the United

States extend to *all persons*, when it is well known that this amendment was designed to protect the negro race. (p. 369.)

See also the Slaughter-House Cases.

16 Wall. 36 pp. 123, 128.

Sedgwick on Stat. Constr. p. 564. note.

Why should our constitution be construed, either by reason of its silence, or by reason of its using the phrase "male persons of the following classes," as disfranchising women who possess all the necessary qualifications of electors? To hold such construction proper is in effect to insert *women* in section 2 of the article on suffrage, together with the idiot and insane, for a proper amendment to the constitution would enfranchise those persons named and described in section 2. Many women are tax-payers, and assist in various ways in carrying the burdens of government; women are interested in having good laws and a good government. Why should *mere silence* disfranchise them? If they be not disfranchised, then the legislature has the power to extend suffrage to women under the proviso contained in section 1, or without it. Our government is a government of the people, for the people, and by the people, and not merely of the electors, for the people, and by the electors. The legislature of this State have by law (chap. 211, Laws 1885) extended suffrage to women under the proviso contained in section 1 as before stated, and the electors have confirmed such extension by their ballots, and the construction of the legislature, as being one of the three co-ordinate branches of government, is entitled to great weight.

Sedgwick on Stat. Constr. p. 412.

People vs Green, 2 Wend. 266, (274.)

Coutant vs People, 11 id. 511.

Atty. General vs Eau Claire, 37 Wis. 400, (438.)

And vastly more so when its enactment has been adopted by the people, who are the ultimate source of power with reference to the suffrage.

But the legislatures of other States have by law extended suffrage, notwithstanding the qualifications contained in the respective constitutions, but no elector was thereby deprived of his constitutional rights. In Colorado the legislature, acting under a constitution containing a proviso like that contained in our own, extended suffrage to women. There the people refused to confirm the act of the legislature.

Const. of Colorado, 1876. Session Laws, 1877.

Kansas extended municipal suffrage to women under a constitution which contained no proviso therefor and by law which was not submitted to the people for their ratification. And it will be noticed that the constitution of Kansas contained in its article on suffrage the phrase "male person."

Art. 5 Const. of Kansas and chap. 230 Laws 1887.

In New York the act of the legislature calling the constitutional convention of 1801, extended suffrage for members of that convention to "all free male citizens over 21 years of age," while the constitution secured suffrage only to male holders of and actual tax-payers on a fixed amount of real estate.

N. Y. Session Laws 1801, chap. 69, p. 151, and Const. N. Y. 1777, l. 39.

Compare also with the constitution of New York, Session Laws 1821, chap. 90, p. 83.

While the constitution of New York specified none but

citizens as entitled to vote, yet the legislature allowed *aliens* to vote for school functionaries.

1 R. S. art. 2, sec. 1, p. 65.

2 R. S. art. 63, sec. 12.

2 R. S. art. 1096, sec. 31.

And compare the same with the constitution of the State when said statutes were enacted.

Other instances might be found in the history of legislation in New York, for instance:

Session Laws 1862, chap. 80, § 2, p. 233.

An act of April 9, 1873, found in

Session Laws 1873, chap. 187, § 3, p. 304.

Under this law women who were tax-payers are said to have voted.

The act of April 24, 1873,

Session Laws 1873, chap. 285, § 4, p. 409.

Under this act it is said women voted.

The act of May 13, 1876,

Session Laws 1876, chap. 254, § 4, p. 250.

Under this act it is reported that 99 women voted.

See history of Woman Suffrage, vol. 3, p. 959.

In 1849 the legislature of Wisconsin enacted a law extending suffrage to the male negro, which law was duly submitted to the people and ratified. All this was done under the proviso contained in art. 3 of our constitution.

At the general election in 1865 one Gillespie, of mixed blood, attempted to cast his ballot which was refused. Gillespie brought suit against the inspectors. And in commenting upon this proviso, Dixon, C. J., in this case of *Gillespie vs Palmer*, 20 Wis. p. 587, says: "I do not see how its language could ever have been the subject of

of doubt or controversy. \* \* \* It is obvious from the very reading that three and but three principles or leading ideas were present to the mind of the framers, or persons who prepared the proviso; first, that the right of suffrage should not be extended to persons not already enumerated in the section without the assent of the legislature to be evidenced by a law enacted for that purpose; second, that such law should not be in force until submitted to a vote of the people and approved by a majority of all the votes cast; and third, that such submission to a vote of the people and majority of all the votes cast should be at some general election. According to the language employed, all the safeguards intended by the framers to be thrown around this important subject of the extension of suffrage are obviously embraced in these three principles."

II. Chap. 211, Laws 1885 was properly enacted, and the formalities incident to its passage and its validity, were duly observed.

See Amended Complaint folios 2, 3, 4.

Facts well pleaded in the complaint are admitted for the purposes of argument on demurrer.

That a majority of all the votes cast *on that subject* is sufficient is well established in this state.

*Gillespie vs. Palmer*, 20 Wis. 572.

*Sandford vs. Prentice*, 28 Wis. 358, p. 362.

*County of Cass vs. Johnston*, 95 U. S. 360, p. 369.

*Carroll Co. vs. Smith*, 111 U. S. 556, 561.

citing *St. Joseph vs. Rogers*, 16 Wall, 644.

III. Amended complaint makes all necessary averments touching the qualifications of plaintiff as a voter under said chapter 211.

See allegations of complaint, 1st, 2d, and 7th.

Registration is not necessary or required to entitle an elector to vote at the municipal election of Racine, Wisconsin. Neither the statutes nor the city charter require this to be done as a preliminary to voting at such election.

IV. Inspectors of election are ministerial officers and malice in the rejecting of ballots by them, acting in such capacity need not be alleged or proved.

In *Gillespie vs. Palmer*, 20 Wis. 572, the Court say, p. 587, "They (inspectors) are mere ministerial officers; certainly far from being judicial." And in their decision on this point the court follow Massachusetts and Ohio, citing

*Lincoln vs. Hapgood*, 11 Mass. 350.

*Blanchard vs. Stearns*, 5 Met. 298.

*Harris vs. Whitecomb*, 4 Gray, 433.

*Jeffries vs. Ankeny*, 11 Ohio, 373.

*Anderson vs. Millikin*, 9 Ohio, St. 568.

And the Court continue "Some of these decisions are based partly on the state statute law regulating elections, as being different from the English law, but mainly upon the necessity of protecting the highly valued privilege of voting when the law has provided no other remedy. We adopt the rule of these decisions."

See also *Lombard vs. Allen*, 3 Allen, 1.

*Gates vs. Neal*, 23 Pick 308.

*Capen vs. Foster*, 12 id. 485.

*Bacon vs. Benchley*, 2 Cush. 100.

In *Goetcheus vs. Matthewson*, 61 N. Y. 420, the Commission of Appeals, per Dwight C. in commenting upon the English law upon this question, say on p. 434: "There is a marked difference between the former English law and the present, to which, if attention is not

paid, the decisions will be misapprehended. Prior to the statute of William IV, which certainly makes, as has been seen, some of their duties ministerial, the returning officer was bound by his oath to make a return of that person as elected who, *in his judgment*, had the majority of *legal* votes. (Rogers on Elections, 246.) Under that state of facts it might well be held that the returning officer, in rejecting a vote, acted *judicially*, as the question, whether a vote was legal or not, was made to depend upon his judgment. Under the present law he can only put specified questions to the voter, as under the law of this state. In asking specific questions, his functions are ministerial. When a question allowed by law is asked, his judgment comes into requisition to determine whether a full response is made to it; in that respect, his power may be judicial."

