86, 1929

In the Privy Council.

No. 121 of 1928.

ON APPEAL FROM THE SUPREME COURT OF CANADA.

IN THE MATTER OF A REFERENCE AS TO THE MEANING OF THE WORD "PERSONS" IN SECTION 24 OF THE BRITISH NORTH AMERICA ACT, 1867.

BETWEEN

HENRIETTA MUIR EDWARDS, NELLIE L. McCLUNG, LOUISE C. McKINNEY, EMILY P. MURPHY AND IRENE PARLBY - - - - - - - - - *Appellants*

AND

THE ATTORNEY-GENERAL FOR THE DOMINION OF CANADA, THE ATTORNEY-GENERAL FOR THE PROVINCE OF QUEBEC AND THE ATTORNEY-GENERAL FOR THE PROVINCE OF ALBERTA - - - - - - - - - - *Respondents.*

CASE OF THE ATTORNEY-GENERAL OF CANADA.

1. This is an appeal by special leave from the judgment of the Supreme Court of Canada pronounced on the 24th April, 1928, upon a reference by His Excellency the Governor in Council for hearing and consideration by the Court, pursuant to the provisions of section 60 of the Supreme Court Act, of the following question relative to the eligibility of women to be summoned to a place in the Senate or Upper House of of the Parliament of Canada : RECORD. pp. 38, 39. pp. 3, 4.

> "Does the word 'Persons' in section 24 of the British North America Act, 1867, include female persons?"

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RECORD.

2. The said reference was made upon the petition of the appellants as persons interested in the admission of women to the Senate of Canada.

3. The provisions of the British North America Act, 1867, relating to the constitution of the Senate and the qualifications of a Senator, viz., sections 21 to 36 inclusive, are set out with other sections of the said Act which have been adverted to in the discussion and consideration of the question referred, at pp. 18–33 of the Joint Appendix.

4. On the hearing of argument of the said reference on the 14th March, 1928, before the full Court (composed of Anglin, C.J., Duff, Mignault, Lamont and Smith, J.J.), counsel for the Attorney-General of Canada contended that the word "persons" in sec. 24 of the British North America Act was limited to male persons, and counsel for the Province of Quebec supported this contention. Counsel for the petitioners contended, on the other hand, that the word "persons" in that section included female persons, and this contention was supported by the counsel for the Attorney-General of Alberta. The Attorneys-General for the other provinces of Canada, though duly notified, did not appear on the argument of the said reference.

5. On the 24th April, 1928, the Court pronounced its judgment unanimously answering the question referred as follows:

p. 39. "The question being understood to be, 'Are women eligible for appointment to the Senate of Canada,' the Question is answered in the negative."

pp. 39-59. The reasons for judgment delivered by the several members of the Court are reported in (1928) S.C.R., pp. 276–304.

6. The Chief Justice of Canada, in his reasons for judgment (in which Mignault, Lamont and Smith, J.J. concurred), after citing the principles of construction which he considered to be applicable as affording guidance to the true determination of the question referred, proceeded as follows, at pages 282 and 283 of the report:

p. 43, l. 15. "Two outstanding facts or circumstances of importance bearing upon the present reference appear to be—

"(*a*) that the office of Senator was a *new* office first created by the B.N.A. Act.

" 'It is an office, therefore, which no one apart from the enactments of the statute has an inherent or common law right of holding, and the right of any one to hold office must be found within the four corners of the statute which creates the office and enacts the conditions upon which it is to be held and the persons who are entitled to hold it; (*Beresford-Hope* v. *Sandhurst* (1889) 23 Q.B.D. 79, at p. 91, per Lord Colerdige, C.J.);'

"(*b*) that by the common law of England (as also, speaking generally, by the civil and canon law: *fœminæ ab omnibus officiis civilibus vel publicis remotæ sunt*) women were under a legal incapacity to hold public office, 'referable to the fact that (as

Willes, J., said in *Chorlton* v. *Lings*, L.R. 4 C.P. 374, at p. 392) in this country in modern times, chiefly out of respect to women, and a sense of decorum, and not from their want of intellect, or their being for any other reason unfit to take part in the government of the country, they have been excused from taking any share in this department of public affairs.' " RECORD.

