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 F. 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.*

RECORD OF PROCEEDINGS.

INDEX OF REFERENCE.

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RECORD OF PROCEEDINGS.

In the Supreme Court of Canada.

No. 1.

Order of Reference by the Governor General in Council.

P.C. 2034.

No. 1. Order of Reference by the Governor General in Council.

CERTIFIED *to be a true copy of a Minute of a Meeting of the Committee of the Privy Council, approved by His Excellency the Governor General on the 19th October,* 1927.

The Committee of the Privy Council have had before them a Report, dated 18th October, 1927, from the Minister of Justice, submitting that he has had under consideration a petition to Your Excellency in Council dated the 27th August, 1927 (P.C. 1835), signed by Henrietta Muir Edwards, Nellie L. McClung, Louise C. McKinney, Emily F. Murphy and Irene Parlby, as persons interested in the admission of women to the Senate of Canada, whereby Your Excellency in Council is requested to refer to the Supreme Court of Canada for hearing and consideration certain questions touching the power of the Governor General to summon female persons to the Senate of Canada.

In the Supreme Court of Canada.

No. 1. Order of Reference by the Governor General in Council— *continued.*

The Minister observes that by section 24 of the British North America Act, 1867, it is provided that:—

> " The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

In the opinion of the Minister the question whether the word " Persons " in said section 24 includes female persons is one of great public importance.

The Minister states that the law officers of the Crown who have considered this question on more than one occasion have expressed the view that male persons only may be summoned to the Senate under the provisions of the British North America Act in that behalf.

The Minister, however, while not disposed to question that view, considers that it would be an Act of justice to the women of Canada to obtain the opinion of the Supreme Court of Canada upon the point.

The Committee therefore, on the recommendation of the Minister of Justice, advise that Your Excellency may be pleased to refer to the Supreme Court of Canada for hearing and consideration the following question:—

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

E. J. LEMAIRE,
Clerk of the Privy Council.

No. 2. Order for Inscription of Reference and Directions. 29th October, 1927.

No. 2.

Order for Inscription of Reference and Directions.

IN THE SUPREME COURT OF CANADA

BEFORE THE HONOURABLE MR. JUSTICE NEWCOMBE

SATURDAY, the 29th day of October, A.D. 1927.

IN THE MATTER of a reference as to the meaning of the word " persons " in section 24 of the British North America Act, 1867.

Upon the application of the Attorney-General of Canada for directions as to the inscription for hearing of the case relating to the above question referred by His Excellency the Governor General, for hearing and consideration by the Supreme Court of Canada under the provisions of section 60 of the Supreme Court Act, and upon hearing read the Order in Council of the 19th October, 1927, (P.C. 2034), setting forth the said question, referred upon the prayer of the petition in the said Order in Council mentioned, upon reading the affidavit of Charles P. Plaxton filed herein, and upon hearing what was alleged by counsel for the applicant:

In the Supreme Court of Canada.

No. 2. Order for Inscription of Reference and Directions. 29th October, 1927—*continued.*

IT IS ORDERED that the said case be inscribed for hearing at the February, 1928, sittings of this Honourable Court, as case No. 2 on the "Western" list.

AND IT IS FURTHER ORDERED that the respective Attorneys-General of the provinces of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan, and the petitioners be notified of the hearing of the argument of the said case by sending to each of them by registered letter on or before the 5th day of November, 1927, a notice of hearing of the said reference and a copy of the said Order in Council, together with a copy of this order.

AND IT IS FURTHER ORDERED that factums may be filed by the said Attorneys-General and on behalf of the petitioners as provided in Rule 80 of the Supreme Court Rules.

AND IT IS FURTHER ORDERED that notice of the said reference be given in the Canada Gazette on or before the 5th day of November, A.D. 1927.

E. L. NEWCOMBE,
J.S.C.

No. 3.

No. 3. Notice of hearing, 29th October, 1927.

Notice of Hearing.

IN 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.

TAKE NOTICE that the reference herein has, by order of the Honourable Mr. Justice Newcombe, dated 29th October, 1927, been inscribed for hearing at the February, 1928, sittings of the Supreme Court of Canada, and you are hereby notified of the hearing of the said reference pursuant to the terms of the said Order, copy of which, together with the Order in Council therein referred to, are hereunto annexed.

Dated at Ottawa this 29th day of October, A.D. 1927.

W. STUART EDWARDS,
Deputy Minister of Justice.

Department of Justice, Ottawa.

To the Attorneys-General of the Provinces of
Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan.

And to
Mrs. Henrietta Muir Edwards, Macleod, Alberta.
Mrs. Nellie L. McClung, Calgary, Alberta.
Mrs. Emily F. Murphy, 11011–88th Ave., Edmonton, Alberta.
Mrs. Louise C. McKinney, Claresholm, Alberta.
Mrs. Irene Parlby, Alix, Alberta.

In the Supreme Court of Canada.

No. 4.

No. 4.

Extracts from The British North America Act, 1867.

(*Printed in Joint Appendix, page* 18.)

No. 5.

No. 5.

Extracts from The British North America Act, 1915.

