DICKSON v. STRICKLAND, Secretary of State, et al. (No. 4215.)

(Supreme Court of Texas. Oct. 15, 1924.)

1. **Officers ⟸19—Rule stated as to inability of Legislature to change qualifications for office prescribed by Constitution.**

Where Constitution declares qualifications for office, it is not within power of Legislature to change or add to these unless Constitution gives that power.

2. **Constitutional law ⟸61, 68(1)—Elections ⟸120—Court without authority to determine qualifications of nominee for Governor to have name placed on ballot at general election, and statute attempting to give jurisdiction invalid.**

Courts are without authority to determine qualifications of one nominated for Governor to have his name placed on ballot at general election, and Complete Tex. St. 1920, art. 3083a (Vernon's Ann. Civ. St. Supp. 1922, art. 3083a), if it attempts to give district court jurisdiction for that purpose, is invalid, in view of Const. art. 4, §§ 1-3, which gives Legislature alone power to determine qualifications of Governor, notwithstanding article 5, § 8.

3. **States ⟸41—Legislature passes on questions of law as well as fact in determining contested election for Governor.**

Under Const. art. 4, § 3, providing that contested elections for certain executive offices, including Governor, shall be determined by Legislature in joint session, all questions, whether of law or fact, which may be involved in contest of right of one to hold office as result of general election, are committed to Legislature.

4. **Appeal and error ⟸1112—Supreme Court enters no judgment on answers to certified questions.**

Supreme Court enters no judgment on answers to certified questions, but Court of Civil Appeals enters judgment on law and facts, being bound to abide by decision as expressed in answers to certified questions.

5. **Elections ⟸120—Primary election not governed by Constitution relative to determination of qualifications by Legislature of certain state officers.**

Only general elections are governed by Const. art. 4, § 3, giving Legislature alone power to determine qualifications of certain state officers, and it does not apply to primary elections.

6. **Injunction ⟸114(1)—Rule stated as to right of private individual, without special interest, to enjoin placing name on ballot at general election.**

Individual without interest in subject-matter of suit, other than to subserve public interest, has no capacity to maintain suit to restrain placing of name of one on ballot at general election, in absence of statute.

7. **States ⟸41—Married woman may hold office of Governor; "he."**

A female, though married, is eligible to hold office of Governor, in view of Const. art. 4, § 4; the word "he" including, "she," especially in view of article 16, § 48, continuing in force laws not repugnant to Constitution, including R. S. art. 5502.

8. **Constitutional law ⟸½—Constitution supreme law of state.**

Constitution is supreme law of state, and statute or principle of common law in conflict therewith is void.

9. **States ⟸41—Wife of former Governor, standing impeached and disqualified, is eligible to office.**

Wife of former Governor, who stands impeached and disqualified from holding office, is not thereby rendered ineligible to office of Governor on theory that emoluments are community property, and husband could not receive his half without violating decree of impeachment; since Constitution forbids imposition of penalties on family of impeached Governor, and salary would become wife's separate estate if husband has deprived himself of right to share therein.

10. **Injunction ⟸128—Proof held not to establish, as matter of law, that nominee for Governor was run to evade decree impeaching husband.**

In action to enjoin married woman's name being placed on general ballot as nominee for Governor, proof *held* not to establish, as matter of law, that her name was used as mere subterfuge to evade decree impeaching her husband as Governor of state.

Certified Questions from Court of Civil Appeals of Third Supreme Judicial District.

Suit by Charles M. Dickson against J. J. Strickland, Secretary of State, and others. Decree for defendants, and plaintiff appealed to Court of Civil Appeals, which certifies questions. Questions answered.

I. W. Stephens, of Fort Worth, and Chas. M. Dickson, of San Antonio, for plaintiff.

W. A. Keeling, Atty. Gen., L. C. Sutton, Asst. Atty. Gen., and W. G. Love, of Houston, Jno. W. Brady, of Austin, John H. Bickett, Jr., of San Antonio, and Ocie Speer, of Fort Worth, for defendants.

GREENWOOD, J. Certified questions from the honorable Court of Civil Appeals of the Third Supreme Judicial District of Texas, in an appeal from the district court of Travis county, Fifty-Third judicial district.

This case is before the Supreme Court on a certificate from the honorable Court of Civil Appeals reading as follows:

"The above styled and numbered cause is pending in this court on appeal from the district court of Travis county, Fifty-Third judicial district. The questions herein certified are material to a decision of the appeal, and grow out of the nature and result of the suit and the facts disclosed by the record before us, which, in so far as deemed material to this certificate, are the following:

"Charles M. Dickson, a resident citizen and legal voter and property taxpayer in the coun-

ty of Bexar, state of Texas, brought the suit 'as provided for in articles 3082, 3083, and 3083-a of the Revised Civil Statutes of Texas, and as otherwise provided by law,' against Mrs. Miriam A. Ferguson and her husband, James E. Ferguson, J. J. Strickland, Secretary of State of Texas, and the county judge, county clerk, and sheriff of each of the counties of Texas, as members of the election board in such counties, for a temporary injunction restraining them from placing, or causing to be placed, the name of Mrs. Miriam A. Ferguson as a candidate for Governor on the official ballot to be used in the general election to be held in the several counties in Texas on the 4th day of November, 1924, and to contest her right to hold the office of Governor under the Constitution and laws of Texas.

"Plaintiff's petition alleged, and the admitted facts show the following:

"That on September 25, 1917, the defendant Mrs. Miriam A. Ferguson was, has been ever since, and is the wife of the defendant James E. Ferguson; that on September 25, 1917, the Senate of Texas, sitting as a court of impeachment for the trial of said James E. Ferguson, who was then Governor of Texas, on certain charges preferred by the House of Representatives, adjudged and decreed that he be removed from the office of Governor of Texas, and thereafter be disqualified to hold any office of honor, trust, or profit under the state of Texas; that thereafter said James E. Ferguson announced himself as a candidate for the office of Governor to be voted on at the Democratic primary election ordered to take place on Saturday, July 26, 1924, but at the suit of one John F. Maddox, a voter and citizen of Texas, he was enjoined from having his name placed on the ticket at said primary election by the district court of Harris county, Tex., which judgment was affirmed by the Court of Civil Appeals for the First Supreme Judicial District of Texas, upon answers by the Supreme Court to questions certified in said cause by said Court of Civil Appeals; that thereafter the name of the said Mrs. Miriam A. Ferguson was placed on the ballot used at the primary elections held on July 26, 1924, and August 23, 1924, at which primary elections she received a majority of the votes cast for nomination for the office of Governor, and in consequence thereof she received the Democratic nomination for Governor on September 3, 1924, from the Democratic Convention of Texas, which assembled in Austin on September 2, 1924; and on September 3, 1924, the chairman and secretary of said convention delivered to the acting secretary of state of Texas, a certificate containing the names of those nominated by said convention, which said list of names, including the name of said Mrs. Miriam A. Ferguson, was certified and transmitted by said acting Secretary of State to the county judge of each county in the state of Texas; and the list of names, including that of Mrs. Miriam A. Ferguson, to be placed upon the official ballot for the approaching November election, is now in the hands of the several judges of the state of Texas, or will be in due course of mail, and, unless restrained from doing so, the county clerks of the several counties in Texas will cause the name of said Mrs. Miriam A. Ferguson to be placed on the official ballot as the Democratic candidate for Governor of Texas, and, unless restrained from doing so, the official ballot containing her name as said candidate will be placed in the hands of the officers and judges of said November election by the election board of each county.

