Supplementary Material

Chapter 7: The Republican Era—Equality/Gender/Jury Service

Rosencrantz v. Territory, 2 Wash. Terr. 267 (1884)

Rosencrantz was indicted by a grand jury, several members of which were married women. She protested, claiming that both the Constitution of the United States and territorial law of Washington forbade married women from serving on grand or petit juries. The trial court overruled her objection. Rosencrantz appealed to the Supreme Court of the Territory of Washington.

The Territorial Court affirmed the trial court ruling. Judge Hoyt's majority opinion maintained that the provision in territorial law declaring that all electors and householders could be jurors entitled women to sit on juries after a later territorial law enfranchised women. On what basis did he argue that women were householders in 1884? Why did the dissent disagree? Who has the better of the argument? Territories and new western states in the late nineteenth century were far more likely than older states in the east to grant women voting and other rights. Why might that be the case?

The Territorial Court of Washington overruled Rosencrantz *in* Harland v. Territory *(1887). The judicial majority in that case concluded that the law enfranchising women violated the provision in the organic act creating the territory that declared, "every law shall embrace but one object, and that shall be embraced in the title." The title of the law enfranchising woman was "An act to amend section 3050 c. 238, of the Code of Washington Territory." That law violated the organic act, the court maintained, because the title did not refer to the object of enfranchising women. If women had no right to vote, then they could not be jurors under Washington law.*

JUSTICE HOYT

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The Code of 1881 provides that all electors and householders shall be competent grand jurors, and it is claimed by plaintiff in error that this must be held to apply to only such persons as were thus qualified at the time such provision was enacted, and not to such as should thereafter become endowed with such requisite qualifications; but to us it seems clear that the legislature intended simply to prescribe what classes of persons in society, as it was then or should be thereafter constituted, should be called upon to perform such jury duty, and that whenever a person, by any change in his condition, was brought within such requirements, he at once became liable to perform such duty; and that likewise when, by a change in the law, a class of persons was brought within such requirements, the members of such class at once became liable to society for all the obligations incident to the class of electors and householders of which they had thus become members. Were such married women then electors and householders? That they were electors is fully conceded, leaving only the single question as to their being householders for consideration. . . . [U]nder the facts disclosed by this record, the indictment herein must be sustained, if it is possible that a married woman living with her husband, as such, can be a householder, within the meaning of such term as used in our act as to grand jurors; and this must depend entirely upon the change wrought in family relations by chapter 183 of the Code of 1881; for, of course, it is conceded that under the common law the relation of the wife to the husband was such that while she was living with him she was not such a householder, as her identity was largely lost in that of her husband, and she had no right to be heard as to the disposition of the property or children that resulted from her marriage, so long as her husband survived.

This harsh rule of the common law has been, however, gradually changing, and from time to time various restrictions have been imposed upon the absolute right of control of the husband, and the right of the wife to participate in such control came to be more and more recognized by the laws of nearly all the states and territories of this Union. And the changes thus made in the law, though many of them were at the time considered radical, have, so far as we are advised, universally tended to the elevation of the marriage relation and of society, and have been fully sustained by the courts. Our legislature, imbued with this spirit of progress, enacted the law which now constitutes the chapter of the Code above referred to; and that it intended radical legislation upon the subject is not only consonant with the spirit of the times, but is clearly shown in the title of the act, "An act to define the rights of married persons"; not *certain* rights, but *the* rights; and when such title is viewed in connection with the body of the act, it could probably with propriety read, "all the rights." At least, the title and the act is broad enough to show that it was the intention by it to abolish all the disabilities of the wife as a member of the family which had been imposed upon her by the common law, and to provide, instead of said common-law rule, a new relation between husband and wife as members of the family.

What was this new relation provided for in said chapter? To us it seems that the relation between husband and wife thereby established was (with certain exceptions therein stated) one of absolute equality before the law; as it not only in express terms gives to her the same rights to hold property as her husband, but in section 3 of said act expressly abolishes all civil disabilities imposed upon her by the marriage relation which were not imposed or recognized as existing as to the husband; and such positive and unequivocal language was used to make this section strong and beyond question, that it was thought necessary to expressly provide that the right to vote or hold office should not thereby be conferred, lest the unrestricted language of said section should be so strong as to amend the election law by implication, and thereby enable women to vote; the single privilege or right which that legislature was not ready to confer upon women, but which the subsequent one saw fit to freely and fully bestow. Then, by section 4 of said act, she was given exactly the same measure of control over the children of the family as her husband, with the same right to any or all of their earnings, and the same voice in directing all things connected with the family government. Before this act the father could control the children irrespective of and even against the express wish and will of the mother, and could send them from or keep them at home, at his own caprice. Since its passage, by its express terms, all of this is changed, and now the mother as fully controls the children as does the father; and it is clear that under said act it would take the agreeing wills of both father and mother before their children could be sent permanently away from home to attend school, or for any other purposes, and we think that likewise, in all the affairs of the family, (not excepted as above stated,) what before could be done by the husband, even against the will of the wife, can now only be done by the consent of both. At common law he had sole control, and was therefore properly treated and held as the head of the family; by our statute the two together, and acting jointly, have like sole control, and are therefore jointly the head of the family. But it is said that if they are thus equal, then neither of them is the head of a family, and therefore not the keeper of a house, as each is only a half of a housekeeper. This, however, does not follow, as each of them has the absolute right to control the family and household in the absence of the other, and each has all the responsibilities and rights growing out of such control. One person engaged in keeping a store is said to be a storekeeper, but we do not speak of one or two persons, who are keeping a store as equal partners, as a half of a storekeeper. Neither do we think that one of two persons engaged upon equal terms in keeping a house can be said to be or is only a half of a housekeeper. Each, acting for himself or herself, but in conjunction with his or her companion, is the keeper of the entire household.