(*Printed in Joint Appendix, page* 40.)

No. 6. Factum of the Appellants.

No. 6.

Factum of the Appellants.

PART I.

This is a Reference by the Governor-General in Council under the provisions of Section 60 of the Supreme Court Act, to ascertain the meaning of the word "Persons" in Section 24 of The British North America Act, 1867. This section provides:

> "The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

Record p. 3. The Petitioners are interested in the admission of women to the Senate of Canada. The Law Officers of the Crown have expressed the view that male persons only may be summoned to the Senate. The Petitioners contend that female persons may also be summoned under the provisions of The British North America Act, 1867, and this Reference has been made by the Governor-General in Council to ascertain the meaning of Record p. 4. the word "Persons" in Section 24 of The British North America Act, 1867. The question submitted is—"Does the word 'Persons' in Section 24 of The British North America Act, 1867, include female persons?"

ARGUMENT.

1. There is nothing in the word "Persons" to suggest that it is limited to male persons. The word in its natural meaning is equally applicable to female persons and it is submitted it should be so interpreted.

2. The only limitation on the word "Persons" as used in Section 24 of The British North America Act, 1867, is the word "qualified," and for the meaning of "qualified" reference must be made to Section 23, which Appendix pp. 20–21. defines the qualifications of a Senator. While the masculine pronoun "He"

is used in Section 23, the Interpretation Act in force in Great Britain at the date of the enactment of The British North America Act, 1867, and known as Lord Brougham's Act, 13–14 Victoria, Cap. 21, section 4, provides 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 . . . "

By express statutory enactment, therefore, Section 23 includes females, unless the contrary is expressly provided. It is submitted there is nothing in The British North America Act, 1867, expressly providing the contrary.

3. The word " Persons " is also used in Section 41 of The British North America Act, 1867, in reference to members of the House of Commons. Section 41 provides:

> " Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces."

The effect of this section is to define the qualifications of members of the House of Commons, by reference to existing provincial legislation, instead of by express enactment, as in the case of Senators by Section 23.

4. By the Dominion Elections Act, 10-11 George V. Cap. 46, Section 38, it is provided " Except as in this Act otherwise provided any British subject, male or female, who is of the full age of twenty-one years may be a candidate at a Dominion Election." The Parliament of Canada has, by this Act, interpreted " Persons " in Section 41 as including females, and under this Act a female person has been elected a Member of the House of Commons.

It is submitted that the word " Persons " in Sections 24 and 41 should receive the same interpretation and that there is nothing in The British North America Act, 1867, to justify a different interpretation.

5. It is further submitted that there is no more justification for assuming that the Imperial Parliament has in any way limited the freedom of the Governor-General to summon to the Senate a female person having the qualification required by Section 23 of The British North America

In the Supreme Court of Canada.

No. 6. Factum of the Appellants—*continued.*

Act, 1867, than there is for assuming that it has limited the power of the Parliament of Canada to interpret "Persons" in Section 41 of the Act as including female persons.

6. Section 33 of The British North America Act, 1867, provides:

> "If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate."

If the Governor General summoned a female person, otherwise qualified, to the Senate, and the Senate exercising the powers given by this Section determined that she was qualified as a Senator, it is submitted that her position as a Senator could not be challenged. If this be so, then the question on the reference cannot be answered in the negative. The Petitioners submit that the question should be answered in the affirmative.

N. W. ROWELL,
of Counsel for Petitioners.

(The Appendix to this Factum has been incorporated in the Joint Appendix prepared for the use of the Privy Council.)

No. 7. Factum of the Attorney-General of Canada.

No. 7.

Factum of the Attorney-General of Canada.

I.

STATEMENT OF THE CASE.

1. By Order in Council of the 19th October, 1927, (P.C. 2034) (Record, p. 3), His Excellency the Governor General in Council was pleased to refer to the Supreme Court of Canada, for hearing and consideration, pursuant to section 60 of the Supreme Court Act, the following question touching the power of the Governor General to summon female persons to the Senate of Canada:

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

2. In the narrative of the said Order in Council, it is stated "that the Law Officers of the Crown who have considered this question on more than one occasion have expressed the view that male persons only may be summoned to the Senate under the provisions of the British North America Act in that behalf."

3. The decision of this question must be governed by the interpretation to be placed upon the provisions of the British North America Act, 1867, by which the Dominion of Canada was called into existence, and in particular those provisions of the Act which relate to the constitution of the Senate and the qualifications of the members of the Senate. These are section 17, which ordained that, "There shall be One Parliament for Canada, consisting

of the Queen, an Upper House styled the Senate, and the House of Commons," and sections 20 to 36 inclusive. (Appendix, pp. 20–22.) The Sections which are particularly important for the determination of the present question are sections 23 and 24, which read as follows :—

Qualifications of Senator.

"23. The Qualification of a Senator shall be as follows :—

(1) He shall be of the full age of Thirty Years :

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union :

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same :

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities :

(5) He shall be resident in the Province for which he is appointed :

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

Summons of Senator.

"24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

II.

ARGUMENT.