"It is contended in the petition that Mrs. Miriam A. Ferguson is ineligible to hold the office of Governor, (1) because she is a woman; (2) because she is a married woman; and (3) because she is the wife of James E. Ferguson, who stands impeached and thereby disqualified to hold any office of honor, trust, or profit under the state of Texas.

"As a further cause of ineligibility to the office of Governor on the part of Mrs. Miriam A. Ferguson, the petition, after setting forth the facts with reference to the impeachment and the injunction proceeding against James E. Ferguson, alleges:

" 'And thereupon the said James E. Ferguson, as your petitioner is informed, believes, and charges, caused the name of his wife to be placed on the ballot at said primary election as a candidate for Governor in pursuance of an understanding, as your petitioner is informed, believes, and charges, between the said James E. Ferguson and his wife, that by this means the said James E. Ferguson would become a candidate in the name of his wife for the Democratic nomination for the office of Governor, and, that, if said nomination was obtained in the name of his wife, then the said James E. Ferguson would be the Democratic nominee for Governor of Texas in the name of his wife, and be elected Governor of Texas in the name of his wife, and, if elected in the November election, the said James E. Ferguson would be the real Governor and the said Mrs. Miriam A. Ferguson merely a figurehead or Governor in name only; and that, in pursuance of this understanding, her name as candidate for the Democratic nomination for Governor was again placed on the ballot to be used at the primary election *held* August 23, 1924.' 'Wherefore your petitioner charges that the said James E. Ferguson is the real candidate for Governor, using his wife's name, with her consent, for the purpose of circumventing and evading the force and effect of the impeachment decree disqualifying him from acting as Governor, or becoming a candidate therefor.'

"The defendant Mrs. Miriam A. Ferguson, in reply to the allegations in the last two quotations from plaintiff's petition, pleaded the following denial:

" 'In this connection this defendant specially denies that the defendant James E. Ferguson caused this defendant's name to be placed on the ballot at the said primary election as a candidate for Governor, or that he caused her name to be so placed on said ballot in pursuance of any understanding, either express or implied, that by so doing the said James E. Ferguson would become a candidate in the name of this defendant, or with any understanding or agreement that, if said nomination was obtained, the said James E. Ferguson would be the nominee for Governor in the name of this defendant, or with any understanding or agreement that, if she was elected at the November election, the said James E. Ferguson would be the real Governor, and this defendant a mere figurehead, or Governor in name only. This

defendant further specially denies that the said James E. Ferguson is the real candidate for Governor, or that he is using this defendant's name with her consent for the purpose of circumventing or evading the force and the effect of the impeachment decree referred to in the plaintiff's petition. And this defendant further specially denies that if she is elected to the office of Governor that the said James E. Ferguson will become the real Governor of Texas, as is alleged in plaintiff's petition, and denies that in the event of her election she will become only nominally the Governor of said state. This defendant further alleges in that connection that she became a candidate for the Democratic nomination for the office of Governor upon her own volition and without any understanding or agreement, either express or implied, with her husband, James E. Ferguson, or any one else, that in the event of her nomination and election the said James E. Ferguson would hold or administer the office of Governor, or that he would be the real Governor and she a mere figurehead. That this defendant, in the event of her election to the office of Governor, will hold and administer said office in her individual capacity as is required by the oath of office which she will take, and that her election will not result in the said James E. Ferguson becoming either nominally or actually the Governor of Texas, or controlling or administering the affairs of said office.'

"This pleading was adopted by defendant James E. Ferguson.

"In reply to this denial, the plaintiff pleaded two articles which appeared in the Ferguson Forum during the campaign in which Mrs. Ferguson received the Democratic nomination for Governor, and a circular to the voters in said campaign, signed by Mrs. Miriam A. Ferguson. It was admitted by the defendants that these two published articles were issued by authority of defendants James E. Ferguson and Mrs. Miriam A. Ferguson, and that this circular was issued by authority of Mrs. Miriam A. Ferguson; and all parties agreed that the two articles and the circular might be considered in evidence at the hearing, which was done. These two articles and circular are attached to this certificate, marked, respectively, Exhibits A, B, and C.

"Three answers were filed in the case, one by Mrs. Miriam A. Ferguson, another by James E. Ferguson, and the third by the remaining defendants in the case. Each of these answers contains a general demurrer and a number of special exceptions which raise specifically the following issues or contentions:

"(1). That plaintiff has not sufficient interest in the suit or the result sought to be accomplished thereby to entitle him to maintain the action, or have preliminary injunction issued at his instance, as prayed for in his petition.

"(2) That article 3083a of the Revised Civil Statutes of Texas, under which the suit was brought, is, in so far as it attempts to vest in a private individual the right or authority to institute or maintain this suit, in conflict with section 21 of article 5 and section 21 of article 4 of the Constitution of this state, and is therefore void and furnishes no authority for the institution or maintenance of this suit.

"(3) That the court was without jurisdiction to determine the issues presented in the petition, or grant the relief prayed for, because the rights asserted by plaintiff and sought to be protected by this suit are political and not legal rights; and, further, because by the Constitution of this state the Legislature is vested with exclusive authority to canvass the returns of the election of all executive officers of the state to determine the eligibility of those voted on for such officers, and all questions relating to the contest of the election of any person to the office of Governor, or any other office of the executive department of the government; and this suit, in its nature and effect, is an effort by judicial decree to interfere with the authority vested by the Constitution in the legislative department of the government, and to forestall and prevent the free exercise of the authority and jurisdiction of the Legislature to determine the eligibility of the defendant for the office of Governor, or any contest of her election based upon any question as to her eligibility to hold said office.

"All the pleadings filed in the case were verified by the respective parties.

"The application for temporary injunction, after due notice to the parties, was heard by the district court sitting in chambers, on the 22d day of September, 1924, upon bill and answer and admissions of the parties; and on the 29th day of September, 1924, the district court rendered the following judgment:

"'All the special exceptions of all the defendants are overruled, and all the exceptions of the plaintiff are overruled, to which action of the court exception was taken by the respective parties. Thereupon the court finds that the plaintiff was entitled to bring this suit under articles of the statutes alleged in his petition, and that the court has jurisdiction of the suit, but the court being of opinion that the plaintiff's pleadings state no cause of action, finds that the plaintiff is not entitled, on the pleadings and evidence set out above, to the injunction prayed for; and it is ordered that the application for said injunction be overruled and that said injunction be denied and refused, to which action of the court the plaintiff then and there excepted and gave notice of appeal to the Court of Civil Appeals for the Third Supreme Judicial District of Texas, at Austin.'

"Plaintiff has duly perfected his appeal, and the cause is now pending thereon in this court.

"Because of the public importance of the controversy thus raised and the evident necessity of having a judicial determination thereof as soon as practicable, we deem it advisable to certify for your decision the following questions:

"(1) Did the district court err in holding that it had jurisdiction to entertain this suit and adjudicate the eligibility of Mrs. Miriam A. Ferguson to the office of Governor of this state, and her right to have her name printed upon the official ballot as a candidate for that office in the general election to be held in November, 1924?

"(2) Did the district court err in holding that the plaintiff, Charles M. Dickson, had a sufficient interest and right to bring this suit, he being a resident citizen, a legal voter and property taxpayer in Bexar county, Tex., and bringing the suit in such capacity only?