So also in regard to the position of New York on this question of malice, a comparison of the language of the Courts with the statutes regulating and prescribing the duties of these officers is essential. The statute may clothe the inspectors with discretionary powers, and in the exercise of such powers they may be protected. "Where, on the other hand, the law denies a discretion, but chalks out the line which they must pursue, they are bound to follow it. The rule, then, may be stated in this form: Where the law neither confers judicial power nor any discretion at all, but requires certain things to be done, everybody, whatever be its name or whatever other functions of a judicial nature it may have, is bound to obey, and is liable to an action for disobedience."

*Goetcheus vs. Matthewson*, 61 N. Y. 420, p. 432.

Citing *Ferguson vs. Earl of Kinnoull*, 9 Cl. & Fin. 251.

The Supreme Court of the United States, in the case

of *Teall vs. Felton*, reported below in 1 N. Y. 537, and affirmed in the Supreme Court and reported in 12 How. 284, said, "that the difference between a judicial and ministerial act must, at all times, be determined by the law under which an officer is called upon to act, and by the character of the act."

See also *Cullen vs. Morris* 2 Starkie 481.

*Tozer vs. Child* 6 E. & B. 289.

and S. C. Ex. Cham. 7 id 317.

Now the position of New York on this point seems to be this as stated in the case of *Goetcheus vs. Mathewson* p. 425 by Lott, Ch. C. "The inspectors of election have the right to ask a person who offers to vote, when challenged, after questioning him on the matters specifically designated, such other questions "as may tend to test his qualifications, etc. \* \* \* " at the poll where he is challenged, and it may be conceded that they act in a *quasi-judicial* character in putting "such other questions" and in determining whether he answers *fully* the questions which shall be put to him."

In this respect the statutes of Wisconsin are similar to those of New York.

R. S. Wis. 1878 Last part of Sect. 36 and Sect. 38.

See also *People vs. Pease* 27 N. Y. 65.

*Cooley on Const. Lim.* (1st ed.) p. 617.

Dwight C. in *Goetcheus vs. Mathewson*, cites with approval the case of *Gillespie vs. Palmer* 20 Wis. 572.

Respondent Olympia Brown claimed the right to vote under Chap. 211 Laws of 1885, and the inspectors knew that for she read exhibit A. (case folios 11, 12,) to the inspectors.

See amended complaint, folio 9.

And that the inspectors did not pass upon her qualifi-

cations is evident, for they refused to administer the preliminary oath required by the statutes. (Complaint folio 8.) The conclusion is and must be that the inspectors refused her vote simply because she was a *woman*. It follows then of necessity that the inspectors undertook to construe a law of the legislature extending the right of suffrage to woman at all elections pertaining to school matters. Is this required of inspectors of elections? If the inspectors act *judicially* in this, how do they obtain jurisdiction of the subject matter, which they must do?

*Goetcheus vs. Mathewson* p. 429.

The inspectors are liable criminally under R. S. 1878, Sect. 4545 only where they receive a vote from a person "knowing that such person has not the requisite qualifications and residence of a legal voter, etc." Could the inspectors have acted upon *knowledge* in the case before us, in view of Chap. 211 Laws 1885? Acting upon *knowledge* is a far different thing from acting according to *judgment*. They are not called upon to exercise judgment in respect to a law, but only in respect to qualifications and then only after proper questions are put or upon *absolute knowledge*. Clearly, if their duties as inspectors did not require them to pass upon said Chap. 211, they acted neither ministerially nor judicially, but *extra judicially*, and are liable in either event.

In the case of the *Nat. Bank of Chemung vs. City of Elmira*, Church Ch. J. says: "Some of the duties of assessors are judicial in their nature, and as to those, when acting within the scope of their authority, they are protected from attack, collaterally, to the same extent as other judicial officers; but they are subordinate officers, possessing no authority except such as is conferred on them by statute, and it is a well settled rule that such officers must see that they act within the authority com-

mitted to them. \* \* \* \* So when their right to act depends on the existence of some fact, which they erroneously determine to exist, their acts are void. So in performing a ministerial duty, their acts are void, if not in accordance with law. But having jurisdiction of the person and subject matter, if they err in the exercise of it, they are protected."

So the decision of this court in *Gillespie vs Palmer* should be affirmed as the law of this State.

V. The municipal election held in the city of Racine on April 5th, 1887, was an election pertaining to school matters, such as was contemplated by chap. 211, Laws 1885.

A comparison of the provision conferring or securing male suffrage, and chap. 211 will aid in the interpretation of the latter.

Article 3, Constitution as amended in 1882, and Laws 1883, Ch. 30, §1.	Chap. 211, Laws 1885.
Sec. 1. Every male person, (Subd. 1) (citizens of the United States)	Every woman, who is a citizen of this State,
Sec. 1 of the age of twenty-one years or upwards, belonging to either of the following classes, who shall have resided within the State for one year next preceding any election, and in the election district where he offers to vote ten days, shall be deemed a qualified elector at such election.	of the age of twenty-one years or upwards, (exceptions noted below) who has resided within the State one year, and in the election district where she offers to vote ten days next preceding any election <i>pertaining to school matters</i> , shall have a right to vote at such election.
Sec. 2 No person under guardianship, <i>non compos mentis</i> or insane, shall be qualified to vote at any election; nor shall any person convicted of treason, etc.	Except paupers, persons under guardianship, and persons otherwise excluded by section 2, art. 3 of the constitution of Wisconsin.

It will be seen at a glance that the language is practically the same in both with one exception, viz. "*election*" in chap. 211 is modified by the phrase "*pertaining to school matters.*" The *descriptio personae* of course differs on account of sex.

What is the meaning and purpose and effect of this phrase "*pertaining to school matters?*" The rest of the language is as general and broad in the one case as it is in the other, and the qualifications are the same in both.

General words receive general construction unless limited.

Woodbury vs. Collins, et. al. 19 Wis., 65.

Harrington vs. Smith, 28 id. 43.

Encking vs. Simmons, 28 id. 272.

And if there be no express exception, the Courts can create none.

*Collins vs. Barron* 5 Md. 533.

citing *Davidson vs. Mykewich* 3 Johns, Ch. Rep. 142.

It is well settled also as a rule that if the words of a statute are precise and clear, no construction is allowed.

Sedgwick on stat. constr., p. 195.

Cooley on const. lim., p. 68.

Mundt vs. Shøboygan and Fond du Lac, R. R. Co., 31 Wis., 451, (457.)

35 Cal. 634.

The phrase "*school matters*" is such a phrase; in its import *clear*, and in its meaning *general*, and occurring as it does in a general statute, it must have reference to the school system of the state as a whole. If this phrase were taken by itself, and reference had to the whole state, no one would hesitate for a moment in con-

struing it as applying to all things connected with the established school system of this state.