4. *Principles of Interpretation.*—In the interpretation of the provisions of the British North America Act, 1867, courts of law are, of course, bound to apply the same methods of construction and exposition which they apply to other statutes of a like nature (*Bank of Toronto* v. *Lambe*, 12 A.C. 575, 579,), and it is only within the latitude prescribed by those methods that the question referred can be correctly determined. In this view, it is submitted that the correct determination of the question referred must be governed by the following principles of construction :

1. That the expression "qualified persons" in said section 24 is to be interpreted in the sense it bore, according to the intent of the legislature,

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No. 7. Factum of the Attorney-General of Canada—*continued.*

when the Act was passed: in other words, that which it meant when enacted it means to-day, and its legal connotation has not been extended, and cannot be influenced by, recent innovations touching the political status of women, or by the more liberal conceptions respecting the sphere of women in politics and social life which may, perhaps, be assumed now to prevail; and,

2. That, in construing the expression "qualified persons" as used in said section 24, (assuming in favour of the petitioners' contention that that expression is of doubtful import), regard is to be had not only to all parts of the Act itself, to the subject matter with reference to which the words are used, and to the object of the Act, but to the state of the law at the time when the Act was passed, and to the antecedent situation in the several provinces which were by that Act united into one Dominion.

5. "A long stream of cases," said Viscount Birkenhead L.C., in the *Viscountess Rhondda's case*, (1922) 2 A.C. 339, 369, "has established that general words are to be construed so as, in an old phrase, 'to pursue the intent of the makers of statutes': *Stradling* v. *Morgan*, 1 Plowd. 203, 205, and so as to import all those implied exceptions which arise from a close consideration . . . of the state of the law at the moment when the statute was passed." The rule upon this subject was well expressed by the Barons of the Exchequer in the case of *Stradling* v. *Morgan*, ibid., in which case it is said, "that the judges of the law in all times past have so far pursued the intent of the makers of the statutes, that they have expounded Acts which were general in words to be but particular, where the intent was particular;" and after referring to several cases, they said:—

> "From which cases it appears that the sages of the law heretofore have construed statutes quite contrary to the letter in some appearance; and those statutes which comprehend all things in the letter, they have expounded to extend but to some things; and those which generally prohibit all people from doing such an act, they have interpreted to permit some people to do it; and those which include every person in the letter, they have adjudged to reach to some persons only; which expositions have always been founded upon the intent of the Legislature, which they have collected, sometimes by considering the cause and necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign circumstances, so that they have ever been guided by the intent of the Legislature, which they have always taken according to the necessity of the matter, and according to that which is consonant to reason and good discretion."

"The same doctrine," said Turner L.J., in *Hawkins* v. *Gathercole*, 6 De G.M. & G. 1, 21, after quoting and approving the foregoing passages, "is to be found in *Eyston* v. *Studd*, and the note appended to it, also in Plowden (pages 459, 465), and in many other cases. The passages to

which I have referred, I have selected only as containing the best summary with which I am acquainted of the law upon this subject. In determining the question before us, we have therefore to consider not merely the words of this Act of Parliament, but the intent of the Legislature, to be collected from the cause and necessity of the Act being made, from a comparison of its several parts, and from foreign (meaning extraneous) circumstances, so far as they can justly be considered to throw light upon the subject."

These two cases, decided at an interval of some three hundred years, furnish, when taken together, a complete exposition of the common law upon this subject: *Viscountess Rhondda's Claim* ib. supra, per Viscount Birkenhead, L.C., p. 370. The application of the principles which they embody is exemplified by many cases, but no more strikingly than in a series of cases (to be presently referred to) which have a peculiar value in relation to the matter now under consideration, since, in each case, there arose the question whether by general words Parliament had affected the parliamentary position of women.

6. *The Provisions of the British North America Act*, 1867.—The place or office of a Senator owes its creation solely to the provisions of the British North America Act, 1867, and it is an office, therefore, which no one, apart from the enactments of the statute, can claim, not the right to hold (because obviously the selection of a Senator being within the absolute discretion of the Executive Government, no right can be asserted), but the legal qualification to be appointed to it. Section 21 provides that the members of the Senate "shall be styled Senators." In section 24, the persons whom the Governor General is authorized to summon to the Senate are described as "qualified persons," and the section declares that "every person" so summoned shall become and be "a member of the Senate and a Senator" In other provisions the word "persons" (s. 25), "qualified persons" (s. 26), "any person" (s. 27), and "qualified person" (s. 32), are used with reference to the individuals who may be summoned to the Senate. The qualifications of a Senator are defined by section 23, and in that and other sections (29, 30, 31 and 34), the words "he," "him," and "his," repeatedly occur. These words, coupled with the constituent title "Senator"—which was adopted from the corresponding Latin word and in the Latin language there was no term to describe a Senatress, although the latter appears to be an English word, and in the Old French form "Senatresse" was used to designate the wife of a Senator—suggest *prima facie* that the connotation of the expression "qualified persons" in section 24 and of the equivalent expressions in other sections of the Act was intended to be limited to male persons. The provisions of section 23, sub-s. 2, perhaps afford some support for this construction, for that subsection in providing for the qualification of a Senator, enacts that he shall be a British subject by birth or by naturalization, which was a sufficient provision if men only were qualified for appointment; but if women also were intended to be

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No. 7. Factum of the Attorney-General of Canada—*continued.*

so qualified there should have been a further provision for their becoming British subjects by marriage.