"(3) Is Mrs. Miriam A. Ferguson ineligible

to the office of governor of this state by virtue of her sex?

"(4) Is Mrs. Miriam A. Ferguson ineligible to the office of Governor of this state by virtue of her status as a married woman?

"(5) Is Mrs. Miriam A. Ferguson ineligible to the office of Governor of this state by virtue of her status as the wife of James E. Ferguson who stands impeached and disqualified from holding office in Texas?

"(6) Does the record, as stated, establish as a matter of law plaintiff's theory that James E. Ferguson is the real candidate for Governor and that his wife's name is being used by him as a subterfuge to evade the force and effect of the impeachment decree; and, if so, is Mrs. Miriam A. Ferguson, therefore, ineligible to the office of Governor of this state?"

The certificate embodies copies of the articles from "The Ferguson Forum" and the campaign circular, which are mentioned in the certificate. The contents of these writings will be stated, as far as is necessary, in answering the sixth certified question.

It is appellant's contention that the district court had jurisdiction of his suit, and that a negative answer should be given to the first question certified, for two reasons: First, because article 3083a of the Complete Texas Statutes expressly authorized the district court to hear and determine his action; and, second, because the recent decision of this court in Ferguson v. Maddox, 263 S. W. 888, was warranted only in the event article 3083a is a valid statute.

The statute does plainly attempt to confer jurisdiction on the district court at the instance of a voter who need have no special interest, to prevent the name of any ineligible candidate for a state office, or for any other office in Texas, from appearing on the ballot in any general, special, or primary election. If therefore the statute be valid as applied to a suit contesting the eligibility of a candidate for Governor at a general election, it will suffice to sustain the jurisdiction of the district court. The grave inquiry we are required to solve is: Was it within the constitutional power of the Legislature to enact the statute, in so far as it applies to a general election for the office of Governor of Texas?

Article 3083a is an amendment of an act approved April 20, 1895 (Acts 1895, p. 81) entitled "An act to better define who are eligible for the several state and county offices of the State of Texas," which provided that no person should be eligible to any state or county office in Texas unless he had resided in the state for 12 months and in the county in which he offered himself as a condidate for six months next preceding the election, and should have been an actual bona fide citizen of such county for more than six months. The act further forbade the issuance by any county judge of any certificate of election to any person unless he possessed the stated qualifications. Chapter 56, Acts 1895, 10 Gammel's Laws of Texas, p. 811. In so far as this act related to officers, such as the Governor, whose qualifications had been particularly and carefully and differently enumerated in the Constitution, it cannot be doubted that it was utterly void.

[1] Ruling Case Law says:

"Where the Constitution declares the qualifications for office, it is not within the power of the Legislature to change or add to these unless the Constitution gives that power." 9 R. C. L. 1124.

The Supreme Court of Illinois concluded a careful examination into the power of the Legislature to require an officer to have a further residence qualification than as specified in the Constitution of that state by saying:

"In our judgment, when the Constitution undertakes to prescribe qualifications for office, its declaration is conclusive of the whole matter, whether in affirmative or in negative form. Eligibility to office belongs to all persons. In our Constitution no other form of stating eligibility to office is found than the declaration that no person shall be eligible who does not possess certain qualifications. The Constitution of the United States is in the same form in this particular, and so are the Constitutions of other states. The expression of the disabilities specified excludes others. The declaration in the Constitution that certain persons are not eligible to office implies that all other persons are eligible." People v. McCormick, 261 Ill. 423, 103 N. E. 1057, Ann. Cas. 1915A. 342.

The Supreme Court of Minnesota announced the same rule in the late case of Hoffman v. Downs, 145 Minn. 465, 177 N. W. 670. Many cases to the same effect are cited in note 3, at page 99 of Cooley's Constitutional Limitations (7th Ed.).

The qualifications of public officers, when defined by the Constitution, are as clearly beyond change by the Legislature as are the qualifications of electors when fixed by constitutional provision. It is the declared law, by both the Court of Criminal Appeals and the Supreme Court of this state, that it is beyond the power of the Legislature to add an additional qualification for an elector to those prescribed by the Constitution. Solon v. State, 54 Tex. Cr. R. 261, 114 S. W. 349; Koy v. Schneider, 110 Tex. 378, 218 S. W. 479, 221 S. W. 880.

The act of 1895 was amended by the act approved February 19, 1919, being chapter 13 of the General Laws passed by the Thirty-Sixth Legislature, and again by the act approved July 25, 1919, correcting verbal inaccuracies in the first amendment, being chapter 40 of the General Laws of the Second Called Session of the 36th Legislature. As amended, the statutes are numbered 3082, 3083, and 3083a in the Complete Texas Statutes (Vernon's Ann. Civ. St. Supp. 1922, arts. 3082, 3083, 3083a).

By its express terms, article 3082 under-

takes to provide that no person shall be eligible to *any* state, county, precinct, or municipal office in Texas, unless, in addition to the qualifications required under the Constitution, he shall also have resided in the state for 12 months, and in the county, precinct, or municipality in which he offers himself as a candidate, for six months next preceding the election, and shall also have been an actual, bona fide citizen of said county, precinct, or municipality for more than six months. Articles 3082 and 3083 undertake to forbid the placing of the name of any ineligible candidate, as previously defined, on any ballot at any general, special, or primary election, and to forbid the issuance to such ineligible candidate of any certificate of election. Article 3083a declares the district court shall have jurisdiction and authority to enforce articles 3082 and 3083, at the suit of any interested party or of any voter. Enough has been said to establish the invalidity of the requirement of article 3082, that the candidate for Governor at general elections must have resided more than six months in a certain county, precinct, or city, and must have been a bona fide citizen thereof. The Constitution definitely states the Governor's qualifications as to residence. It requires no more in that respect than that he "shall have resided *in this state* at least five years immediately preceding his election." So, it was utterly beyond the power of the Legislature to authorize the courts to keep the name of a candidate for Governor off any election ballot, when possessed of every constitutional qualification, regardless of whether he possessed the additional qualifications specified in article 3082.

The articles are not considered free of constitutional infirmity, though we assumed that we should disregard or eliminate the portions seeking to illegally add to the requirements of the Constitution as to qualifications for office in this state.

[2] Section 1 of article 4 of the Constitution provides that the executive department of the state shall consist of a Governor, a Lieutenant Governor, Secretary of State, Comptroller of Public Accounts, Treasurer, Commissioner of the General Land Office, and Attorney General. Section 2 of article 4 requires the election of these officers, except the Secretary of State, by the qualified voters of the state at the time and places of election for members of the Legislature.

Section 3 of article 4 reads:

"The returns of every election for said executive officers, until otherwise provided by law, shall be made out, sealed up, and transmitted by the returning officers prescribed by law, to the seat of government, directed to the Secretary of State, who shall deliver the same to the speaker of the House of Representatives, as soon as the speaker shall be chosen; and the said speaker shall, during the first week of the session of the Legislature, open and publish them in the presence of both houses of the Legislature. The person voted for at said election, having the highest number of votes for each of said offices respectively, and being constitutionally eligible, shall be declared by the speaker, under sanction of the Legislature, to be elected to said office. But if two or more persons shall have the highest and an equal number of votes for either of said offices, one of them shall be immediately chosen for such office by joint vote of both houses of the Legislature. Contested elections for either of said offices shall be determined by both houses of the Legislature in joint session."