And at pp. 284–288 of the report :—

" Prior to 1867 the common law legal incapacity of women to sit in Parliament had been fully recognized in the three provinces— Canada (Upper and Lower), Nova Scotia and New Brunswick, which were then confederated as the Dominion of Canada. p. 45, l. 8.

" Moreover, paraphrasing an observation of Lord Coleridge, C.J., in *Beresford-Hope* v. *Sandhurst* (1889) 23 Q.B.D. 79, at pp. 91, 92, it is not also perhaps to be entirely left out of sight, that in the sixty years which have run since 1867, the questions of the rights and privileges of women have not been, as in former times they were, asleep. On the contrary, we know as a matter of fact that the rights of women, and the privileges of women, have been much discussed, and able and acute minds have been much exercised as to what privileges ought to be conceded to women. That has been going on, and surely it is a significant fact, that never from 1867 to the present time has any woman ever sat in the Senate of Canada, nor has any suggestion of women's eligibility for appointment to that House until quite recently been publicly made.

" Has the Imperial Parliament, in sections 23, 24, 25, 26 and 32 of the B.N.A. Act, read in the light of other provisions of the statute and of relevant circumstances proper to be considered, given to women the capacity to exercise the public functions of a Senator? Has it made clear its intent to effect, so far as the personnel of the Senate of Canada is concerned, the striking constitutional departure from the common law for which the petitioners contend, which would have rendered women eligible for appointment to the Senate at a time when they were neither qualified to sit in the House of Commons nor to vote for candidates for membership in that House? Has it not rather by clear implication, if not expressly excluded them from membership in the Senate? Such an extraordinary privilege is not conferred furtively, nor is the purpose to grant it to be gathered from remote conjectures deduced from a skilful piecing together of expressions in a statute which are more or less precisely accurate. (*Nairn* v. *University of St. Andrews* (1909) A.C. 147, at p. 161). When Parliament contemplates such a decided innovation it is never at a loss for language to make its intention unmistakable. 'A judgment,' said Lord Robertson in the case last mentioned at pp. 165–6, 'is wholesome and of good example which puts forward subject-matter and fundamental constitutional law as guides of construction never to be neglected in favour of verbal possibilities.'

RECORD

"There can be no doubt that the word 'persons' when standing alone *prima facie* includes women. (Per Loreburn, L.C., *Nairn* v. *University of St. Andrews* (1909) A.C. 147, at p. 161.) It connotes human beings—the criminal and the insane equally with the good and the wise citizen, the minor as well as the adult. Hence the propriety of the restriction placed upon it by the immediately preceding word 'qualified' in ss. 24 and 26 and the words 'fit and qualified' in s. 32, which exclude the criminal and the lunatic or imbecile as well as the minor, who is explicitly disqualified by s. 23 (1). Does this requirement of qualification also exclude women?

"*Ex facie*, and apart from their designation as 'Senators' (s. 21), the terms in which the qualifications of members of the Senate are specified in s. 23 (and it is to those terms that reference is made by the word 'qualified' in s. 24) import that men only are eligible for appointment. In every clause of s. 23 the Senator is referred to by the masculine pronoun—'he' and 'his'; and the like observation applies to ss. 29 and 31. (*Frost* v. *The King* (1919) Ir. R. 1 Ch. 81, at p. 91.) Moreover, clause 2 of section 23 includes only 'natural-born' subjects and those 'naturalized' under statutory authority and not those who become subjects by marriage—a provision which one would have looked for had it been intended to include women as eligible.

"Counsel for the petitioners sought to overcome the difficulty thus presented in two ways:

p. 46, l. 23. "(*a*) by a comparison of s. 24 with other sections in the B.N.A. Act, in which, he contended, the word 'persons' is obviously used in its more general signification as including women as well as men, notably ss. 11, 14 and 41.

"(*b*) by invoking the aid of the statutory interpretation provision in force in England in 1867—13-14 Vict., c. 21, s. 4, known as Lord Brougham's Act—which reads as follows:

"'Be it enacted that in all Acts words importing the Masculine Gender shall be deemed and taken to include Females, and the Singular to include the Plural, and the Plural the Singular, unless the contrary as to Gender or Number is expressly provided.'

