

Opinion No. 12-934

August 12, 1912

BY: FRANK W. CLANCY, Attorney General

TO: Mrs. Lola C. Armijo, State Librarian, Santa Fe, N. M.

STATE LIBRARIAN.

A woman is qualified to hold the appointive office of State Librarian.

OPINION

{*81} I have received your letter in which you state that you have been told it has been said that you are not qualified to hold the position of librarian because you are a woman, and that your disqualification is shown by Section 6 of the Organic Act which created the Territory of New Mexico, and by Section 2 of Article VII and Section 11 of Article XX of the Constitution, and you ask me for my opinion on this subject.

As far as the effect of Section 6 of the organic act is concerned, this question is not an entirely new one in this office. That section is as follows:

"And be it further enacted, That every free white male inhabitant, above the age of twenty-one years, who shall have been a resident of said territory at the time of the passage of this act, shall be entitled to vote at the first election, and shall be eligible to any office within the said territory; but the qualifications of voters and of holding office, at all subsequent elections, shall be such as shall be prescribed by the legislative assembly: Provided, That the right of suffrage, and of holding office, shall be exercised only by citizens of the United States, including those recognized as citizens by the treaty with the Republic of Mexico, concluded February second, eighteen hundred and forty-eight."

It is my view, taking this section as a whole, that it refers only to elective officers. It declares who shall be entitled to vote at the {*82} first election and who shall be eligible to any office in the territory. Strictly speaking, the word "eligible" would be limited to elective officers, but by common usage this word has come to have nearly the same meaning as "qualified"; but however that may be, this section is referring to elections, and after declaring who shall be entitled to vote at the first election says that "the qualifications of voters and of holding office at all subsequent elections," may be prescribed by the legislative assembly, and I can see no way that this section can be held to have any reference to an appointive office like the one which you hold.

On March 22, 1910, the then superintendent of public instruction asked me as to the qualification of a woman to hold the office of school director, and on March 24, 1910, in response I called his attention to the opinion of my immediate predecessor, Mr. James

M. Hervey, given on March 27, 1908, to the Governor, in which, after careful discussion of authorities, the conclusion was reached that a woman could hold the office of county school superintendent, in which I fully concurred, and stated that the views given were equally applicable to the office of school director.

Reference to that opinion by Mr. Hervey will show that he fully considered the effect of Section 6 of the Organic Act, even as to the right of women to hold elective offices. He pointed out that the privilege to hold office was one entirely within the control of the territorial legislature, and that if the legislature had not seen fit expressly to confer the right to hold such an office upon a woman, she could not hold it unless the right could be derived from the common law which was in force in New Mexico where not modified or abrogated by statute. It does not seem necessary here to repeat even briefly the careful examination of the law and authorities made by Mr. Hervey, but it will be sufficient to state that his conclusion was that the weight of authority established the rule that at common law a woman could hold no office except one that was ministerial in its nature, local in its extent, and the duties of which were not inconsistent with her right or ability to hold the office, and he reached the conclusion that within this rule, and without any express legislative permission, a woman could be a county school superintendent. I am unable to see why this rule as stated by Mr. Hervey is not applicable to the office which you hold. That office is certainly ministerial in its nature, local in its extent, and its duties are not inconsistent with the ability of a woman to hold the office.

Since the receipt of your letter I have had my attention called to the fact that Mr. Hervey on March 25, 1908, gave to the secretary of the territory an opinion that he could not appoint a woman to the office of assistant secretary of the territory, distinguishing that office from that of a school superintendent as not being of a local character, the jurisdiction of the secretary extending throughout the entire territory.

I conclude, therefore, that even while New Mexico was a territory, the provisions of Section 6 of the Organic Act in no way militated against a woman holding the position of territorial librarian. As a matter of fact that position has been held by women for nearly eight years and no question was ever raised as to their qualifications.

However the law may have been under the territorial form of {*83} government, upon our changing to a state government, any constitutional provisions which are applicable would over-ride and change former conditions if inconsistent therewith. We come therefore to a consideration of the two sections of the constitution to which you direct my attention.

Section 2 of Article VII of the Constitution, which article relates to the elective franchise, and to nothing more, unless a part of said section 2 does so, is as follows:

"Every male citizen of the United States who is a legal resident of the state and is a qualified elector therein, shall be qualified to hold any public office in the state, except as otherwise provided in this constitution; provided, however, that women possessing

the qualifications of male electors prescribed in paragraph one of this article shall be qualified to hold the office of county school superintendent, and shall also be eligible for election to the office of school director or members of a board of education."

It may be suggested that the words "any public office in the state" cover appointive as well as elective offices, and the argument in favor of the disqualification of women to hold any such public office is based upon the application of the maxim, **expressio unius exclusio alterius est**, and because women are declared to be eligible to certain school offices that therefore they are excluded from all other offices. I am unable to appreciate the force of this argument as applied to this section which I believe treats only of elective offices and has no relation to appointive offices, and I do not attach much importance to this section, as the matter is controlled and settled by the other section referred to in your letter.

That other section is Section 11 of Article XX of the constitution, and very briefly states "That women may hold the office of notary public and such appointive offices as may be provided by law." I am not sure that I understand how anyone could think this section shows your disqualification as a woman, but I imagine the person who is said to have stated that proposition may have had the idea that this section means that women may hold appointive offices if it is provided by law that they may hold them, but to give it such a meaning it is necessary to interpolate or add to it words which are not there. As it stands it seems to include all appointive offices which may be provided by law. If the constitution makers intended that this section should mean that women might hold appointive offices if the law provided that they should, they could easily have made that meaning clear. It would have been easy to say that women may hold appointive offices if the law should so provide, or if the law should provide that they might hold such offices.

Immediately upon receipt of your letter I looked at these constitutional provisions and this one seemed to me clearly to indicate that you are qualified to hold the appointive office of librarian, and a little later a member of the constitutional convention told me that his recollection was distinct that at the time this section was under discussion in the convention it was clearly stated and understood that its effect would be to permit women to hold any appointive offices which might be provided by law. This intention and understanding, aside from the mere wording of the section, seem ^{*84} probable when we consider the general tendency of modern times to throw open the doors to women for employments and activities which have been forbidden to them in the past, and it would be a most unfortunate state of affairs if we should find ourselves constrained to hold that our constitution, instead of liberalizing in such matters, had gone backward and imposed even greater disabilities and disqualifications upon women than have existed in the past and throughout the greater part of the United States.