Other provisions of the Constitution explicitly state what renders one eligible to be Governor, as well as what renders one ineligible.

No one can be inducted into the office of Governor without a legislative determination of his election. Not only must the Legislature determine that he received the highest number of votes, but section 3 of article 4 requires a legislative adjudication of his constitutional eligibility. Should the election be contested on the ground of lack of constitutional eligibility, or on any other ground, such contest may be determined only by both houses of the Legislature in joint session.

The Constitution, having committed to the Legislature, and withheld from the judiciary, the power to determine the eligibility of all elective state officers of the executive department, such power of determination must be exercised by the Legislature and could not be granted away to the courts, at least in so far as the attempted grant pertains to the general election whose result is to be declared only under sanction of the Legislature, after inquiry into the constitutional qualifications of the person found to have received the highest number of votes.

The court has not been favored with written arguments on the certified questions as to the jurisdiction of the trial court. The contentions advanced by appellant's distinguished counsel in oral argument may be briefly summarized as follows:

First, that the power of the Legislature does not come into exercise until after the election, leaving the courts unhampered until the time comes for the Legislature to receive the returns of the election and declare its result and determine contests; second, that the power of the Legislature does not extend to the determination of questions purely of law; and, third, that authority was granted the Legislature to empower the district court to enforce articles 3082 and 3083, by the final clause of amended section 8 of article 5 of the Constitution, providing that the district court shall have "general original jurisdiction over all causes of action whatever for which a remedy or jurisdiction is not provided by law or this Constitution, and such other jurisdiction, original and appellate, as may be provided by law." We will carefully consider each of these contentions.

It is plain that the Constitution intended

the Legislature to be the tribunal to decide: First, as to whether a person claiming the office of Governor was constitutionally eligible; and, second, as to whether such person received the highest number of legal votes. It could not be meant for this supremely important delegation of power to be rendered nugatory by the action of other tribunals, yet the Legislature would be rendered impotent if, in advance of its action, it might be bound by a determination in which it could have no part. This court has consistently drawn the distinction between the power to decide the result of an election—a political question—and the power to decide the right to hold an office after election—a judicial question. To say that the courts should take jurisdiction only before the election, out of which property rights spring, would be to impute to the makers of the Constitution a wholly unreasonable purpose to leave to the courts the consideration of questions always regarded as political, and to bring the legislative power into play only after the questions became judicial.

Judge Gould spoke for the court in Wright v. Fawcett, 42 Tex. 206, in saying:

"It is true that the district court has jurisdiction, as has been often held, to try the right to an office. * * * To decide the result of an election is a question of a different character, 'part of the process of political organization, and not a question of private right.' Huselman v. Rems, 41 Pa. St. 396. And see Arbury v. Beavers, 6 Tex. 469; Baker v. Chisholm, 3 Tex. 157; and Walker v. Tarrant Co., 20 Tex. 16. Where the law has provided a mode of deciding cases of contested elections, designed to be final, the courts have no authority to adjudicate such cases, other than that the law may give to them."

If it is the Constitution which provides that a nonjudicial tribunal shall settle such cases, the decision thereof by such tribunal is beyond judicial control, unless plainly authorized by the Constitution itself.

The court observed in Seay v. Hunt, 55 Tex. 558, that on principle and authority the question of eligibility to office was to be regarded as a question of a political nature, and that it was "one which the public welfare demands should be promptly decided prior to the induction into office of the party elected."

In City of Dallas v. Consolidated St. Ry. Co., 105 Tex. 341, 342, 148 S. W. 294, the court said:

"As elections are essentially the exercise of political power, it cannot be doubted that all action properly related thereto and necessary to their completion is from the same source, and is but the expression of the same power. The canvassing of the returns of an election is necessary to the determination of the result; it is an integral part of the election itself, without which the election is a vain proceeding; and, as such, inheres as a right sanctioned by the political power, as absolute as the right of the electorate to vote, or for the election to be held. When it is declared that, because of their relation to the political power of the government, elections are beyond the control of the judicial power, it is meant that the whole election, including every step and proceeding necessary to its completion, is exempt from judicial interference; and the canvassing of the returns of an election must therefore be held as within the rule and justly entitled to its protection."

The Supreme Court of Arkansas construed a section of the Constitution of that state (Const. 1868, art. 6, § 19) directing the president of the Senate to open and publish returns of every election for certain executive officers, including the Governor, in the presence of the members of the Legislature, and providing that "the person having the highest number of votes shall be declared elected, but if two or more shall have the highest and equal number of votes for the same office, one of them shall be chosen by joint vote of both houses. Contested elections shall likewise be determined by both houses of the General Assembly in such manner as is or may hereafter be prescribed by law." The gist of the opinion is found in the following paragraph:

"Here the whole question is settled; the manner of filling the executive chair is prescribed; the time of elections (sec. 3, art. 15) is fixed; the manner of voting (sec. 1, art. 8); how the return shall be inclosed; to whom transmitted; how and where they shall be published; how the result shall be declared; and if aspirants have the same vote, how one of them shall be chosen; and if the election is contested, how it shall be determined; and in this it seems they intended to cover the entire ground, and to dictate the mode of determining who shall be the executive, and thus fixing the tribunal to try this issue, and nowhere intimating that the high prerogative of deciding this question should belong to any other tribunal, carries to our mind the conviction that it was intended to be exclusive." State ex rel. v. Baxter, 28 Ark. 135.

Taylor v. Beckham, 108 Ky. 278, 56 S. W. 177, 49 L. R. A. 263, 94 Am. St. Rep. 357, is a notable case, which was carried to the United States Supreme Court, where it is reported in 178 U. S. 548, 20 Sup. Ct. 890, 1009, 44 L. Ed. 1187. It deals with the relative powers of the Legislature and of the courts under constitutional provisions like our own. The Kentucky Court of Appeals held in that case:

"The Constitution of this state creates the offices of Governor and lieutenant governor. It provides how they shall be filled by election. It also provides how the result of that election shall be determined. In each of the four Constitutions of this state the General Assembly has been made the exclusive tribunal for determining this matter. This shows a clear and settled purpose to keep this political question out of the courts. We have no more right to supervise the decision of the General Assembly in determining the result of this election, than we have to supervise the action of

the Governor in calling a special session of the Legislature, or in pardoning a criminal, or the action of the Legislature in contracting debts, or determining upon the election of its members, or doing any other act authorized by the Constitution."

An election contest necessarily involves questions of both fact and law. It may be predicated upon a status or upon facts which existed before an election, upon what took place at the election, and perhaps in some instances upon a status or what took place after an election. The ineligibility of a candidate before an election, whether arising from lack of age, or from personal misconduct, or other infirmities, the manner of giving notice of the election, appointing election officers, their qualification, the creation of election districts, the preparation of the polls or polling places, the manner in which the ballots may have been prepared, and various other things which of necessity precede an election, are all well known subjects of election contests.

A failure to observe any one or more of the many articles of title 49, Revised Statutes, applicable to general elections, may become the subject-matter of an election contest, and many of these provisions concern matters which must occur before the time of actual voting. In determining what a "contested election" is, we must bear in mind that an election in this state is not a single event, but a *process*, and that the entire *process* is subject to contest. The "election" for Governor does not end until the result is declared. State ex rel. Morris v. Bulkeley, 61 Conn. 359, 23 A. 186, 14 L. R. A. 657.