7. The argument for the view that women are "qualified persons" within the meaning of said section 24, must, therefore, involve the proposition that this expression was intended to include female persons, and that where words importing the masculine gender elsewhere occur in the Act, including the word "Senator," they must be construed to include females, and as if Parliament had used the appropriate alternative words to designate persons of the feminine gender. In support of this contention, reliance will, no doubt, be placed on the provisions of Lord Brougham's Act, 1850 (Imp. Statutes, 13 Vict. c. 21), and of the Interpretation Act, 1889, (Imp. Statutes, 52–3 Vict. c. 63). The former Act, by its 4th section, provided :—

> "Be it enacted that in all Acts words importing the masculine gender shall be deemed and taken to include females. . . . . .unless the contrary as to gender. . . . . .is expressly provided."

The Interpretation Act, 1889, under the title "Re-enactment of Existing Rules," provided, by sec. 1, sub-s. 1, as follows :—

> "In this Act and in every Act passed after the year one thousand eight hundred and fifty, whether before or after the commencement of this Act, [January 1, 1890] unless the contrary intention appears,—
>
> "(*a*) words importing the masculine gender shall include females."

From these provisions it seems to follow that, "unless the contrary intention appears" and not the more stringent "unless the contrary as to gender is expressly provided," is the test now to be applied to Acts passed by the Imperial Parliament since 1850, although until the 1st January, 1890, Lord Brougham's Act applied to those Acts. The Interpretation Act, in this respect, operates as a retrospective declaration of the effect of Lord Brougham's Act in regard to the matter dealt with in sec. 1 of the Interpretation Act. Section 41 of the latter Act repeals Lord Brougham's Act in its entirety.

On the strength of these enactments it may be contended that the provisions of the British North America Act, 1867, do not, expressly at all events, evince any intention obnoxious to the application to the provisions which deal with the constitution of the Senate of the gender glossary which those enactments prescribe, and that the various expressions used in those provisions in reference to a member of the Senate must, therefore, be construed to include females. Unfortunately for this contention there are a series of decisions, closely applicable, which strongly repel it. Before referring to these decisions, it will be convenient to consider what the position of women was under the law of England at the time the British North America Act, 1867, was passed, for this consideration must, it is submitted, strongly influence the decision of this case as it did the decision of the cases to be referred to. This inquiry appears to be required by the

language of the Act itself, seeing that the object of that Act, as the preamble in terms declares, was to give effect to the desire which the provinces of Canada, Nova Scotia, and New Brunswick had expressed (in the Quebec Resolutions adopted in 1864, as revised by the delegates from the different provinces in London in 1866) to be federally united into one Dominion under the Crown of the United Kingdom of Great Britain and Ireland " with a Constitution similar in principle to that of the United Kingdom." The constitution of the Senate as one of the constituent Houses of the Parliament of Canada is undoubtedly a vital part of the Constitution conferred upon the Dominion of Canada by the British North America Act, 1867, and this much is clear, that the constitution of that Parliament was intended to be so far similar in principle to that of the United Kingdom, that the privileges, immunities, and powers to be held, enjoyed, and exercised by the Senate and by the House of Commons, and by the members thereof, respectively, though they may be so defined as to equal with, cannot exceed those, at the passing of the British North America Act, held, enjoyed, and exercised by the Commons House of the Parliament of the United Kingdom and by the members thereof: sec. 18 of the British North America Act, 1867, and the Parliament of Canada Act, 1875, (Imp. Statutes 38-39 Vict. c. 38). The provisions of the British North America Act, 1867, afford no reason for supposing that the constitution of the Senate, in regard to so important a matter as the definition of the class of persons to be regarded as legally qualified for appointment to a place in that Chamber was not intended to be similar in principle to that of the Parliament of the United Kingdom. At all events, on the assumption that there is ambiguity in the text of that Act upon that subject, it is a legitimate method of interpretation, plainly consistent with the declaration of the object of the Act and sanctioned by a long-settled rule of construction to read it by the light which the state of the law at the time it was passed throws upon it.