"(*a*) A short but conclusive answer to the argument based on a comparison of s. 24 with other sections of the B.N.A. Act in which the word 'persons' appears is that in none of them is its connotation restricted, as it is in s. 24, by the adjective 'qualified.' 'Persons' is a word of equivocal signification, sometimes synomymous with human beings, sometimes including only men. 'It is an ambiguous word,' says Lord Ashbourne, 'and must be examined and construed in the light of surrounding circumstances and consitutional law' (*Nairn* v. *University of St. Andrews* (1909) A.C. 147, at p. 162).

"In section 41 of the B.N.A. Act, which deals with the qualifications for membership of the House of Commons and of the voters at elections of such members, 'persons' would seem to be used in its wider signification, since, while in both these matters the legislation affecting the former Provincial Houses of Assembly, or Legislative Assemblies, is thereby made applicable to the new House of Commons, it remains so only 'until the Paliament of Canada otherwise provides.' It seems reasonably clear that it was intended to confer on the Parliament of Canada an untrammelled discretion as to the personnel of the membership of the House of Commons and as to the conditions of and qualifications for the franchise of its electorate; and so the Canadian Parliament has assumed, as witness the Dominion Elections Act, R.S.C. 1927, c. 53, ss. 29 and 38. It would, therefore, seem necessary to give the word 'persons' in s. 41 of the B.N.A. Act the wider signification of which it is susceptible in the absence of adjectival restriction.

"But, in s. 11, which provides for the constitution of the new Privy Council of Canada, the word 'persons,' though unqualified, is probably used in the more restricted sense of 'male persons.' For the public offices thereby created, women were, by the common law, ineligible, and it would be dangerous to assume that by the use of the ambiguous term 'persons' the Imperial Parliament meant in 1867 to bring about so vast a constitutional change affecting Canadian women, as would be involved in making them eligible for selection as Privy Councillors. A similar comment may be made upon s. 14, which enables the Governor General to appoint a Deputy or Deputies."

"As put by Lord Loreburn in *Nairn* v. *University of St. Andrews* (1909) A.C. 147, at p. 161:

'It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentuous and far-reaching by so furtive a process.'

"With Lord Robertson (ibid. at pp. 165-6), to mere 'verbal possibilities' we refer 'subject-matter and fundamental constitutional law as guides of construction.' When Parliament intends to overcome a fundamental consitutional incapacity it does not employ such an equivocal expression as is the word 'persons' when used in regard to eligibility for a newly created public office. Neither from s. 11 or s. 14 nor from s. 41, therefore, can the petitioners derive support for their contention as to the construction of the phrase 'qualified persons' in s. 24.

"Section 63 of the B.N.A. Act, the only other section to which Mr. Rowell referred, deals with the constitution of the Executive Councils of the provinces of Ontario and Quebec. But, since, by s. 92 (1), each provincial legislature is empowered to amend the constitution of the province except as regards the office of

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Lieutenant-Governor, the presence of women as members of some provincial executive councils has no significance in regard to the scope of the phrase ' qualified persons ' in s. 24 of the B.N.A. Act.

" (*b*) ' Persons ' is not a ' word importing the masculine gender.' Therefore, *ex facie*, Lord Brougham's Act has no application to it. It is urged, however, that that statute so affects the word ' Senator ' and the pronouns ' he ' and ' his ' in s. 23 that they must be ' deemed and taken to include Females,' ' the contrary ' not being ' expressly provided.'

" The application and purview of Lord Brougham's Act came up for consideration in *Chorlton* v. *Lings* (1868) L.R. 4, C.P. 374, where the Court of Common Pleas was required to construe a statute (passed, like the British North America Act, in 1867) which conferred the parliamentary franchise on ' every man ' possessing certain qualifications and registered as a voter. The chief question discussed was whether, by virtue of Lord Brougham's Act, ' every man ' included ' women.' Holding that ' women ' were ' subject to a legal incapacity from voting at the election of members of Parliament,' the court unanimously decided that the word ' man ' in the statute did not include a ' woman.' "

After quoting from the reasons for judgment delivered by the learned Judges in that case, the learned Chief Justice (at page 290 of the Report) concluded as follows :

p. 49, l. 35.