In view of the general rules to which we have referred, we would undoubtedly be doing violence to the constitutional provision which places the power of hearing a contested election in the Legislature, if we were to say that the courts were likewise given power over contests of election for Governor, merely because the courts generally have power over justiciable questions, and may, on occasion, have power over results which flow from the decisions of bodies having jurisdiction of contested elections.

Notwithstanding the present suit was brought before the election, its subject-matter is one confided to the Legislature in a contest over the election, and it is therefore withdrawn from the courts. The Constitution has erected the tribunal and fixed the time and place of determining election contests for Governor, and every justiciable issue in such a contest must be there disposed of. The tribunal erected is a joint session of the Legislature; the time is the first week of the session of the Legislature; the place is the capitol of the state. The subject-matter is everything which can be legally embraced in the phrase "contested elections." Such a contest may embrace every part of the "*process*" of electing a Governor, for the reason that the "*election*" which may be contested is not merely the acts of voting, but every step regulated by law, from the announcement of the candidate to the declaration of the result.

The Legislature is wholly without power to erect another tribunal for determining a contested election for Governor. It is wholly without power to determine that the contest shall, either in whole or in part, be heard before any other tribunal than the joint session of the Legislature, and at the time specified in the Constitution. It is equally without power to confer upon any other tribunal authority to determine any justiciable issue which could arise in a contest before the joint session of the Legislature.

[3] The language of the Constitution furnishes no sanction for the withdrawal of questions of law, any more than questions of fact, from determination by the Legislature. All questions, whether of law or fact, are alike committed to the Legislature, which may be involved in a contest of the right of any one to hold an elective, executive, state office as the result of a general election.

We do not mean to express any opinion as to whether section 3 of article 4 prevents the courts from adjudicating private rights growing out of elections. This case involves no such inquiry. Nor is it necessary that we stop to inquire about the effect of the Legislature's action when without jurisdiction, or in excess of constitutional power. The time to consider such questions in this court cannot come until they are presented to the court in a proper proceeding.

The broad and general terms of section 8 of article 5 cannot prevail over the specific terms of section 3 of article 4. San Antonio v. Toepperwein, 104 Tex. 45, 133 S. W. 416; Warren v. Shuman, 5 Tex. 441.

In People v. Hall, 80 N. Y. 122, the court, in considering the effect of constitutional provisions conferring general judicial power on the courts, in connection with other sections of the Constitution authorizing the Legislature to judge the qualifications of its members, said:

"When it is said, on such occasion, to either house of the Legislature, 'You are to be the judge of the election of the members to your body,' there is a specific conferment of this particular power; and when it is said, at the same time, to the judicial body, 'You are to have general jurisdiction in law and equity,' though the conferment of power is general, there is, by the force of the concurrent action, excepted from the general grant the specific authority definitely bestowed with the same breath upon another body. In such case it may well be that a form of words in the instrument, that clearly makes a gift of judicial power to one co-ordinate body, should be construed as reserving the particular power thus bestowed, from the general conferment of judicial power by the same instrument, at the same time, upon another co-ordinate body."

[4] The decision in Ferguson v. Maddox (Tex. Sup.) 263 S. W. 888, has no bearing whatever on the jurisdictional questions now under consideration. The opinion in Ferguson v. Maddox determines the precise questions before the court under the certificate from the Galveston Court of Civil Appeals. The Supreme Court is never to be understood, as it has heretofore declared, to make determinations, by implication or otherwise, in opinions answering certified questions with respect to anything save the precise questions answered—no matter what questions might be said to arise on the facts of the case certified. The Supreme Court enters no judgment on answers to certified questions. The Court of Civil Appeals, instead, enters the proper judgment on the law and facts, being bound to abide by the decision of the Supreme Court as expressed in its determination of the certified questions. Clary v. Hurst, 104 Tex. 425, 138 S. W. 566. No question having been certified in Ferguson v. Maddox with reference to the trial court's jurisdiction, or as to the validity of articles 3082, 3083, and 3083a, no such question was decided.

[5] Moreover, the questions we are determining did not and could not arise under the facts of Ferguson v. Maddox. These questions relate entirely to a voter's right to invoke the jurisdiction sought to be conferred by article 3083a, on the district court, to prevent the name of a candidate for Governor appearing on ballots in a *general* election. The whole controversy in Ferguson v. Maddox was over preventing the name of a candidate for Governor from appearing on ballots at a *primary* election. The only election governed by section 3 of article 4 is the general election. Koy v. Schneider, 110 Tex. 369, 218 S. W. 479, 221 S. W. 880.

Speaking of primaries, the Supreme Court of the United States said in Newberry v. U. S., 256 U. S. 250, 41 Sup. Ct. 472, 65 L. Ed. 913, as this court had said in substance in Koy v. Schneider, supra:

"They are in no sense elections for an office, but merely methods by which party adherents agree upon candidates whom they intend to offer and support for ultimate choice by all qualified electors."

[6] It is not claimed that appellant Dickson has any interest in the subject-matter of this suit other than to subserve the public interest. His lack of special interest is fatal to his capacity to maintain his suit in the absence of a valid statute authorizing him to sue. San Antonio v. Strumberg, 70 Tex. 366, 7 S. W. 754. Again, as plainly declared by this court in Staples v. State, 112 Tex. 68, 245 S. W. 641: "Where the suit is for the benefit of the public at large, and no citizen is affected differently from all other citizens, the state, as agent of all, is properly interested for the benefit of all its citizens;" and such a suit can only be maintained by those authorized under the Constitution to protect public rights and interests. It is unnecessary to add more on this question to the satisfactory discussion in the opinion in the Staples Case.

By the third and fourth questions the Court of Civil Appeals inquires whether Mrs. Miriam A. Ferguson is ineligible to hold the office of Governor, because she is a woman, or because she is a married woman. These questions have been briefed and argued with zeal and earnestness commensurate with their importance. On their solution depends the right of all women to hold office in Texas under the present Constitution. The grounds advanced for declaring Mrs. Ferguson ineligible for Governor, because she is a woman or because she has a husband, are as follows:

First. The language of the Constitution, in creating the office of Governor and in prescribing the Governor's qualifications and duties, clearly manifests an intention to exclude all but men from that office.

Second. Since the common law was adopted in Texas in 1840 (Laws 1840, p. 3). and was continued in force by the Constitution, and since, under the rules of the common law, women, and particularly married women, were ineligible to hold office, and since the character of the Governor's duties renders their proper performance impossible by an unmarried woman, or by a married woman, the Constitution must be construed in the light of the common law, and so construed, neither the Constitution nor the statutes of Texas authorize an unmarried woman or a married woman to become Governor of the state.

Third. The suffrage amendments to the federal and state Constitutions have not changed the status of women from that of ineligibility to that of eligibility to public office.

When the competency of women to hold office in Texas is challenged, the fundamental inquiry is as to the extent of restrictions on the people in their sovereign capacity with respect to freedom of choice of their public servants. No further authority need be cited to demonstrate the correctness of this position than the language which this court, through its great justice, Reuben R. Gaines, quoted with approval in Steusoff v. State, 80 Tex. 430, 15 S. W. 1100, 12 L. R. A. 364, as follows:

"Eligibility to office is not declared as a right or principle by any express terms of the constitution, but it rests as a just deduction from the express powers and provisions of the system. The basis of the principle is the absolute liberty of the electors and the appointing authorities to choose and appoint any person who is not made ineligible by the constitution. Eligibility to office therefore belongs not exclusively or specially to electors enjoying the right of suffrage. It belongs equally to all persons whomsoever not excluded by the constitution."