8. *Position of Women under the Common Law in* 1867.—By the common law of England—and it had not been modified when the British North America Act was passed in 1867—no woman under the degree of a Queen or a regent, married or unmarried, could take part in the government of the State. A woman was under a legal incapacity to be elected to serve in Parliament, and even if a peeress in her own right, she had no right, as an incident of peerage, to receive a writ of summons to the House of Lords: (Whitelocke's Notes Upon the King's Writ, (1766), vol. 1, p. 475; Colquhoun's Roman Law (1849), vol. 1, p. 580; Pollock & Maitland, History of English Law (1895), vol. 1, p. 466; *The Countess of Rutland's case*, 6 Rep. 52b; *Chorlton* v. *Lings* (1868) L.R. 4 C.P. 374, 391, 392, per Willes J.; *The Queen* v. *Crosthwaite* (1864) 17 Ir. Com. Law Rep. 463; *Viscountess Rhondda's Claim* (1922) 2 A.C. 339; *Robinson's case*, 131 Mass. Rep. 376, 377, per Gray C.J.). Women were, moreover, subject to a legal incapacity to vote at the election of members of Parliament: (Coke, 4 Inst. p. 5; *Olive* v. *Ingram*, 7 Mod. 263, 273; *Chorlton* v. *Lings*, ib. supra ; *The Queen* v. *Crosthwaite*, ib. supra, per Deasy B., at p. 472; per Fitzgerald B., at

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p. 476; *Nairn* v. *University of St. Andrews* [1909] A.C. 147; *Robinson's Case*, ib. supra), or of the Knights of the Shire (*Chorlton* v. *Kessler*, L.R. 4 C.P. 397), or of town councillors (*The Queen* v. *Harrald*, (1872), L.R. 7 Q.B. Cas. 361), or of Town Commissioners under the Towns Improvement (Ireland) Act, 1854, (*The Queen* v. *Crosthwaite*, ib. supra), or to be elected members of a County Council (*Beresford-Hope* v. *Sandhurst* (1889) 23 Q.B.D. 79; *De Souza* v. *Cobden* (1891) 1 Q.B. 687.) They were also excluded, or rather excused, by the common law from taking part in the administration of justice either as judges or as jurors, with the single exception of inquiries by a jury of matrons upon a suggestion of pregnancy (Coke, 2 Inst. 119, 121; 3 Bl. Com. 362; 4 Bl. Com. 395; Willes J. in L.R. 4 C.P. 390, 391). And so, by inveterate usage, women were under a general disability, by reason of their sex, to become attorneys or solicitors (*Bebb* v. *Law Society* (1914) 1 Ch. 286; *Robinson's Case* (1881), 131 Mass. Rep. 376). More recently, it was held by the Court of Appeal in Ireland that a woman, by reason of her sex, was disqualified from being Clerk of Petty Sessions (*Frost* v. *The King* (1919) 1 Ir. Rep. (Ch.) 8; (1920) W.N. 178, H.L. (Ir.)

In *Chorlton* v. *Lings*, ib. supra, at p. 389, Willes J. referred to, as the highest authority produced by the appellant for the exercise of public functions by a woman, " the solitary and exceptional case " of the celebrated Anne, Countess of Pembroke, Dorset, and Montgomery, who took, by descent, the office of hereditary sheriff of Westmoreland and exercised it in person; at the Assizes at Appleby she sat with the judges on the Bench: Co. Litt. 326a, note 280. This is not the only instance of the kind to be found in the books. Pollock and Maitland in their History of English Law, vol. 1, p. 466, note 2, after observing that, " The line between office and property cannot always be exactly marked; it has been difficult to prevent the shrievalties from becoming hereditary," note that " for several years under Hen. III. Ela, Countess of Salisbury, was sheriff of Wiltshire," but that in this case " there was a claim to an hereditary shrievalty." Willes J. refers to the shrievalty of Westmoreland as " an office that could have been and usually is discharged by a deputy; although the countess, being a person of unusual gifts both of body and mind, thought fit to discharge the duties in person "; but the judgment of Gray C.J. in *Robinson's Case*, 131 Mass. Rep. 376, 378, contains an interesting discussion of this instance, in which he concludes that it is highly improbable in fact that the Countess did habitually discharge the duties of the office in person, and expresses the opinion that she could not have done so without violating the well settled law. " When such an hereditary office descended to a woman," stated Gray, C.J., p. 378-9, " she might exercise the office by deputy (at least with the approval of the Crown), but not in person; nor could it be originally granted to any woman because of her incapacity of executing public offices ": citing various ancient authorities.

9. Whether these cases are but instances of a general incapacity on the part of women at common law to hold any public office or perform any public function is by no means clear. In their work on the History

of English Law, before the time of Edward I, vol. 1, p. 468, Pollock and Maitland speak of a sure instinct already having guided the law to a general rule "which will endure until our own time." "As regards private rights, women are on the same level as though postponed in the canons of inheritance; but public functions they have none. In the camp, at the council board, on the Bench, in the jury box, there is no place for them." This statement must, however, be understood subject to what the authors say on a preceding page, (p. 465), that "Public law gives a woman no rights and exacts from her no duties *save that of* paying taxes and *performing such services as can be performed by a deputy.*"

In *R.* v. *Crosthwaite*, decided in 1864, ib. supra, (p. 475), Baron Fitzgerald quotes from the report in Jenkins' "Eight Centuries," 3rd ed. (6th Cent.) Case XIV of the Duke of Buckingham's case (1569), Dyer 285b, in which there was a question as to the holding of the office of High Constable of England by a woman to whom it had descended the following statement of that very learned judge (Judge Jenkins) :—