School matters are undoubtedly the most important matters connected with the state, and the most far-reaching in their results, and in their influence upon the future welfare of the state. Total amount expended in money for the support of schools in this state for the year 1886 is \$3,646,160.02: of this amount \$2,644,858.59 raised in 1886 by taxation. In the schools of this state during the year 1886, 11,048 teachers have received employment, and the number of scholars enrolled between the ages of 4 and 20 is 331,018, while the total number in the state between 4 and 20 years of age is 556,093.

See report of State Supt. 1886, pp. 7, 12, 18.

The legislature of this state, well recognizing the great importance to the state of this interest, have extended to women the privilege of participating in all that concerns the interest and welfare of these schools of the state, and very wisely, too; while the people by their ballots have said, "be it so." Now these schools are under the immediate control, management, and supervision of various officers and boards, some appointed and some elected. The legislature knew this and the people knew it.

The natural import of the words of any legislative act, according to the common use of them, when applied to the subject matter of the act, is to be considered as expressing the intention of the legislature.

7 Mass. 523.

Brooks vs. Hill, 1 Mich., 123.

Sedgwick on stat. constr., pp. 198, 208, 220, 253, 328, 415.

Cooley on const. lim., p. 70.

Way vs. Way, 64 Ill., 406.

R. S. 1878 Wis. Sec. 4971 Subd. 1.

The intent of the people to whom said Chap. 211 was submitted must be arrived at in the same manner.

The subject matter of this act is suffrage to woman, and the great and important subject of school matters is connected with the subject of suffrage in this state by the word "pertaining" in said act.

This word "pertaining" is defined by Webster as meaning "relating to" which latter term is defined as follows: "to stand in some relation," "to have a bearing or some concern," "to pertain" "any sort of connection which is perceived or imagined between two or more things, or any comparison which is made by the mind, is a relation" I. Taylor.

Webster Dict. under the words "pertain" "relate," and "relation."

The word "pertaining" is derived from the Latin "*per-tineo*" which is used by classical writers both in its literal sense and in a figurative sense. As an illustration of the former see *Cicero de Natura Deorum* 2. 55, where he uses the following "Venae in omnes partes corporis pertinentes" also *Caes. Bellum Gallicum* 1-1 the following: "Belgae pertinent ad inferiorem partem fluminis Rheni;" the meaning being "extending to," "reaching to." In the figurative sense see *Livy* 23, 27, "Caritas patriae per omnes ordines pertinebat;" and also *Cicero De Sen.* 23, "ad posteritatis memoriam pertinere," and *Cicero Oratio Pro Roscio Amerino*, "Illa res ad meum officium pertinet."

Authons' Latin Dict. under "pertineo."

The word has come into our language with its figurative meaning which is "to relate to" "to extend to" "to exert an influence upon" and so it is used in said Chap. 211 by the legislature. Such is the connection by language between the phrase "school matters" and "suffrage." The connection in fact and practice corresponds.

The public schools of the city of Racine are under the direct control and management of a Board of Education, which board appoints a city Superintendent of Schools, and employs all teachers and fixes their respective salaries. This board is composed of two commissioners from each ward of the city, appointed by the mayor and confirmed by the city council.

See Title 15 City Charter Racine as amended in 1885.

"All contracts entered into by the Board of Education excepting the employment of teachers, shall, before they shall have any validity, be countersigned by the city comptroller," who also has other duties pertaining to school matters.

See Secs. 8 & 10, Title 15, Racine City Charter.

The Board of Supervisors, on which cities, villages and town are represented (R. S. 1878 § 662) exercise all the legislative functions of the county as a body corporate.

R. S. 1878 § 52.

For these officers respondent attempted to cast her ballot at the municipal election held in the respective election districts of the city of Racine on April 5, 1887.

(See Case folios 7, 8.)

It is manifest that an election at which such officers are elected necessarily pertains to school matters, as Respondent alleges in her amended complaint, (see case, folio 5,) which allegation, if well pleaded, must be taken as true for the purposes of this argument.

And clearly, if women cannot vote at the municipal election, they can have no voice or participation in the control and management of the schools of Racine, and such is undoubtedly true of all the cities of the state. It is so even if the board of education were elected directly

by the ballots of the people, for their names are placed upon the municipal ticket, and the inspectors are prohibited from examining said ballots.

R. S. 1878, Sect. 32.

Still where the statute, Chap. 211, has made no exceptions the courts can make none.

5 Md. 533.

Citing 3 John, Ch. Rep. 142.

Gilbank vs. Stephenson, 30 Wis. 155.

Citing Cothren vs. Connaughton, 24 Wis. 134.

To hold therefore that this Respondent had no right to vote at said Racine municipal election, is to hold chap. 211, Laws 1885, inoperative in the city of Racine and as we believe, in most if not all the cities of the State, which clearly was not the intention of the legislature or the people. That it was not the intent of the legislature to exclude from the operation of said law the women of cities is conclusively shown by the fact that the original bill as introduced in the State Senate and known as "Bill No. 208 S," contained the words "within the city or town where she offers to vote," which was changed by amendment in the Assembly into "election district where she offers to vote." In this amendment the Senate at once concurred.

(See bill No. 208 S with filings thereon and amendments.)

There can be little doubt as to the meaning and purpose of this amendment. It was thought best to conform the language of the law to the language of the general election laws.

The phrase "election district" has in our statutes a definite and unmistakable meaning, which phrase is now

a part of our constitution (see art. 3, of Const. of Wis., as amended 1882) and is wholly insusceptible of application to any other political division known to our laws. The Supreme Court of Wisconsin has never defined "election district." But the highest court of Pennsylvania have considered it and defined it, in the case of *Chase vs. Miller*. The constitution of Pennsylvania contains the phrase in the same connection in which it is found in our constitution. The constitutional provision in force at the time in Pennsylvania was: "In elections by the citizens, every white freeman of the age of twenty-one years, having resided in the State one year, and in the election district where he offers to vote, etc." Section 43 of General Election Law, 2d July, 1839, Purd. 289, Penn., authorized the commander of volunteers in actual service to name a place where the soldiers might exercise the right of suffrage. The commander designated the camp as such place. This 43d section was attacked in *Chase vs. Miller* as unconstitutional and void and so held by the Court, because it was in conflict with the above constitutional provision. Chase and Miller were both candidates at the election held—for the same office—and it was agreed that Chase received 5811 legal votes and Miller 5646 legal votes; it was also agreed that Chase received 58 "army votes" and Miller received 362. The legality of these "army votes" was the main question before the court. The Court by Wood <sup>and</sup> J. in this case say, (p. 420), "Always, from 1799 down to the present hour, election districts, within the meaning of our statutes, have denoted subdivisions of Pennsylvania territory, marked out by known boundaries, prearranged and declared by public authority. \* \* Now, whilst the constitution did not stop to define election districts, it took up and incorporated them as the legislature had theretofore or should thereafter define and regulate

them \* \* And therefore election districts mean in the constitution just what they mean in the statutes."

*Chase vs Miller* 41 Penn St. 403.

The Court further say (p. 419) that this amendment to the constitution "introduced not only a new test of the right of suffrage, to-wit, a district residence, but a rule of voting also. *Place* became an element of suffrage for a twofold purpose. Without the district residence, no man shall vote, but having had the district residence the right it confers is to vote *in that district*. Such is the voice of the constitution. The test and the rule are equally obligatory."