" The decision in *Chorlton* v. *Lings* (L.R. 4, C.P. 374) is of the highest authority, as was recognized in the House of Lords by Earl Loreburn, L.C. in *Nairn* v. *University of St. Andrews* (1909) A.C. 147, and again by Viscount Birkenhead, L.C., in rejecting the claim of Viscountess Rhondda to sit in the House of Lords, with the concurrence of Viscount Cave, and Lords Atkinson, Phillimore, Buckmaster, Sumner and Carson, as well as by Viscount Haldane, who dissented (1922) 2 A.C. 339. "

" In his speech, at p. 375, the Lord Chancellor said :—

p. 50, l. 2.

' It is sufficient to say that the Legislature in dealing with this matter cannot be taken to have departed from the usage of centuries or to have employed such loose and ambiguous words to carry out so momentous a revolution in the constitution of this House. And I am content to base may judgment on this alone.'

" In our opinion *Chorlton* v. *Lings*, L.R. 4, C.P. 374 is conclusive evidence against the petitioners alike on the question of the common law incapacity of women to exercise such public functions as those of a member of the Senate of Canada and on that of their being expressly excluded from the class of ' qualified persons ' within s. 24 of the B.N.A. Act by the terms in which s. 23 is couched (*New South Wales Taxation Commissioners* v. *Palmer*) (1907) A.C. 179, at p. 184 so that Lord Brougham's Act cannot be invoked to extend those terms to bring " women " within their purview.

"We are, for these reasons, of the opinion that women are not eligible for appointment by the Governor-General to the Senate of Canada under Section 24 of the British North America Act, 1867, because they are not 'qualified persons' within the meaning of that section. The question submitted, understood as above indicated, will, accordingly, be answered in the negative." RECORD.

7. Mignault, J., while concurring generally in the reasoning of the Chief Justice, stated briefly, in a separate judgment, the grounds on which he based his answer to the question submitted, in part, as follows: (at pp. 302, 303 of the report).

"The real question involved under this reference is whether on the proper construction of the British North America Act, 1867, women may be summoned to the Senate. . . . The expression 'persons' does no stand alone in section 24, nor is that section the only one to be considered. It is 'qualified persons' whom the Governor General shall from time to time summon to the Senate (sec. 24), and when a vacancy happens in the Senate, it is a 'fit and qualified person' whom the Governor-General shall summon to fill the vacancy (sec. 32). On the proper construction of these words depends the answer we have to give. . . . p. 59, l. 1.

"The contentions which the petitioners advanced at the hearing are not new. They have been conclusively rejected several times, and by decisions by which we are bound. Much was said of the interpretation clause contained in Lord Brougham's Act, but the answer was given sixty years ago in *Chorlton* v. *Lings* (1868) L.R. 4, C.P. 374. It appears hopeless to contend against the authority of these decisions. p. 59, l. 20.

"The word 'persons' is obviously a word of uncertain import. Sometimes it includes corporations as well as natural persons; sometimes it is restricted to the latter and sometimes again it comprises merely certain natural persons determined by sex or otherwise. The grave constitutional change which is involved in the contention submitted on behalf of the petitioners is not to be brought about by inferences drawn from expressions of such doubtful import, but should rest upon an unequivocal statement of the intention of the Imperial Parliament, since that Parliament alone can change the provisions of the British North America Act in relation to the 'qualified persons' who may be summoned to the Senate."

8. Duff, J., after referring to the argument which had been advanced in favour of the limited construction of sec. 24 of the British North America Act, 1867, and the decisions cited in support of it, proceeded to state that he was unable to accept that argument, in so far as it rested upon the view that in construing the legislative and executive powers granted by the British North America Act, they must proceed upon a general presumption against the eligibility of women for public office. He had come to the conclusion that there was a special ground upon which the restricted construction p. 52, l. 33.