To approach the subject from any other viewpoint would not accord with the constitutional history of Texas. Among the first words of the state's declaration of independence, adopted March 2, 1836, is the declaration that government derives all its legitimate powers from the people. In the Constitution of the Republic is a statement of rights never to be violated on any pretense whatever. There we find it recorded that "all political power is inherent in the people, and all free governments are founded on their authority, and instituted for their benefit." The declaration is carried into every Constitution, appearing as section 2 of article 1 of the Constitution of 1876. With the ultimate political sovereignty of the people so forcefully declared throughout our history, the court would be unmindful of its high responsibility were it not careful in examining any claim of restriction on the liberty and authority of those who establish governments, and can change them in the mode prescribed by the fundamental law.

How early this court declared against any presumptions in favor of such restrictions as we are asked to discover and enforce in this case, is disclosed by the report of the case of McMullen v. Hodge, in 5 Tex. at page 73. In that case the first Supreme Court, through Justice Lipscomb, in referring to constitutional conventions, said:

"It would be in the power of such convention to take away or destroy individual rights, but such an intention would never be presumed; and to give effect to a design so unjust and unreasonable would require the support of the most direct, explicit affirmative declaration of such intent."

A careful analysis of the controlling sections of the Constitution, in the light of the proceedings of the constitutional convention and of the terms of previous Constitutions, makes it entirely clear that the electors of this state have left themselves free to choose a Governor without regard to the sex or coverture of the person of their choice.

Section 3 of the schedule of the Constitution of the Republic contained a provision requiring that one be a *male* citizen, as well as be otherwise qualified, in order to hold any office under the Republic.

The Journal of the Constitutional Convention, which framed our present organic law, shows that a similar resolution, which would have made it requisite that one be a male in order to be thereafter eligible to office in Texas, was presented but was not adopted. Journal, p. 93. It was also proposed to amend the requirement that the Governor be 30 years of age by substituting therefor that he be "a qualified elector." In connection with the provision confining suffrage to the male sex, such an amendment would have rendered women ineligible to the governorship. The convention rejected the amendment by a vote of 15 in favor of it to 64 against it. Journal, p. 298.

Significant, too, was the change made by the Constitution of 1876 in the form of oath to be taken before entering upon the discharge of the duties of any office in Texas. The Constitution of 1869 (section 1, art. 12) required each officer, before performing any duty, to swear "that I am a qualified elector in this state." Section 14 of article 3 of the same Constitution prohibited the holding of any office, state, county, or municipal, by a person not a registered voter. The first qualification of an elector, under that Constitution, was that he be a *male* citizen of the United States. The Constitution of 1876, while still requiring electors to be males, struck out from the oath of office the words, "I am a qualified elector."

In fixing the qualifications of members of the legislative department, in the article immediately preceding that dealing with the executive department, the Constitution required that the senators and representatives be qualified electors. These officers were thus confined to the male sex. Having already had their attention directed to sex as as basis for qualification for important constitutional offices, how could it be doubted that the omission by the Constitution makers to require Governors to be chosen from the male sex was deliberate?

The Constitution of 1876 itself is so explicit in stating who shall be eligible and who shall be ineligible for Governor, as to remove all difficulty in answering the questions certified. Section 4 of article 4 says of the Governor:

"He shall be at least 30 years of age, a citizen of the United States, and shall have resided in this state at least five years immediately preceding his election."

Here is a statement of the affirmative qualifications which the Governor must possess.

Section 9 of article 12 states no person holding office under the United States shall be eligible to any office under the state. Section 3 of article 12 forbids any citizen of the state from holding any office, who, after the adoption of the Constitution, fought a duel with deadly weapons, or committed an assault on any person with deadly weapons, or acted as second at a duel, or sent or accepted a challenge to fight a duel. Section 1 of article 16, in prescribing the oath of office, renders one ineligible to hold any office who has paid, offered, furnished, or contributed anything of value, or promised any office or employment, as a reward for giving or withholding a vote. There are other provisions negativing the right to hold office, including that of Governor. None are based on sex or coverture.

Mrs. Ferguson comes within the terms of none of the constitutional provisions stating who shall not hold the office of Governor.

She is at least 30 years of age. She is a citizen of the United States. She has resided in this state more than five years before the general election. Possessing every affirmative qualification which the Constitution declares requisite to eligibility, and being under no disqualification working ineligibility under the provisions of the Constitution, it must be held that she meets every test prescribed for the Governor by the supreme law of the state.

Much stress is laid in arguments for appellant on the fact that the words "he" and "his" are used in section 4 of article 4 in defining the Governor's qualifications. Since we have no English word, which in the singular number, includes both "he" and "she," the most appropriate word under common usage, to include both sexes while using the singular number, is the word "he." The context of the Constitution, as a whole, plainly reveals the sense in which "he" is used. Cooley says.

"As a general thing, it is to be supposed that the same word is used in the same sense whenever it occurs in a constitution." Cooley's Constitutional Limitations, 95.

That "he" must include "she" is obvious when we read such sections as section 10 of article 1, where, in stating the rights of the accused in criminal prosecutions the following language is used:

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

Besides, section 48 of article 16 continued in full force all laws then in force not repugnant to the Constitution of the United States, or of the state. One of the laws then and now in force, enacted January 16, 1840, declared:

"The masculine gender shall include the feminine and neuter." Article 5502, R. S.

In determining that the use of the pronoun "his," in stating an officer's qualifications in the Constitution did not bar a woman, the Supreme Court of Missouri said:

"It is part of the general law of the state (and was before the time of the present Constitution) that where persons are referred to by words importing the masculine gender, females as well as males should be deemed included thereby, unless a contrary intent appears by the context or otherwise. Rev. Stat. 1855, p. 1024, § 10; Rev. Stat. 1889, §§ 6568, 6569. The mere use of the word 'his' in the Constitution, in referring to the qualification of officers, we do not regard as evidencing a purpose to limit all office holding to the male sex, or as depriving the people of St. Clair county of the right to select a woman as clerk of their county court." State v. Hostetter, 138 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, 59 Am. St. Rep. 515.

In giving to the words "he" and "his" the same meaning they had consistently had in the law of Texas for more than a third of a century before the Constitution was adopted, we adhere to the ancient rule that "the obvious common sense meaning of the terms is the one in which they should be understood." Republic v. Skidmore, 2 Tex. 265.

Does the early adoption of the common law and its continuation by the Constitution militate against the decision that Mrs. Ferguson is eligible for the office of Governor of Texas?

[7, 8] The Constitution is the supreme law of the state. It is elementary that a statute or principle of the common law in conflict with the Constitution is void. So, if there be any conflict between the common law, declaring Mrs. Ferguson ineligible, and the Constitution, declaring her eligible, it is our plain duty to give effect to the Constitution.

No one disputes this proposition. The insistence of appellant is that, construing the Constitution in the light of the common law, it declares only men, or at least only men and unmarried women, to be eligible to hold the office and perform the exalted functions of chief executive of the state. We find no substantial basis for such an insistence in Texas.