The application is manifest to the case at bar under chap. 211 Laws 1885, Wis. This law gives woman a right to be exercised in a definite place and nowhere else, "*in the election district*."

If therefore women have any rights whatever conferred upon them by said chap. 211 they must exercise such right where the statute designates and *nowhere else*. The people knew the meaning of "election districts" and most assuredly the legislature did, and recognizing its force selected it in lieu of "city or town" as best signifying their intention.

And such construction as will carry out the intention of the legislature which framed the act, should be given to it.

3 Cowen 89.

*Harrington vs Smith*, 28 Wis. 43 (p. 59.)

*Haentze vs Howe*, 28 id. 293.

*Sedgwick on Stat. Constr.* pp. 194, 197, 219, 263, 265, 328.

*Supervisors of Niagara vs the People*, 7 Hill 511.

"In construing statutes, courts I grant, are to look to

the language of the whole act, and if they find any particular clause, not so large and extensive in its import as those used in other parts of the statute; and if upon a view of the whole act, they can collect from the more large and extensive expressions used in other parts, the real intention of the legislature, it is their duty to give effect to the larger expressions."

12 Ga. 530.

Metcalf J. in *Commonwealth vs. Hartnett*, 3 Gray 450, on page 451 uses the following well recognized rule.

"It is a common learning, that the adjudged construction of the terms of a statute is enacted, as well as the terms themselves, when an act, which has been passed by the legislature of one state or country, is afterwards passed by the legislature of another. So when the same legislature, in a later statute, use the terms of an earlier one which has received a judicial construction, that construction is to be given to the later statute. And this is manifestly right. For if it were intended to exclude any known construction of a previous statute, the legal presumption is, that its terms would be so changed as to effect that intention."

Citing, 6 Dane Ab. 613.

Kirkpatrick vs. Gibson's Ex'ors, 2 Brock, 388.

Pennock vs. Dialogue, 2 Pet. 18.

Adams vs. Field, 21 Verm. 266.

Whitcomb vs. Rood, 20 Verm. 52.

Rutland vs. Mendon, 1 Pick, 156.

Myrick vs. Hasey, 27, Maine 17.

The only election pertaining *exclusively* to school matters in this state is to be found in rural school districts, which are technically known in our statutes as "school district meetings." And in many of these school districts

a woman might have residence in our election district, while the district meeting for her district would be held in an adjoining election district, for example, joint districts of which there are about twenty in Racine county alone. (See school report Wisconsin 1883-4 Graham, p. ~~433~~<sup>132</sup>) And furthermore had the legislature intended a limitation to school districts of this right of suffrage, they certainly would have used terms to designate such intent. School district meeting is a term well known and frequently used in our statutes. Such a limitation of chap. 211 would be a farce upon legislation and cannot be maintained for a moment.

"When technical words occur in a statute, they are to be taken in a technical sense, unless it appears they were intended to be applied differently from their ordinary or legal acceptance."

Residence in an election district is *technical* and cannot mean residence in a school district.

Sedgwick on Stat. Constr. p. 221.

citing 1 Kent Com. 462.

Clark vs. Utica, 18 Barb. 451.

State vs. Mace, 5 Md. 337, 350.

The clear intention of chap. 211 is, in recognition of the vast importance to the state of school matters, and assigning that as a reason, to extend to women full and complete suffrage at all elections affecting in any manner the schools of the State.

R. S. 1878, sec. 428, provides that "Every person shall be entitled to vote in any school district meeting who is qualified to vote at a general election for State and county officers, and who is a resident of such school district." No ten days' residence is here required, and is it to be presumed that the legislature intended such a difference

between the qualifications of the male voter and the female voter at school district meetings? Besides could women vote at school district meetings without being qualified to vote at the general election? The difficulties in the way of such limited construction are many and insurmountable. Had the legislature intended to confer upon women a right or privilege to be exercised only at a school district meeting it seems highly probable, if not indeed certain, that they would have submitted if need be an amendment of R. S. 428 to the people for confirmation.

It will be observed that chap. 211 reads "every woman \* \* \* (possessing qualifications) \* \* \* shall have a right to vote at such election." *For whom?* The act provides for no separate ballots or ballot-boxes. If it were intended to limit women to voting for any part less than the whole of the ballot, such a limitation would have been expressed. Presumably the meaning and intent were to permit women to cast the ballot used at the election, if the election pertained to school matters. Every law is presumed to contain all provisions necessary to its execution.

The language of the act is sufficiently broad and general to admit of such construction, and being a *remedial* law such construction should be given to it. That it is a *remedial* law there can be little if any doubt.

"Remedial acts are those made from time to time to supply defects in the existing law, whether arising from the inevitable imperfection of human legislation, *from change of circumstances*, from mistakes, or from any other cause."

Sedgwick on Stat. Constr. p. 32, (2d ed.)

See also Pomeroy's Art. on "Statutes" in Johnson's Encyclopedia.

Being remedial, it should be construed liberally, and so as to remove the evil and extend the benefit proposed.

White vs. Steam Tug, 5 Cal. 462.

Sedgwick Stat. Constr. p. 308.

Dwarris, p. 632.

White vs. The Mary Ann, 6 Cal. 462.

Cullorden vs. Mead, 22 Cal. 95.

Jackson vs. Warren, 32 Ill. 331.

Wilbur vs. Paine, 1 Ohio, 256.

A statute which creates a right of action in an individual, or a particular class of individuals, is not penal, but remedial.

Neal vs Moultrie 12 Ga. 104.

Any other construction than that which would allow respondent to vote at the municipal election, will utterly defeat the law, and render the same wholly inoperative. But it is held that statutes clear and consistent as far as they go, are not to be held inoperative for uncertainty, for not settling questions as to matters consequent upon their execution.

State ex. rel. vs Hundhausen 26 Wis 432.

And this court has held that, that construction which will *save* rather than which will *avoid* a statute is preferred.

Ruggles vs Fond du Lac, 53 Wis. 436.

Bigelow vs R. R. Co., 27 Wis. 478.

Atkins vs Fraker, 32 Wis. 510.

Bound vs R. R. Co., 45 Wis. 543.

Grenada vs Broughn, 112 U. S. 261 (268.)

Courts cannot consider the *policy* of a statute, and

cannot arrest the operation of statutes because they are *unwise*, when no question of legislative power is involved.

- Broadhead vs Milwaukee, 19 Wis. 624 (p. 695).  
 Bushnell vs Beloit, 10 id 155 (p. 165.)  
 Baker vs the State, 54 id 368 (p. 379.)  
 Atty. Genl. vs R. R. Cos., 35 id. 425 (553.)  
 Coutant vs the People, 11 Wend 511.  
 Weister vs Hade below cites, 2 Rawle 374.  
 Sedgwick on Stat. Constr. pp. 156, 183, 194, 252.  
 Cooley on Court Law, pp 138-9, 203, Note 3.  
 Weister vs Hade, 52 Penn St. 478.  
 Cochran vs Van Surley, 20 Wend 381.

Mr. Justice Baldwin of the Supreme Court of the United States uses this language in the case of *Bennett vs Boggs*, 1 Bald. 74 and 75. "We cannot declare a legislative act void because it conflicts with our opinions of policy, expedience, or justice. We are not the guardians of the rights of the people of the state, unless they are secured by some constitutional provisions which comes within our judicial cognizance."