RECORD. of sec. 24 must be maintained, but before stating that he thought it right to explain why, in his view, the general presumption contended for had not been established. First, one must consider the provisions of the Act themselves, apart from "extraneous circumstances." It would, he thought, hardly be disputed that as a general rule the legislative authority of Parliament and of the legislatures enabled them, each in their several fields, to deal fully with the subject of the incapacity of women. One could not hold otherwise without refusing to give effect to the language of secs. 91 and 92, and, indeed, one felt constrained to say, without ignoring the fact that the authors of the Act were engaged in creating a system of representative government for the people of half a continent. Counsel did, in the course of argument, suggest the possibility that Parliament, in extending the parliamentary franchise to women, had exceeded its powers, but he did not think that was seriously pressed. There could be no doubt that the Act did, in two sections, recognise the authority of Parliament and of the Legislatures to deal with the disqualification of women to be elected, or sit, or vote, as members of the representative body or to vote in an election of such members. These sections were secs. 41 and 84, and the learned judge developed an argument in support of that construction of those
p. 54, l. 23. sections. The subject of the qualification and disqualification of women as members of the House of Commons being thus recognized as within the jurisdiction of Parliament, was it quite clear that the construction of the general words of sec. 11 dealing with the constitution of the Privy Council was governed by the general presumption suggested? Inferentially, in laying down the "principle" of the British Constitution as the foundation of the new policy, the preamble recognized the responsibility of the Executive to Parliament, or rather to the elective branch of the legislature and the right of Parliament to insist that the advisers of the Crown should be persons possessing its "confidence" as the phrase was.

p. 55, l. 1. It might be suggested, he could not help thinking, with some plausibility, that there would be something incongruous in a parliamentary system professedly conceived and fashioned on this principle, if persons fully qualified to be members of the House of Commons were by an iron rule of the constitution, a rule beyond the reach of Parliament, excluded from the Cabinet or the Government; if a class of persons who might reach any position of political influence, power or leadership in the House of Commons, were permanently, by an organic rule, excluded from the Government. In view of the intimate relation between the House of Commons and the Cabinet, and the rights of initiation and control which the Government possesses in relation to legislation and parliamentary business generally, and which, it cannot be doubted, the authors of the Act intended and expected would continue, that would not, he thought, be a wholly baseless suggestion.

The word "persons" was employed in a number of sections of the Act (secs. 41, 83, 84 and 133) as designating members of the House of Commons, and though the word appeared without an adjective, indubitably it was used in the unrestricted sense as embracing persons of both

sexes; while in secs. 41 and 84, where males only were intended, that intention was expressed in appropriate specific words. RECORD.

Such general inferences therefore as may arise from the language of the Act as a whole could not be said to support a presumption in favour of the restricted interpretation.

Nor was he convinced that the reasoning based upon the " extraneous circumstances " they were asked to consider—the disabilities of women under the common law, and the law and practice of Parliament in respect of appointment to public place or office—established a rule of interpretation for the British North America Act, by which the construction of powers, legislative and executive, bestowed in general terms was controlled by a presumptive exclusion of women from participation in the working of the institutions set up by the Act. This mode of approach, though recognized by the courts as legitimate, must obviously be employed with caution. p. 56, l. 6.

The " extraneous facts," upon which the underlying assumption was founded, must be demonstrative. It would not do to act upon the general resemblances between the questions presented here, and that presented in the cases cited. Those cases were concerned with the effect of statutes which might at any time be repealed or amended by a majority. They had nothing to do with the jurisdiction of Parliament or with that of His Majesty in Council executing the highest and constitutional functions under his responsibility to Parliament; and were not intended to lay down binding rules, for an indefinite future, in the working of a Constitution. And, above all, they were not concerned with broad provisions establishing new parliamentary institutions, and defining the spheres and powers of legislatures and executives, in a system of representative government. Passages in the judgments of seemingly general import, must be read *secundum subjectam materiam.*

In 1867, the learned judge proceeded to remark by way of illustration, p. 56, l. 23.
it would have been a revolutionary step to appoint a woman to the Privy Council or to an Executive Council in Canada—nobody would have thought of it. But it would also have been a radical departure to make women eligible for election to the House of Commons, or to confer the electoral franchise upon them; to make them eligible as members of a provincial legislature, or for appointment to a provincial legislative council. And yet it is quite plain that, with respect to all these last-mentioned matters, the fullest authority was given and given in general terms to Parliament and the legislatures within their several spheres; the " policy of centuries " being left in the keeping of the representative bodies, which with the consent of the people of Canada, were to exercise legislative authority over them.