Quite true it is that under the ancient common law the legal personality of the wife was considered merged in that of the husband, so that she was regarded as without judgment or will of her own, and without capacity to own or convey property, or to sue or be sued. 1 Cooley's Blackstone (3d Ed.) 441. If that were woman's true status to-day under the Constitution and laws of Texas, she would be utterly ineligible to public office. The truth is that the old common-law principles invoked against Mrs. Ferguson have never been in force in Texas, and certainly are not in force at the present time.

England, as she advanced in Christian civilization, was fast to find means to rid herself of the iniquities which must have resulted, had some of the strict common-law rules governing marital rights and duties been rigidly applied. Thus English courts of equity created and recognized for married women rights, interests, and capacities to such an extent that they were enabled to beneficially hold, use, enjoy, and alienate property. Johnson v. Gallagher, 3 De Gex, F. & J. 494; 3 Pomeroy's Equity Jurisprudence, § 1098. Moreover, the English ecclesiastical courts administered the civil law under which "the husband and wife are considered as two distinct persons, and may have separate estates, contracts, debts, and injuries, * * *" and the wife may "sue and be sued without her husband." 1 Cooley's Blackstone, 443. And we find Lord Chief Justice Tindal speaking of the ecclesiastical law forming a part of the common law of England. Rev v. Mills, 10 Cl. & F. 534, 671. Mr. Bishop

concludes that the common law embraced that administered in courts of law, in courts of equity, and in the ecclesiastical courts. 1 Bishop on Marriage & Divorce, §§ 56, 57, p. 44.

By the old Roman law, from which many of the harsh rules of the common law were derived with respect to married women, under certain circumstances the wife became subject to the absolute dominion of the husband, her personality was merged in his, and she had no power to acquire property. But this began to be changed even prior to the early Roman Empire, until finally these old doctrines were superseded by the new doctrines of the Civil Law, "which involved the almost absolute independence of husband and wife, at least so far as their legal rights were concerned." Morey's Outlines of Roman Law, 243, 1511; 2 Sherman's Roman Law in the Modern World, 60.

It was because the founders of the Republic recognized the greater justice of the modern civil law, on the subject of marital rights, which came to Mexico through Spain, that when Texas came to adopt the common law, it was enacted as a part of the act for its adoption that the marital rights of husband and wife should be governed by regulations entirely at variance with the common-law principles on which reliance must be placed to deprive a married woman of her separate identity, her discretion, and her will and subject her to the husband's dominion, so as to disqualify her from holding public office.

In Cartwright v. Hollis, 5 Tex. 152, the court, by Chief Justice Hemphill, declares that the state's obvious purpose in the first regulations of marital rights "was to preserve from the wreck of the Spanish system of jurisprudence, those rules, with some modifications, which regarded the matrimonial union, so far as property was concerned, as a species of partnership; and in which each partner might have separate estates or property, as well as a common stock of acquisitions and gains. They have no analogy to the strict principles of the common law, and they exclude all such rules and doctrines as merge the individuality of the wife in the person of the husband, at least so far as the rights of the parties to property are in question, and which preclude the idea that the wife may have a separate estate and interest." Again, it is said in another opinion of Chief Justice Hemphill: "But the common law is not and never has been in force in this state on the subject of marital rights." Bradshaw v. Mayfield, 18 Tex. 21.

Barkley v. Dumke, 99 Tex. 150, 87 S. W. 1147, recognized that the strict rules of the common law about marriage would lead to gross injustice to innocent women, and the court in that case refused to follow the common law, adopting instead the law of Spain.

The doctrine which must be sanctioned to disqualify Mrs. Ferguson was distinctly repudiated by Texas nearly 40 years ago, when the Supreme Court said of a married woman:

"Here her separate being has not been merged in her husband as at common law, but as far as it could be done consistently with the preservation of the home and family, she has been disenthralled." Cullers v. James, 66 Tex. 497, 1 S. W. 314.

To the same effect is Rogers v. Roberts, 89 Tex. 613, 35 S. W. 77.

Furthermore, the fact that the supposed reasons for the rule against married women holding office were, and are, untrue, and that the rule is wholly discordant with the traditions, customs, and morals of our people, would forbid the rule's adoption. For, as said by this court in Swayne v. Lone Acre Oil Co., 98 Tex. 605, 86 S. W. 742, 69 L. R. A. 986, 8 Ann. Cas. 1117:

"In other instances rules established in England were not regarded as of controlling authority in this state, for the reason that it was thought that the conditions here were so different from those existing in England that, if the conditions in that country had been the same as in this, the ruling there would have been different."

Of like purport is the reasoning in State v. Quible, 86 Neb. 417, 125 N. W 619, 27 L. R. A. (N. S.) 531, 21 Ann. Cas. 401, and In re Leach, 134 Ind. 665, 34 N. E. 641, 21 L. R. A. 701.

An examination of the authorities and of history will, we think, disclose that there was no fixed rule of the common law against the eligibility of a woman, or of a married woman, for office. The authorities show, we believe, that in every instance in which a woman's right to hold office was questioned prior to the present generation, she was held to be competent, although the courts often remarked that women were not competent to hold all offices. Missouri v. Hostetter, 137 Mo. 636, 39 S. W. 270, 38 L. R. A. 208, note p. 215, 59 Am. St. Rep. 515.

We have no doubt that the Court of King's Bench of England, in a case decided in 1788, styled The King v. Alice Stubbs et al., 2 Durnford & East's Reports, 395, correctly stated the prevailing opinion as to the law of England at that time on the subject of the right of a woman to hold office. Mrs. Alice Stubbs had been appointed one of the overseers of the poor of the township of the monastery of Ronton Abbey, for the county of Stafford. Her appointment was contested on the ground that she was a woman and incompetent to hold the office. The court held that she was competent, and confirmed her in the office, saying:

"As to the second objection, we think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment. The only qualification required by 43 Eliz. is that they shall be substantial house-

holders, which has no reference to sex. * * * There are many instances where, in offices of a higher nature, they are held not to be disqualified, as in the case of the office of high chamberlain, high constable, and marshal, and that of common constable, which is both an office of trust, and likewise, in a degree, judicial."

The statement that women in England at the time might hold these offices, as well as other offices, appears to be sustained by the authorities cited in the case, and others, to which we now make reference: 3 Bouvier's Law Dictionary, p. 3486. See, also, voluminous notes in 38 L. R. A. 208; 2 Raymond's Reports, 1014; Lady Russell's Case, 84 Eng. Reports (Reprint), 578; Woman Governess of the Workhouse, 91 Eng. Reports (Reprint) 654; Olive v. Ingram, 93 Eng. Reports (Reprint) 1067; Duke of Buckingham's Case, 73 Eng. Reports (Reprint) 640; Ex parte Burrell, 1 Eng. Reports (Reprint), 850.

It is, however, not so much the common law as it may have existed in England, which was adopted by the act of 1840, as it is the common law of England as understood and declared by the different courts of the United States, to which we look in determining a question of first impression in this state. Grigsby v. Reib, 105 Tex. 597, 153 S. W. 1124, L. R. A. 1915E, 1, Ann. Cas. 1915E, 1, Ann. Cas. 1915C, 1011. It is clear that there is considerable conflict in the decisions of our several states on woman's eligibility to hold office while she was denied the ballot. Such conflict would authorize this court to follow the juster rule, if the question had to be treated as entirely controlled by the common law and unaffected by suffrage amendments.