Neither are the consequences of construction for the consideration of courts, but for the legislature.

Clark vs Janesville, 10 Wis. 219 (126.)

And an act will not be construed *against* intention to avoid consequences.

Harrington vs Smith, 28 Wis. 43.

And the legislature is the sole judge of the *expediency* of laws.

Tallman vs Janesville, 17 Wis. 71 (80.)

To insert in this law, (chap. 211,) the words *directly*

and *exclusively* before "school matters" would be a strong and palpable instance of *judicial legislation* which courts are careful to avoid.

Tynan vs Walker, 35 Cal. 634 (639, 642.)

The title affords very little clue to intent.

Sedgwick on State, Constr. pp. 39, 40, 45.

Flynn vs Abbott, 16 Cal. 358.

Dwarris p. 507.

We submit therefore that chap. 211, Laws 1885, is constitutional; that said law was properly enacted and confirmed by the people; that the municipal election held April 5th, 1887, in the city of Racine. was an election pertaining to school matters within the meaning of said law; that Respondent was entitled to vote at said election; that the inspectors are liable in damages to Respondent for refusing to permit her to vote at said election; that it is not necessary to allege *malice* on the part of the inspectors in so refusing; that the complaint of the plaintiff below should stand and that the decision of the lower court overruling the demurrer of the defendants to said complaint be affirmed.

ROWLANDS & ROWLAND,  
 Attorneys for Respondent.

STATE OF WISCONSIN.

IN SUPREME COURT.

OLYMPIA BROWN,

vs.

ALBERT L. PHILLIPS, ET ALIS.

The right of suffrage is strictly a civil or political right, as distinguished from natural rights.

"The truth seems to be, that the right of voting, like many other rights, is one which, whether it has a fixed foundation in natural law or not, has always been treated in the practice of nations as a strictly civil right, derived from and regulated by each society according to its own circumstances and interests"

Story on Con., § 580

Again, speaking of the diversity of qualification required in the different states, he says: "In some of the states the right of suffrage depends upon a certain length of residence and payment of taxes; in others upon mere citizenship and residence; in others upon the possession of a freehold or some estate of a particular value, on upon the payment of taxes or performance of public duty, such as service in the militia or on the highways. id. § 582.

It follows, therefore, that the right of voting at all elections and for all persons is exclusively within the legislative power except so far as that power has been limited by the constitution of the state.

The legislature of a state possesses the whole legislative power which resides in the people of a state except where the constitution of the state has limited the power. Cooley on Con. Lim. \* 173, 206, states the proposition as follows:

"In every sovereign state there resides an absolute and uncontrolled power of legislation. In Great Britain this complete power rests in the parliament. In the American states it resides in the people themselves as an organized body politic. But the people by creating the constitution of the United States have delegated this power as to certain subjects and under certain restrictions to the congress of the Union; and that portion they cannot resume, except as it may be done through amendment of the National Constitution. For the exercise of the legislative power, subject to this limitation, they create by their state constitutions a legislative department upon which they confer it; and granting it in general terms they must be understood to grant the whole legislative power which they possessed except so far as at the same time they saw fit to impose restrictions. While therefore the parliament of Britain possesses completely the absolute and uncontrolled power of legislation, the legislative bodies of the American states possess the same power except, *First*, as it may have been limited by the constitution of the United States; *Second*, as it may have been limited by the constitution of the state. A legislative act cannot there-

fore be declared void, unless its conflict with one of these two instruments can be pointed out.

"It is to be borne in mind, however, that there is a broad difference between the constitution of the United States and the constitution of the States as regards the powers which may be exercised under them. The government of the United States is one of *enumerated* powers; the governments of the states are possessed of all the general powers of legislation. When a law of congress is assailed as void we look in the national constitution to see if the grant of specified powers is broad enough to embrace it; but when a state law is attacked on the same ground it is presumably valid in any case, and this presumption is a conclusive one unless in the constitution of the United States or of the State we are able to discover that it is prohibited. We look in the constitution of the United States for *grants* of legislative power, but in the constitution of the state to ascertain if any *limitations* have been imposed upon the complete power with which the legislative department of the state was vested in its creation. Congress can pass no laws but such as the constitution authorizes, either expressly or by clear implication. While the state legislature has jurisdiction of all subjects on which its legislation is not prohibited."

The constitution of the United States imposes no restriction on states in respect to the right of suffrage.

We therefore have to inquire whether chapter 211, Laws 1885, is prohibited by the constitution of this state; the first section reads as follows:

"Every woman who is a citizen of this State, of the age of twenty one years or upwards, except paupers, persons under guardianship and persons otherwise ex-

cluded by section 2, of article 3, of the constitution of Wisconsin, who has resided within the state one year and in the election district where she offers to vote ten days next preceding any election pertaining to school matters, shall have a right to vote at such election."

This act was duly submitted to the people at the next general election after it was passed and a majority of vote cast in its favor.

Section 1, article 3, of the constitution confers the right of suffrage upon certain persons, viz.: upon every male person of the age of 21 years who shall have resided in the state for one year. 1st, who is a white citizen of the United States. 2d who shall have declared his intention to become a citizen. 3d, Indians who have been declared by a law of congress to be citizens of the United States. 4th, Indians not members of any tribe?

Then follows the proviso that "the legislature may at any time extend by law the right of suffrage to persons not herein enumerated, but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election and approved by a majority of all the votes cast at such election."

In considering this question we should constantly keep in mind that the legislature has full and absolute power over the right of suffrage where such power is not restricted by the constitution. The four classes upon whom the right is conferred by the constitution are placed by that instrument beyond and above the legislative power, although the exercise of the right may be regulated in a reasonable manner, by legislative act it cannot be impaired nor subjected to any additional conditions which may substantially affect the exercise of the right; but these provisions of the constitu-

tion are in the nature of a grant of the right of suffrage to the persons enumerated in section one, and no limitation would be implied from this grant to the persons described, on the power of the legislature to extend the right to other persons not enumerated in section one, if the proviso had not been incorporated in that section.

The only restriction which is imposed on the legislative power over the right of suffrage is found in sec. 2 of article 3, which reads as follows:

"No person under guardianship, *non compos mentis* or insane, shall be qualified to vote at any election; nor shall any person convicted of treason, or felony, be qualified to vote at any election, unless restored to civil rights."

If the constitution had read as above stated, omitting the proviso to subdivision 4, could any body doubt that it was the intention of the framers of that instrument to leave the right of conferring the elective franchise in the legislative discretion, on all persons on whom it was not granted by section 1, or who were not excluded from it by section 2. The fact that the framers of the constitution after they had granted the right of suffrage to the persons described in section 1, then prohibited the legislature from conferring it upon the persons described in section 2, shows conclusively that they did not understand that conferring the right upon certain persons in section 1, impliedly inhibited the legislature from conferring it on other persons, but on the contrary shows that the framers of the constitution understood that the legislature would possess the plenary power of granting the right to other persons, hence the necessity of section 2, as a restriction on that power. But considering the proviso in subdivision 4, in connection with

the remaining parts of section 1 and of section 2, all doubt on the subject is removed, without that proviso it would have been competent for the legislature to have extended the right of suffrage to all persons whatever by the passage of a simple act, but the framers desiring to throw additional safeguards around the extension of this important right, provided in subdivision 4, that the legislature should only extend it to other persons than those enumerated on condition that the law granting such extension should be submitted to a vote of the people at a general election, and receive a majority of the votes cast; thus the proviso is a restriction upon the unlimited power which the legislature would otherwise have professed, and is in no sense a grant of legislative power on that subject, and the proviso is a clear recognition that the legislature would have possessed unlimited power to extend the right except as restricted by section 2.