In view of this, he did not think the " extraneous facts " relied upon were really of decisive importance, especially when the phraseology of the particular sections already mentioned was considered; and their value became inconsiderable when compared with reasons deriving their force from the presumption that the Constitution in its executive branch was intended to be capable of adaptation to whatever changes (permissible

RECORD. under the Act) in the law and practice relating to the election branch might be progressively required by change in public opinion.

p. 57, l. 5. *Sic.* For these reasons, the learned judge was not convinced of the existence of any such general resumption such as that contended for.

On the other hand, there were considerations which he thought specially and very profoundly affected the question of the construction of sec. 24, and the learned judge, in the following passages of his judgment (at pp. 300 and 301 of the Report), then proceeded to give his reasons for answering the question referred in the negative :

p. 57, l. 8. " It should be observed, in the first place, that in the economy of the British North America Act, the Senate bears no such intimate relation to the House of Commons, or to the Executive, as each of these bears to the other. There is no consideration, as touching the policy of the Act in relation to the Senate, having the force of that already discussed, arising from the control vested in Parliament in respect of the Constitution of the House of Commons, and affecting the question of the Constitution of the Privy Council. On the other hand, there is much to point to an intention that the constitution of the Senate should follow the lines of the Constitution of the old Legislative Councils under the Acts of 1791 and 1840.

" In 1854, in response to an agitation in the province of Canada, the Imperial Parliament passed an Act amending the Act of Union (17 and 18 Vic., Cap. 118 already mentioned) which fundamentally altered the status of the Legislative Council. Before the enactment of this Act, the Constitution of the Legislative Council had been fixed (by secs. 4 to 10 of the Act of Union) beyond the power of the legislature of Canada to modify it. By the Statute of 1854, that constitution was placed within the category of matters with which the Canadian Legislature had plenary authority to deal. Now, when the British North America Act was framed, this feature of the parliamentary constitution of the province of Canada, the power of the legislature of the province to determine the constitution of the second Chamber, was entirely abandoned. The authors of the Confederation scheme, in the Quebec Resolutions, reverted in this matter (the Constitution of the Legislative Council, as it was therein called) to the plan of the Acts of 1791 (save in one respect not presently relevant) and of 1840. And the clauses in these resolutions on the subject of the Council, follow generally in structure and phraseology the enactments of the earlier statutes.

" It seems to me to be a legitimate inference, that the British North America Act contemplated a second Chamber, the constitution of which should, in all respects, be fixed and determined by the Act itself, a constitution which was to be in principle the same though, necessarily in detail, not identical, with that of the second Chambers established by the earlier statutes. That under those

statutes, women were not eligible for appointment is hardly susceptible of controversy. RECORD.

"In this connection, the language of sections 23 and 31 of the British North America Act deserves some attention. I attach no importance (in view of the phraseology of secs. 83 and 128) to the use of the masculine personal pronoun in section 23, and, indeed, very little importance to the provision in section 23 with regard to nationality. But it is worthy of notice that subsection 3 of section 23 points to the exclusion of married women, and subsection 2 of section 31 would probably have been expressed in a different way if the presence of married women in the Senate had been contemplated; and the provisions dealing with the Senate are not easily susceptible of a construction proceeding upon a distinction between married and unmarried women in respect of eligibility for appointment to the Senate. These features of the provisions specially relating to the constitution of the Senate, in my opinion, lend support to the view that in this, as in other respects, the authors of the Act directed their attention to the Legislative Councils of the Acts of 1791 and 1840 for the model on which the Senate was to be formed."