> "An office of inheritance to which adjudicature is annexed descends to two daughters, as in this case of the office of constable; after it has so descended it may be exercised by deputy; but such an office cannot be originally granted to any woman; for *feminae non sunt capaces de publicis officiis*,"

stating it as a maxim, and the judgment of Baron Fitzgerald as well as of the other members of the majority of the Court in *Crosthwaite's case* and of Barton J. in the more recent case of *Frost* v. *The King* (1919) 1 Ir. Rep. (Ch.) 81, largely proceeds upon that view of the law. In *Beresford-Hope* v. *Sandhurst*, ib. supra, at p. 95, Lord Esher M.R., said : "I take it that by neither the common law nor the Constitution of this country from the beginning of the common law until now, can a woman be entitled to exercise any public function." And, again, in *De Souza* v. *Cobden*, ib. supra, p. 691, the same learned judge said, "that by the common law of England women are not in general deemed capable of exercising public functions, though there are certain exceptional cases where a well recognized custom to the contrary has been established." In *The Queen* v. *Harrald*, ib. supra, at p. 362, Cockburn C.J. said : "It is quite certain that by the common law a married woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions."

On the other hand, in *Chorlton* v. *Lings*, ib. supra, p. 388, Willes J., refers to the discussion in Selden's de Synedriis Veterum Ebraeorum of the origin of the exclusion of women "from judicial and like public functions," and he does not define what he meant by "like public functions," though his observations suggest that he entertained a wide view of the exclusion of women from the exercise of public functions. In the *King* v. *Stubbs* (1788) 2 T.R., 395, 397, and in Comyn's Digest, 5th ed., p. 189, there is given a list of offices which women were deemed capable of filling, which includes the offices of Marshall of England, Great Cham-

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berlain, Constable of England, Keeper of a Castle or gaol, Governor of a Workhouse, Commissioner of Sewers, Forester and Common Constable. But Gray C.J., says that this was for the reason that each of these offices might be executed by a deputy (*Robinson's case*, ibid., p. 379). Women were also decided to be capable of voting for and of being elected to the office of sexton of a Parish, "a sexton's duty being in the nature of a private trust": *Olive* v. *Ingram*, (1738) 7 Mod. 263; and so, also, of being appointed an overseer of the poor (*The King* v. *Stubbs*, ibid supra); but upon an exhaustive and learned review of the cases, in *Robinson's case*, ibid supra, p. 379, Gray C.J., concluded as follows:—

> "And we are not aware of any public office, the duties of which must be discharged by the incumbent in person, that a woman was adjudged to be competent to hold, without express authority of statute, except that of overseer of the poor, a local office of an administrative character and in no way connected with judicial proceedings."

This appears, on the authorities, to be a correct statement of the law, but the judgments of the dissenting judges in *The Queen* v. *Crosthwaite*, ib. supra, and of the judges who took part in the more recent decision of *Frost* v. *The King*, ib. supra, and also the judgment of the Court of Appeal in Alberta, in *Rex* v. *Cyr* (1917) 3 W. W. R. 849, in which it was held that a woman was under no disqualification in that province from being appointed a police magistrate, at least throw some doubt upon the general proposition that women were, by the common law, excluded from the exercise of all public functions. However, whatever doubt there may be about that general proposition, this much is clearly settled, that by the common law of England women were under a legal incapacity either to vote at the election of, or to be elected, a Member of Parliament, or, if peeresses in their own right, to have a seat and vote in the House of Lords.

10. The policy of the common law, in regard to the exclusion of women from public functions, appears to have followed substantially that of the Roman law, in which it was laid down in general terms "*feminae ab omnibus officiis vel publicis remotae sunt*": Ulpian lib. ii. D. tit. de reg. Juris. Ulpian witnessed, however, in his own lifetime a historic breach of this general principle, of peculiar interest in the present case. Lampridius, in his biography of the profligate Roman Emperor Elagabalus (Heliogabalus), A.D. 218-222, says that, when the Emperor held his first audience with the Senate (on his arrival in Rome in July, 219), he gave orders that his mother should be asked to come into the Senate Chamber and that on her arrival she was invited to a place on the Consul's Bench and there took part in the drafting of a decree and expressed her opinion in the debate. And Elagabalus, says Lampridius, was the only one of all the Emperors under whom a woman attended the Senate like a man, just as though she belonged to the senatorial order: The Scriptores Historiae Augustae, ed. of the Loeb Classical Library,

with an English translation by David Magie, Ph.D., Vol. II, pp. 113-131; Gibbon's History of the Decline and Fall of the Roman Empire, 2nd ed. by Milman, Vol. I, p. 158. Lampridius also says that the Emperor established a "*senaculum*" or women's Senate on the Quirinal Hill, which, under the presidency of his mother, enacted absurd decrees concerning matters of court etiquette. (op. cit. p. 113-115). The name "senaculum" (which properly denotes a place in which the Senators waited while the Senate was not in session) seems to have been applied to this gathering of matrons merely for the purpose of giving it a quasi-political importance (op. cit. p. 112, note 6). Elagabalus and his mother were slain by a mob in A.D. 222. "And the first measure enacted after the death of Antonius Elagabalus," says Lampridius (op. cit. p. 143), "provided that no woman should ever enter the Senate, and that whoever should cause a woman to enter, his life should be declared doomed and forfeited to the kingdom of the dead."