The proviso is as broad as the English language could make it. "May extend the right of suffrage to persons not herein enumerated." Women are certainly not enumerated in section 2, and it will therefore be necessary for this court to hold that *they are not persons*, in order to hold that the legislature has not the constitutional right to extend suffrage to women, which would be absurd.

## II

The only remaining question is, what is the scope and application of chapter 211, laws of 1885.

The language of section 1 is plain and unambiguous:

"Every woman who has resided within the state one year, and in the election district where she offers to

vote, ten days next preceding *any election pertaining to school matters* shall have a right to vote at such election."

The only place for construction in determining the meaning of this section is to ascertain what the phrase "pertaining to school matters" means.

The word "pertaining" is the broadest word which could have been used in connection with the phrase "school matters." Pertaining, appertaining, appurtenance, appendage, are all words of a similar meaning, but pertaining is the broadest and most comprehensive of them all. It is only necessary to examine the best dictionaries and works on words and phrases to reach this conclusion. The primary meaning of this term is "belonging to or relating to." The word appurtenance is one of synonyms, or one of the words used in defining appertaining. Now, appurtenance means "something connected as an incident with another thing deemed a principal." Appurtenant: annexed or *pertaining* to some more important thing; appurtenant and appurtenances are substantially the same in meaning as accessory or accessories." Abb. Dic.

But is useless to spend time on the meaning of a word so well understood. The true definition of pertaining is something which in any way relates to some other thing or things.

Does the municipal election of the city of Racine in any way relate to school matters? The principal thing involved in that election is to elect officers to carry on the city government, but inasmuch as the entire school system of the city depends upon the character and action of the officers elected, there can be no doubt but that the election pertains or relates to school matters.

The mayor nominates and the common council appoint the school commissioners, who determine the number, character, and length of time that schools shall be kept in the city. The common council appropriate the money for carrying them on, the mayor may remove the school commissioners and appoint others in their places, etc., etc. Chapter 211, is founded upon the idea that the women of the state have as vital an interest in the kind, character, length of time taught of our schools as the men, that they have the highest interest in the training and education of the youth of the state, in their morals and character, which are largely formed during their attendance at school, and by the influences that surround them there, and unless they can vote for municipal officers in Racine, they can have no voice whatever in determining these matters.

It is said in the brief of counsel for the appellants that it was the intention of the legislature to confer only a *limited* right of suffrage, and the only ground upon which a practically general right of suffrage can be claimed, is that the legislature by the *misuse* or *inapt* use of words or terms conferred a right entirely beyond their intent and purpose.

This passage contains an implied admission that we are right in the construction we put on the language employed in the act, but it is surprising both as an argument and an assertion of fact, and is not wholly respectful to the judiciary committee of the assembly who reported the bill. On that committee were Col. Vilas, present secretary of the interior; Mr. Hudd, present member of congress; Mr. Estabrook, Present attorney-general, and other good lawyers; and the implication from this passage in the brief, is that neither

they nor the legislature knew the meaning of one of the oldest and most common words in the English language.

"To whom also he showed himself alive, after his passion, by many infallible proofs, being seen of them forty days and speaking of the things *pertaining* to the kingdom of God." Acts 1, 3.

"According as his divine power hath given unto us all things that *pertain* unto life and goodness through the knowledge of him that hath called us to glory and virtue." 2 Pet., 1, 3.

On the contrary I regard the law as the highest evidence of the learning and ability of the committee and of the legislature, their purpose was to give the women of the state a voice and a vote at all elections pertaining to school matters. It obviously was not their intention to confine this vote to district school meetings in which only the women residing in the county school districts could take part, if that had been their intention they doubtless would have said so in the act. It was not their intention to confine the vote to school officers proper, if it had been, they would have said so, but on the contrary it was their intention to give the women a vote in the far more necessary and important elections in our cities where the seeds of immorality and vice are more widely scattered and where the good of the state imperatively demands the most wholesome and pure administration of school affairs, and throughout the state generally in all elections where educational interests were involved. And hence they used the apt and proper terms to carry out this intention by providing that when *any election* was held in the State which

in any way involved educational interest women might vote at such election.

Perhaps the legislature did not consider in detail the entire scope and application of the law, but they were determined to make it broad enough to include every election which in any way related to school matters, and hence the law reads, every woman may vote at *any election pertaining* to school matters. The legislature was determined that the right thus conferred should be a substantial and effective right, and not a mere theoretical and fruitless one.

The only safe guide to the intention of the legislature is a fair construction of the language used in the laws they enact. It is not becoming in counsel nor admissible for courts to construe this law on the assumption that the legislature did not know what they were doing in passing it, and that the people in ratifying it did not have intelligence enough to understand its meaning.

But there is another argument in the brief of counsel for appellants that is quite as remarkable as the one I have just commented on, that is,

That the vote being given by ballot, it involves the right to vote for every officer at an election pertaining to school matters, although some of the officers thus voted for may not have any duties to perform in relation to schools.

The whole argument of counsel seems based upon the idea that the legislature did not possess ordinary intelligence, and for that reason the court must annul this act.

Now I assume on the contrary that the legislature

were quite as well aware as the counsel, of the laws of this state regulating elections, and that they knew that if they only allowed women to vote for such officers as performed duties directly relating to school matters it would defeat the intention of the legislature in enacting the law, hence they provided that at any election pertaining to school matters, women might vote *at such election*, not for such persons as were candidates for office whose duties required them to take action in school matters, but *at such election* if it in any way related to school matters. The intelligence of the legislature is clearly apparent in the language used in the act they intended that a substantial right of suffrage should be conferred on women.

But counsel exclaim: "The latter proposition cannot be tolerated;" pray why not: There is no doubt but that the sentiment in favor of extending suffrage to women is rapidly growing and extending in this country. The desire that politics shall be elevated and purified lies at the foundation of that sentiment.

My friends on the other side seem to belong to that class that Mr. Story describes in his work on the constitution. He says:

"The question may indeed be raised whether it be not possible that we have plunged into new dangers in laying thus broadly the basis of responsible citizenship. There are those who foresee only evil and who prophesy only calamity. But evil is always prophesied when concession is made to democracy. \* \* \* It was prophesied in England \* \* \* when political rights were extended to the Jews. Every step in that country toward making the parliament a truly representative body of the whole nation. Every dis-

franchisement of decayed or corrupt boroughs and every extension of the franchise to the people *has been earnestly opposed as fraught with danger to the State*. Every step in America in the same direction has met with the like opposition. The rulers, whether they be kings or lords or *privileged classes, always believe they rule by divine right. Power is safe in their hands, but it would be dangerous in the hands of the people at large*; this is the assumption always when the demand of *new classes* for a voice in the government *are to be resisted*. The American people have assumed that that which is most just is wisest and safest, and they trust to time and experience to justify their confidence. It is beyond question that many unfit persons will demand and exercise the right of suffrage, but no test that could be prescribed — whether of education, property, experience, race or color (or sex) could be completely effectual in separating out the fit from the unfit, the virtuous from the vicious, the patriotic and public spirited from the selfish, mercenary and mean." § 1974.