9. It is submitted on behalf of the Attorney-General of Canada that the judgment of the Supreme Court of Canada is right and ought to be affirmed and that the appeal therefrom ought to be dismissed for the reasons stated in the Reasons for Judgment delivered by the Judges of the Supreme Court of Canada, and for the following, amongst other

REASONS.

1. Because the relevant provisions of the British North America Act, 1867, ought to be construed to-day according to the intent of the Parliament which passed the Act, *i.e.*, by reference to the natural and ordinary meaning of the words used at the date when the statute was passed and so as to import all these implied exceptions which arise from a close consideration, not only of the object, the subject-matter, and all parts of the Act itself, but also of the then existing state of the law, in the light of which the Act must be read and interpreted.
2. Because the terms in which the provisions of the British North America Act, 1867, relating to the constitution of the Senate are expressed—the constituent title "Senator," a strictly masculine term and the masculine pronouns "he," "him," and "his" invariably employed throughout in reference to members of the Senate, the qualifications required of a Senator and the specified causes of his disqualification —in themselves all point to the soundness of the inference that men only were intended to be "qualified persons"

eligible for appointment to the Senate within the meaning of sec. 24 of the said Act.

3. Because the declared object of the British North America Act, 1867, was to unite the several Provinces therein mentioned into one Dominion under the British Crown "with a Constitution similar in principle to that of the United Kingdom," and there is no room for inference in the light of the then existing state of the common law of England and of the law and usages of the British Constitution, that the framers of that Act intended, without using language apt to express such an intention, to render women eligible to be summoned to the Upper Chamber of the Canadian Parliament, although excluded from the British.

4. Because by the principles of the common law and settled and uniform constitutional practice and principle as well in the several provinces united by the British North America Act, 1867, into the Dominion of Canada, as in England, women were under a legal incapacity to sit in Parliament, and if the framers of that Act had intended to remove that disability, as regards eligibility for appointment to the Senate of Canada, and effect a constitutional change so fundamental and momentous, they would have declared that intention in apt and explicit language and not by the furtive process of general words or of an indirect implication based upon an interpretation clause in a general Act like Lord Brougham's Act, 13 Vict. (1850), c. 21, s. 4.

5. Because the terms of the treaty of union between the several Provinces, embodied in the Quebec Resolutions, 1864, and given effect by the British North America Act, 1867, considered in the light of the form and character of the legislatures which had formerly been established in the Canadian Provinces, afford strong grounds for the inference that it was the intention of the framers of the British North America Act, 1867, to make the constitution of the Upper House of the Canadian Parliament (designated in those resolutions the Legislative Council) in principle the same as, though necessarily in detail not identical with, that of the Upper House, known as the Legislative Council, under the constitutions established by the Constitutional Act, 1791 (31 Geo. III. c. 31), for the Provinces of Upper and Lower Canada respectively, and later by the Act of Union, 1840 (3 & 4 Vict., c. 35), for the Province of Canada; and under those statutes it is past question that women were not eligible for appointment to the Upper House.

6. Because if the meaning of the term "qualified persons" in section 24 of the British North America Act, 1867, be other-

wise ambiguous or obscure, the fact that from 1867 to the present time qualified men only have been considered eligible for appointment to a place in the Senate of Canada—and that this interpretation of the enactment has until quite recently remained unchallenged—must be allowed full efficacy as unbroken and continuous usage showing that the contemporaneous interpretation of the enactment by persons of authority has been uniformly consistent with what is now claimed on behalf of the Attorney-General of Canada to be its true legal interpretation.

7. Because the expression " qualified persons," in said sec. 24 of the British North America Act, 1867, in its context and on its true construction, necessarily and properly implies qualified male persons only, and that being the intention expressed, the general interpretation clause that words importing the masculine gender shall include females " unless the contrary is expressly provided " (Lord Brougham's Act, 13 Vict. (1850), c. 21, s. 4) or " unless the contrary intention appears " (The Interpretation Act, 1889, 52–53 Vict., c. 63, s. 1, ss. 1 (*a*)), does not apply and cannot be invoked to extend by implication the expression " qualified persons " to female persons.

LUCIEN CANNON.
E. LAFLEUR.
C. P. PLAXTON.

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