11. *The Decisions.*—Having thus dealt with the political position of women under the common law, it will now be convenient to refer to the pertinent decisions.

The leading case is that of *Chorlton* v. *Lings*, ib. supra, decided in 1868. It concerned the interpretation of the Representation of the People Act, 1867 (30-31 Vict. Cap. 102). The Reform Act of 1832 (2 Wm. 4, c. 45) in referring to the old rights of franchise, used the general word "person" with reference to the voter (s. 18), but the new franchise was conferred only on "every male person of full age and not subject to any legal incapacity," etc. (secs. 19 and 20). The Representation of the People Act, 1867, enacted that, "Every man shall be entitled to be registered as a voter . . . . who is qualified as follows . . . . is of full age and not subject to any legal incapacity," etc. (s. 3). By Lord Brougham's Act, (13–14 Vict. c. 21, s. 4) "Words importing the masculine gender shall be deemed and taken to include females unless the contrary as to gender is expressly provided." Upon this, it was contended that the word "man" in the Act of 1867 included "women," and that they were, therefore, entitled to be registered as voters. The Court (Bovill, C.J., and Willes, Byles and Keating, JJ.) held that it did not. Their decision rests on two principal grounds: (1) that at common law women were under a legal incapacity to vote for members of Parliament, and (2) that the subject matter and general scope and language of the Act of 1867, when read with the Reform Act of 1832, show that the legislature was dealing only with the qualification to vote of men in the sense of male persons, and that, notwithstanding Lord Brougham's Act, it could not be presumed to have intended, by the mere use of the word "man," to extend the franchise to women, who theretofore did not enjoy it.

> "There is," said Bovill, C.J., (p. 386), "no doubt that in many statutes, 'men' may be properly held to include women, whilst in others it would be ridiculous to suppose that the word was used in any other sense than as designating the male sex: and we must

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look at the subject-matter as well as to the general scope and language of the provisions of the later Act in order to ascertain the meaning of the legislature. I do not collect, from the language of this Act, that there was any intention to alter the description of the *persons* who were to vote, but rather conclude that the object was, to deal with their *qualification ;* and, if so important an alteration of the personal qualification was intended to be made as to extend the franchise to women, who did not then enjoy it, and were in fact excluded from it by the terms of the former Act, I can hardly suppose that the legislature would have made it by using the term 10 ' man '."

" The application of the Act, 13 & 14 Vict. c. 21, contended for by the appellant is," said Willes, J. (p. 387), " a strained one. It is not easy to conceive that the framer of that Act; when he used the word ' expressly ' meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammar and law, that general words are to be restrained to the subject-matter 20 with which the speaker or writer is dealing."

" The legislature up to the passing of the Act of 1867, was " Willes, J. said further (p. 388), " unquestionably dealing with qualifications to vote of men in the sense of male persons, and was providing what should entitle such individuals of mankind to vote at parliamentary elections : and, without going through the Act of 1867, I may say that there is nothing, unless it be the section now in question, to shew that the intention of the legislature was ever diverted from the question what should be the qualification entitling male persons to vote, to the question whether the personal incapacity 30 of other persons to vote should be removed. The Act throughout is dealing, not with the capacity of individuals, but with their qualification."

" It further appears to me that the Lord Chief Justice is right in holding that, assuming Brougham's Act to apply, it would not have worked the change that is desired in favour of women, because the Act of 1867 does ' expressly ' in every sense exclude persons under a legal incapacity, and women are under a legal incapacity to vote at elections."

" It is impossible to suppose," said Byles J. (p. 393), " that 40 Parliament, while dealing with qualification, and qualification only, by the variation of a phrase, (which at the least *may* convey the same meaning as its predecessor in the Reform Act), intended to admit to the poll another half of the population."

12. A more recent decision of importance, decided by the House of Lords in 1908, is that of *Nairn* v. *University of St. Andrews* [1909] A.C. 147.

By sec. 27 of the Representation of the People (Scotland) Act, 1868 (31 & 32 Vict., c. 48), " every person whose name is for the time being on the register . . . . of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such University," and by sub-s. 2 of sec. 28 of the same Act " all persons on whom the university to which such general council belongs has . . . conferred " certain degrees are to be members of the general council of the respective universities. The appellants, who were women, were graduates of the University of Edinburgh—a university within the meaning of the Act—and as such had their names enrolled on the general council of that university, and they claimed the right to vote in the election of the parliamentary representative of the university, on the ground that they were " persons " within the meaning of the Act.