Counsel say:

"In so far as it creates a new class of voters, it detracts from the value and importance of the votes of those to whom the right of suffrage has been from time immemorial committed."

This is in the true conservative, old foggy style and spirit; we rule by divine right, untold calamities will befall the state if new classes are admitted to share our privileges; but fortunately the gentlemen are living in a progressive age; although they are young men, even they have lived long enough to witness the advancement and progress of women towards an equality with men. The old dogmas of the common law, that mar-

ried women are civilly dead, that husband and wife are but one person, and that person is the husband, that a married woman is incapable of making a contract or owning property, have been exploded within the memory of the gentlemen; and women have pushed their way into new occupations, business marts and financial fields, and into the professions until now before the law and in practical affairs they stand almost upon an equality with men in all the pursuits and avocations of life.

The claim that it was only the intention of the legislature by this act to allow women to participate in school district meetings is unfounded and absurd, that could have been done by a simple act of the legislature, without any submission to the people, as had already been done by the passage of a law making women eligible to school offices; to suppose that the legislature would have provided for so unnecessary and expensive a method, as requiring a vote of the people at a general election to accomplish so insignificant a result is indeed placing the intelligence of the legislature at the lowest possible mark, the whole course of the argument in which the counsel claim that this court should nullify by judicial decision a solemn act of the legislature passed with almost all the formalities required to amend the constitution is based upon the idea that the legislature was composed of idiots, and that they were fit representatives of constituencies composed of fools, and that neither the legislature when they passed, nor the people when they ratified this act, possessed sufficient intelligence to understand the effect of their action. No stronger argument could possibly be made,

showing the necessity for an extension of the right of suffrage to a more intelligent and responsible class.

The counsel for appellants draw a very alarming picture of the extent which this act confers the right of suffrage on women, and imply that direful evils will certainly follow, although they do not state what these evils would be, except that it would probably make women eligible to office, for the purpose, I suppose, of inducing the court to disregard and set at naught the plainly expressed intention of the legislature.

It must be borne in mind that the only question involved in this case is the right of women to vote at the Racine municipal election, and I reply to the gentleman's imaginary statement of evils that "sufficient for the day is the evil thereof." I can hardly believe that the city of Racine will be worse governed if women are permitted to vote than it now is, and there is every reason to believe that the school system will be greatly improved by the active participation of women in its administration.

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*Of Counsel.*

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State of Wisconsin.

SUPREME COURT.

OLYMPIA BROWN,  
*Plaintiff and Respondent,*

vs.

ALBERT L. PHILLIPS,  
ALEXANDER BURCH, and  
JAMES PALMER,  
*Defendants and Appellants.*

ARGUMENT IN SUPPORT OF MOTION FOR REHEARING.

Material portions of the law known as Chap. 211, Laws 1885, and under which this respondent attempted to vote for certain officers voted for at the municipal election held in Racine, Wisconsin, on the 5th day of April 1887, are the following:

“Every woman who is a citizen of this state, of the age of twenty-one years or upwards, \* \* who has resided within the state one year, and in the *election district* where she offers to vote, ten days next preceding any election pertaining to school matters, shall have a right to vote at such election.”

This is a valid law. See opinion of Court in

*Brown vs. Phillips, et als.,*

just rendered. From this law the following syllogism may be formed:

Major premise: Every woman, possessing certain qualifications named and described in Chap. 211, Laws 1885, shall have a right to vote at any election pertaining to school matters.

Minor premise: Plaintiff, Olympia Brown, possesses all the qualifications so named and described in said Chap. 211.

Conclusion: She shall have a right to vote at any such election.

The demurrer of the appellants denies the legal proposition or major premise written above. The minor premise must be denied by answer. Now if the major premise is a correct legal proposition, then the conclusion must follow from proof of the minor premise. It was therefore proper for respondent to allege as she does in her seventh allegation, to-wit: "That on the 5th day of April 1887, she was a legally qualified elector at said municipal election, and possessed none of the disabilities enumerated or referred to in Chap. 211, Laws of 1885, and was entitled to vote in the second ward at said election," etc.

And upon proper proof of such allegation she will have established what? Her right to vote at an election pertaining to school matters.

That it was necessary for plaintiff to allege as aforesaid is, we think, clearly established by the Supreme Court of the United States in

*Murphy vs. Ramsey* 114 U. S., 37 and 47.

On page 37 the Court say: "that the pleader has not in any of the complaints, alleged as matter of fact, that the plaintiff was a legally qualified voter, entitled to be registered as such." It is true plaintiff might have alleged the existence of all the specified qualifications, and the absence of the specific and enumerated disqualifications. What then? The Court would be left to infer as a matter of law, that plaintiff was or was not entitled to vote. But such inference as a matter of law must necessarily have been deduced from allegations contained in the complaint. That a person is legally qualified to vote, and is entitled to vote is a clear conclusion from facts and not a conclusion of law.

On page 47 of *Murphy vs. Ramsey* above, the Court say "In the two cases last referred to, the allegations of the complaint show, not only that the several plaintiffs were legally entitled to be registered as voters, but declared that the refusal of the registration officers to admit them to the list was wrongful and malicious. The demurrers admit the plaintiff's case, as thus stated, and therefore ought to have been overruled."

But in said allegation seventh, plaintiff alleges that she was a legally qualified elector at said municipal election; and was entitled to vote in the second ward at said election. Do the phrases "at said municipal election" and "at said election" make the allegation a "conclusion of law?"

Before answering this question, allegation fifth, of plaintiff's complaint should be considered to-wit: "Plaintiff further alleges upon information and belief, that said annual municipal election for said City of Racine, held on said 5th day of April 1887, was an election pertaining to school matters."

The language of this allegation is necessarily restricted

to *within the meaning of Chap. 211, Laws of 1885.* Was it proper for plaintiff to allege that "said annual municipal election \* \* was an election pertaining to school matters *within the meaning of said act?* That said election does or does not *pertain to school matters* is certainly not a conclusion of law, but rather a conclusion from facts, and law. A conclusion from what facts and law? The facts are: 1st, that certain candidates for office were to be voted for at said election and were voted for thereat; 2nd, that said officers when elected, would have duties pertaining to schools, to-wit: the appointment of certain school officers and so forth; and 3rd, that said election was an election pertaining to school matters *within the meaning and intent of said Chap. 211.*

In support of the latter it would seem proper to introduce in evidence the legislative journals. Plaintiff in her allegation *fifth*, merely states a conclusion from the facts stated, when she alleges that said election pertained to school matters. It was necessary for her so to plead, and the demurrer admits the allegation as stated. For further consideration of this, see:

Bliss on Code Pleading, §§ 206 to 210.