The chapter in question has then so changed the common law that a wife living with her husband may be a householder, and hence qualified to serve as a grand juror. But it is claimed that the said chapter is unconstitutional, if given this application to our jury system, on the ground that the jury guaranteed by the constitution is a jury of men; but, as this question was very slightly, if at all, argued in this case, we shall content ourselves by saying that, as to this case, such position is untenable, as the legislature was at liberty to provide for the trial of crime not infamous without presentment of a grand jury at all; and, *a fortiori,* could provide for its presentment by other than common-law grand jury. . . .

JUSTICE WINGARD concurs

JUSTICE TURNER, dissenting,

. . . I do not believe that females are competent under the law as grand or petit jurors, nor do I believe that females who are married and living with their husbands are "householders" within the meaning of section 2078 of the Code. . . . The question is as to the meaning of section 2078 of the Code, which provides: "All qualified electors shall be competent to serve as petit jurors, and all qualified electors and householders shall be competent to serve as grand jurors," etc. Section 3050 being amended so as to make females "qualified electors," it would seem that they are now embraced within the provisions of section 2078, and are therefore competent as jurors, unless it is proper to construe section 2078 to mean qualified electors who were such at the time of the passage of the law, or who might become such under then existing laws.

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Section 2, article 3, of the constitution of the United States provides: "The trial of all causes, except in cases of impeachment, shall be by jury," etc. Article 5 of the amendment provides: "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury," etc. Article 7 of the amendment provides: "In suits at common law, when the value in controversy shall exceed twelve dollars, the right of trial by jury shall be preserved," etc. The terms "grand jury" and "trial by jury," in these provisions, have been held to secure to the citizens in the courts of the United States and in the courts of the territories such a grand jury and such a petit jury as was understood and secured by the common law of England. . . . One of the incidents of a jury trial is that the jury shall not be composed of less than 12 men. . . .

The application of all this to section 2078 of the Code is that it cannot be supposed that the legislature, in framing *that* provision, meant to leave the important subject of jurors, and the incidents attaching to jury trials, to be affected by legislation upon an entirely different subject-matter. It might well be that at some future time the legislature would wish to restrict the elective franchise. A provision limiting the right to vote to citizens of the age of 50 years would be lawful as concerns the rights of electors, but it would be unlawful and unconstitutional as a limitation on the right of trial by jury. Another incident of trial by jury at common law, in my judgment, was that the jury should be composed of men. . . . It cannot be doubted that at common law one of the incidents of a jury trial, with one exception, and that founded on regard for the delicacy of the sex, was that the jury should be composed of men. Blackstone classes that qualification with those of citizenship and liberty. It is said that the rights of the weaker sex, if I may now call them so, are more regarded than in the days of Blackstone, and that the theory of that day, that women were unfitted by physical constitution and mental characteristics to assume and perform the civil and political duties and obligations of citizenship, has been exploded by the advanced ideas of the nineteenth century. This may be true. No man honors the sex more than I. one has witnessed more cheerfully the improvement in the laws of the states, and particularly in the laws of this territory, whereby many of the disabilities of that day are removed from them, and their just personal and property rights put upon an equal footing with those of men. I cannot say, however, that I wish to see them perform the duties of jurors. The liability to perform jury duty is an obligation, not a right. In the case of woman, it is not necessary that she should accept the obligation to secure or maintain her rights. If it were, I should stifle all expression of the repugnance that I feel at seeing her introduced into associations, and exposed to influences which, however others regard it, must, in my opinion, shock and blunt those fine sensibilities, the possession of which is her chiefest charm, and the protection of which, under the religion and laws of all countries, civilized or semi-civilized, is her most sacred right.

. . . [T]e law now concerning the important incidents of a jury trial are, by express constitutional provision, what they were at the common law, and that under that law a jury was no jury unless it was composed of men. The jury spoken of by the constitution is the common-law jury, and consists of 12 men.

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Next, as to the meaning of the word "householder" in the statute. Householder means, according to all the definitions, "the head of a family." I think that in all cases where there is a husband living with

his family, that he is, in contemplation of law, the head and the only head of the family. . . . It is claimed that in this territory the laws have placed the civil and property rights of husband and wife on an equal footing; that they are equal as to rights and obligations in the household, and therefore that both of them are heads of the family and both of them householders. If it be true that the laws of the territory have had the effect stated, the logical deduction would seem to be, not that the law has created two heads of the family, but that it has deposed from the position of superiority what was formerly the one head, and that now there is no head, as understood by the common-law term. The idea of a double head in nature or in government is that of a monstrosity. . . . The husband was not only the head of the family at common law, because under that law he had the right to be obeyed by all the family, including the wife, but because of inherent and acquired differences between himself and wife in mental and physical constitution. He was better fitted to wage the war for present subsistence, and to accumulate the competence that was to make provision against want in the future. The experience gained by him in prosecuting this branch of the partnership matured his judgment, strengthened his will, and made him confident and self-reliant. I believe that the facts I have mentioned obtain to this day, and that they operate and will continue to operate to give the husband paramount authority in the household, as that term is understood at common law, until an upheaval of nature has reversed the position of man and woman in the world. Legislative enactment would not make white black, nor can it provide the female form with bone and sinew equal in strength to that with which nature has provided man. No more can it reverse the law of cause and effect, and clothe a timid, shrinking woman, whose life theater is and will continue to be, and ought to continue to be, primarily the home circle, with the masculine will and self-reliant judgment of a man.

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