Consideration of the true nature of public office will suffice to show that it would be wholly inconsistent with our law recognizing the capacity of married women to become agents and trustees, to deny married women the capacity to hold office. Smith v. Strahan, 16 Tex. 321, 67 Am. Dec. 622; Black v. Bryan, 18 Tex. 461; Holman v. Oil Co. (Tex. Civ. App.) 152 S. W. 885; Fielder Lumber Co. v. Smith (Tex. Civ. App.) 151 S. W. 605; Wright v. Wright, 7 Tex. 526; Nickelson v. Ingram, 24 Tex. 630. An office is essentially a trust or agency for the benefit of the public. The supreme qualification is unselfish fidelity to duty. Who will say that her sex prevents a woman from displaying this virtue in as marked a degree as the greatest of men?

The decisions seem in general accord that the suffrage amendments making women qualified electors have removed any pre-existing sex ineligibility to office.

In the Opinion of Justices, 240 Mass. 601, 135 N. E. 173, it is said:

"Under a constitution framed and phrased as is the Constitution of Massachusetts, we think that an amendment thereto adopted by the people of this Commonwealth, striking out the word 'male' wherever it occurred as a limitation upon the right to vote, would plainly make women eligible to office upon the same footing as men. It seems to us that when the same effect is wrought by an amendment to the Constitution of the United States, the same result follows. The constitutional situation has become so changed by the supervention of the nineteenth amendment to the United States Constitution with its consequent operation upon the Constitution of Massachusetts, as to render no longer of force the opinions of the Justices in 107 Mass. 604, and 165 Mass. 599, 43 N. E. 927, 32 L. R. A. 350. The firm foundation upon which they rested has been swept away by that amendment."

The reasons for holding women eligible to hold office by reason of the removal of the bar against their participation in the ballot, seem of peculiar force in Texas; for the two rights to vote and to hold office appear associated in many provisions of former Constitutions as well as of our present Constitution, as in section 1 of article 6 of the Constitution of 1869, and in sections 4 and 9 of article 16 of the Constitution of 1876.

In fact, it is to blind one's eyes to the truths of current history not to recognize that the last vestige of reason to sustain a rule excluding women from office was removed when she was clothed with equal authority with men, in the government of state and nation, through the ballot. When the reason for the rule of exclusion has failed, the rule should no longer be applied. 12 C. J. 179.

[9] The fifth question inquires whether Mrs. Ferguson was rendered ineligible by the decree of the Senate of Texas, sitting as a court of impeachment, removing her husband, James E. Ferguson, from the office of Governor and adjudging that he be henceforth disqualified to hold any office of power, trust, or profit under the state.

Appellant's position is that the emoluments of the office of Governor are community property, and that James E. Ferguson could not receive his community half of his wife's salary as Governor without violating the decree of impeachment.

It is unnecessary to inquire into the exact status of the wife's salary from public office as separate or community property, under our present Constitution and statutes. For, if it be assumed that Mrs. Ferguson's salary as Governor would belong to the community estate of her husband and herself, still James E. Ferguson would not be receiving or sharing any emolument or profit derived from any office held by James E. Ferguson under the state. The emolument would be derived from Miriam A. Ferguson holding an office and performing its duties. Such a disqualification as is here insisted on could be supported on no other theory than that of legal identity of husband and wife, and that theory we definitely repudiate, as

it has been uniformly rejected from the earliest cases determined by this court.

The Constitution forbids the imposition of penalties on members of the family of an impeached Governor by declaring that the Senate's judgment of impeachment shall extend, in addition to punishment after indictment and trial, *only* to removal from office and disqualification to hold office under the state.

There is a third reason why no supposed community interest of James E. Ferguson in the salary of an office held by his wife should render his wife ineligible to hold such office. And that is, if by his wrong he had deprived himself of any right to share such salary, the same would become his wife's separate estate. Wright v. Hays, 10 Tex. 136, 60 Am. Dec. 200; Nickerson v. Nickerson, 65 Tex. 281.

[10] The sixth and last certified question is whether plaintiff's charge was established as a matter of law that James E. Ferguson was the real candidate for Governor, and that his wife's name was used as a mere subterfuge to evade the decree impeaching James E. Ferguson.

The only proof to establish the charge was a campaign circular issued by Mrs. Ferguson when a candidate for the Democratic nomination for Governor, and articles in "The Ferguson Forum." These instruments are many pages in length. The parts most pertinent to the certified question announce that Mrs. Ferguson is running on a platform previously promulgated by her husband, who would be the candidate but for the adjudication of his ineligibility, and pledges the best efforts of both Mrs. Ferguson and husband to give the people the best administration which their ability and gratitude can produce. After carefully considering the circular and articles, we conclude they negative the claim that Mrs Ferguson was not the real candidate for Governor, and are wholly insufficient to establish as a matter of law any conspiracy to use her name as a subterfuge to escape the effect of the impeachment decree.

To each of questions 1 and 2 the court answers "Yes."

To each of questions 3, 4, 5, and 6 the court answers "No."

NATIONAL BANK OF CLEBURNE et al. v. M. M. PITTMAN ROLLER MILL.
(No. 586–4052.)

(Commission of Appeals of Texas, Section A. Nov. 19, 1924.)

1. Damages ⟸40(2)—Loss of expected net proceeds from resale of wheat held element of damages for breach of contract to loan money to buy wheat.

In action by milling company against bank for breach of contract to make loan, loss of net profits, expected from resale of wheat, and contemplated by party when contract was made, *held* element of damages, not too remote or contingent.

2. Damages ⟸6—Rule against recovery of contingent damages not applicable to those certain to result but uncertain in amount.

Rule against recovery of uncertain and contingent damages as too remote only applies to such damages as are not certain result of breach, and not those certain to result but uncertain in amount.

3. Damages ⟸190—In action for breach of contract to loan money with which to buy wheat, evidence held insufficient to support recovery of net profits possible from a resale.

In action for breach of contract to make loan, evidence *held* insufficient to show purpose of loan was to furnish funds to purchase wheat for resale so as to support recovery of possible net profits from resale.

Error to Court of Civil Appeals of Fourth Supreme Judicial District.

Action by the M. M. Pittman Roller Mill against the National Bank of Cleburne and others. Judgment for plaintiff in the district court was affirmed by the Court of Civil Appals (252 S. W. 1096), and defendants bring error. Reversed and remanded to district court.

Thompson, Barwise, Wharton & Hines and Ellis Douthit, all of Fort Worth, for plaintiffs in error.

Wm. H. Atwell, of Dallas, for defendant in error.

BISHOP, J. This suit was instituted by defendant in error to recover of plaintiffs in error the sum of $8,400 by reason of alleged breach of contract to loan defendant in error $14,000 with which to buy wheat during the season of 1921. Defendant in error alleged that it was necessary to have said funds in order to run its said business and flouring mill. It set out in its petition the written agreement alleged to have been breached, which is hereinafter quoted, and alleged that with said $14,000 it could and would have purchased 14,000 bushels of wheat upon which it would have made the sum of $8,400, or 60 cents per bushel; that by reason of said breach it was damaged in the sum of $8,400; and that it could have bought wheat at $1 per bushel in June and July, and could have sold it in September for $1.60 per bushel. The case was tried by the court without a jury, and resulted in a judgment in favor of defendant in error for the amount sued for. The record contains the findings of fact and conclusions of law of the trial court and also a statement of facts.

There is evidence to sustain the finding of the trial court that the contract to make the loan was entered into as alleged, and that same was breached; that defendant in er-