In order to consider the question, did the municipal election of Racine held April 5, 1887, *pertain to school matters* within the meaning and intent of said Chap. 211, it was necessary for the learned court to do three things, which this court did, to-wit: 1st, to regard as true the allegation of plaintiff, that certain officers were voted for at said election; 2nd, to take judicial notice of the Racine charter; 3rd, to take judicial notice of the legislative journals. But this court has heretofore decided that it can not do the last mentioned, and in this following English Courts and those of several states of the United States. This

question of taking judicial notice of the contents of legislative journals came before this court in *Shipman vs. the State*, 42 Wis., 377, 391. In his opinion in this case, which is the opinion of the court, Mr. Justice Cole, says: "We suppose we cannot take judicial notice of the matters stated in the Assembly Journal; and any ratification of the contract on the part of the legislature would properly appear in some resolution or law passed." Did the learned Court overlook this in not only permitting counsel in his closing arguments to quote freely from legislative journals, but also in itself quoting at length therefrom in its opinion rendered herein? In *King vs. Arundel, Hobart*, 109, the Chancellor says, (page 111): "The journal is of good use for the observation of the generality and materiality of the proceedings and deliberations as to the three readings of any bill, the intercourse between the Houses, and the like; but when the act is passed, the journal *expires.*" And Bliss in his work on Code Pleading, § 195, note 6, says in connection with the case just cited: "Whether, if it became material to inspect the journals, the Court would do it without the proper allegation and proof, or whether it would judicially notice facts appearing in the records without evidence in regard to them, is not distinctly stated. If, however, 'when the act is passed, the journal is expired,' it would seem to be *below* the judicial notice of the Court."

The court in *Grob vs. Cushman* 45 Ill. 119, say: "And counsel in their argument refer to the journals of the house in support of the position. On the trial below, no evidence from the journal was introduced. But it is now urged that, as they are public records, this court will take *judicial notice* of them, and not require them to be embodied in the evidence. It is true, that they are public records, but it does not follow that they will be regarded

as within the knowledge of the courts like public laws. Like other records and public documents, they should be brought before the courts *as evidence*. But when offered they prove their own authenticity. *Until so produced they cannot be regarded by the courts.* This is the rule announced in the case, *Illinois Central R. R. Co., vs. Wren*, 43 Ill. 77. This is certainly the safe rule, for how else can errors be discovered. Are the journals correct beyond all question or possibility of error? Plaintiff alleges that said municipal election pertains to school matters. To establish this or to controvert it, *some evidence is necessary*, then it is not a conclusion of law, and is proper pleading. Let the defendants take issue upon it, so as to lay the foundation for proof. The demurrer accepts it as true as alleged, for the purposes of the argument. To return then to the question heretofore asked in the argument, to-wit: Do the phrases "*at said municipal election,*" and "*at said election,*" contained in in allegation *seventh* of the complaint, make that allegation a "conclusion of law?" It would seem not. If it must be taken as true that said election *pertains to school matters* within the meaning of said Chap. 211, then to state that plaintiff was legally qualified to vote *thereat*, and was entitled to vote *thereat* is to state a "matter of fact" within the decision rendered in *Murphy vs. Ramsey*, supra. Then it follows as it seems to us that the demurrer of the defendants should have been overruled with leave to answer the complaint of the plaintiff.

But there are still other considerations to which we ask the attention of this court.

No reference to the legislative journals was made in the printed brief of the appellants, or in the opening argument of counsel on the hearing, thus no opportunity

was given the respondent or her counsel to reply to the references made to such journals or to the quotations made therefrom. This was error.

The closing argument should be allowed to introduce no *new matter*, for this may result in *great injustice*, as in this case it manifestly did. Let fairness prevail even if the law be iniquitous. Both parties are suitors before an impartial court, and acknowledged rules of procedure in argument should be *strictly* adhered to.

Brown vs. Swineford 44 Wis. 290.

But citations on a point of practice so well established are wholly unnecessary. And further the counsel for the appellants in his closing argument stated that two of the committee to which the bill which became Chap. 211 Laws 1885 was referred, were opposed to the same, to-wit: Hons. Thomas R. Hudd and James O'Neill. How counsel obtained his information is not known, certainly no evidence was taken to show this. Both gentlemen voted in favor of the bill, and *why so*, if they opposed the bill? Did the counsel expect in this way to prepare the way for making his argument from the legislative journals more effective? This also was done for the first time on the closing argument after our mouths were closed. Such procedure is highly improper and has resulted prejudicially to respondent's interests.

The proviso contained in Sect. 1 of Art. 3 of the Constitution of Wisconsin is as follows: "Provided, that the legislature may at any time extend by law, *the right of suffrage* to persons not herein enumerated, *but no such law shall be in force until the same shall have been submitted to a vote of the people at a general election, and approved by a majority of all the votes cast at such election.*" Thus the people have reserved from the legislature and to them-

selves the question of extending suffrage. Chap. 211, Laws of 1885 was so submitted and so approved as the proviso contemplates. Two results follow logically and necessarily. 1st, the *right of suffrage contemplated by* the proviso has been extended by law, if however the words of said law are broad enough to admit of it. 2nd, the *intent of the people* and not the *intent of the legislature* alone should control. The people of the state by their votes ratified the *law* and not the intent of the legislature, if such intent is not to be found in the law alone. The people could not know the history of the bill which became law, and of the several bills which were indefinitely postponed. The people ratified this particular law, and their intent must be gathered from the law itself and not outside of it. This law like constitutional provisions obtains its force from the people who ratified it, not from the legislature which framed it.

Cooley on Const. Lim. p. 81.

State vs. Mace 5 Md. 348 and 350.

Manly vs. State 7 id. 135.

Hills vs. Chicago, 60 Ill. 86.

Beardstown vs. Virginia, 76 Ill. 34.

The intent of the people when this law was ratified *is what the words used mean* in their obvious and common sense.

1 Story on Const. §401 (4th ed.)

Cooley on Const. Lim. pp. 68, 72, 81.

Sedgwick on Statutory Constr. p. 413.

Gibbons vs. Ogden 9 Wheat. 188.

Cronise vs. Cronise 54 Penn. St. 255.

Meaning and intent of the legislature, like the meaning

and intent of a constitutional convention may be sought and may aid in construction but "can never abrogate the text; can never fritter away its obvious sense; can never narrow down its true limitations; can never enlarge its natural boundaries," and withal must be resorted to with much qualification and reserve.

1 Story on Const. §406, 407.

Sturges vs. Crowninshield 4 Wheat. 202, 203.

Cooley on Const. Lim. pp. 80, 81.

In *Pick Wo vs. Hopkins*, 118, U. S. 356 may be found an illustration of where the intent of the people is carried far beyond the intent of the framers of the 14th amendment to the Constitution of the United States. Another illustration may be found in the history of the provision of the constitution of the United States that "No State shall \* \* pass any \* \* law impairing the obligation of contracts." Since Chap. 211 would have no force or effect without the ratification of the people, then the *intent of the legislature* must have *expired* when the law was ratified by the people, unless such intent is to be found in the law itself, where the intent of the people also is to be found. But there is no reason for supposing the intent of the legislature to be different from the intent of the people except from such reasons as were gathered from bills defeated and improperly brought to the Court's notice. Then what do the words of Chap. 211 obviously mean? For facility in comparing the male suffrage provision and said Chap. 211, the comparison made on page 24 of Respondent's Brief heretofore filed herein is here repeated :