Lord Loreburn L.C., after referring to the legal incapacity of women at common law from voting, said (pp. 160–161) :—

> " If this legal disability is to be removed, it must be done by Act of Parliament. Accordingly the appellants maintain that it has in fact been done by Act of Parliament . . . I will only add this much to the case of the appellants in general. It proceeds upon the supposition that the word " person " in the Act of 1868 did include women, though not then giving them the vote, so that at some later date an Act purporting to deal only with education might enable commissioners to admit them to the degree, and thereby also indirectly confer upon them the franchise. It would require a convincing demonstration to satisfy me that Parliament intended to effect a constitutional change so momentous and far-reaching by so furtive a process. It is a dangerous assumption to suppose that the legislature foresees every possible result that may ensue from the unguarded use of a single word, or that the language used in statutes is so precisely accurate that you can pick out from various Acts this and that expression and, skilfully piecing them together, lay a safe foundation for some remote inference. Your Lordships are aware that from early times Courts of law have been continuously obliged, in endeavouring loyally to carry out the intentions of Parliament, to observe a series of familiar precautions for interpreting statutes, so imperfect and obscure as they often are."

Lord Ashbourne made the following remarks (pp. 162–163) :—

> " In 1868 the Legislature could only have had male persons in contemplation, as women could not then be graduates, and also because the parliamentary franchise was by constitutional principle and practice confined to men . . . .
>
> " I can, then, entertain no doubt that, when examined, ' person ' means male persons in the Act. The parliamentary franchise has always been confined to men, and the word ' person ' cannot by any

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reasonable construction be held to be prophetically used to support an argument founded on a statute passed many years later."

Lord Robertson said (p. 164):—

> " My Lords, the central fact in the present appeal is that from time immemorial men only have voted in parliamentary elections. What the appeal seeks to establish is that in the single case of the Scottish universities Parliament has departed from this distinction and has conferred the franchise on women. Clear expression of this intention must be found before it is inferred that so exceptional a privilege has been granted."

And, after stating his reasons for rejecting the appellants' contention that the word " person " in the Act of 1868 included women, he added, in conclusion (pp. 165–166):—

> " I think that a judgment 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."

13. The decision of the Committee for Privileges of the House of Lords in *Viscountess Rhondda's Claim* [1922] 2 A.C. 339, is also noteworthy. In this case, Margaret Haig, Viscountess Rhondda, a peeress of the United Kingdom in her own right presented a petition praying that His Majesty might be pleased to order a writ of summons to Parliament to be issued to her. The petitioner based her claim to receive a writ of summons to Parliament in the right of her dignity, upon sec. 1 of the Sex Disqualification (Removal) Act, 1919, (9–10 Geo. V, c. 71), which provided that, " A person shall not be disqualified by sex or marriage from the exercise of any public function," etc.

The Committee decided, after an elaborate legal argument, by a vote of 22 to 4, that the claim of the petitioner had not been made out. The reasons for this decision are elaborately set out in the leading opinion of Viscount Birkenhead, L. C., in which, of the judicial members of the Committee, Lords Cave, Dunedin, Atkinson, Phillimore, Buckmaster, Sumner and Carson concurred. The decision proceeds upon two grounds (1) that a peerage held by a peeress in her own right is one to which at common law the incident of exercising a right to receive a writ of summons was not and never was attached, and (2) that the legislature, by the use of the vague and general words of the Sex Disqualification (Removal) Act, 1919, could not have intended to give peeresses the right to sit and vote and thus effect such a revolutionary change in the constitution of the House of Lords. " It is sufficient to say," said Lord Birkenhead, at p. 375, in stating his conclusions, " 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." " In my opinion," said Lord Cave, (p. 389), " the common law gave no right or title to a peeress to

sit in this House, or to receive a summons for that purpose. It was not the case of her having a right which she could not exercise. I think she had no right; for I agree with my noble and learned friend, the Lord Chancellor, that a common law right to do something which the common law forbids to be done is a contradiction in terms. If this is so, then the patent certainly gave the petitioner no right to sit; and the Act of 1919, while it removed all disqualifications, did not purport to confer any right. If the right to sit in this House is to be conferred on peeresses it must be by express words."

14. The next case is that of *Beresford-Hope* v. *Sandhurst* (1889) 23 Q. B. D. 79. The Municipal Corporations Act, 1882, sec. 11, sub-s. 3, enacted: "Every person shall be qualified to be elected and to be a councillor who is at the time of election qualified to elect to the office of councillor." The 63rd section of the same Act provided that: "For all purposes connected with and having reference to the right to vote at municipal elections, words in this Act importing the masculine gender include women." There can be no question, therefore, that women were entitled to elect to the office of councillor, but the question which the Court had to decide was whether, under the words of sec. 11, they were qualified to be elected. The Court held that they were not. Stephen, J., delivering the judgment of the Queen's Bench Division, after referring to the decision in *Chorlton* v. *Lings*, said (p. 84):—

> "If, for the sake of argument, it were admitted that the language of the Act was ambiguous, the passage quoted, which states a fact undoubtedly, and notoriously true, would be enough to make us feel that, if it is intended that women should be eligible for such offices as these, an exception would be made in a general rule of long standing, and such an exception ought to be made in perfectly plain language."

The judgment of Stephen, J. was affirmed by the Court of Appeal. In that Court, Lord Esher, M. R., after referring to the decision in *Chorlton* v. *Lings* as having established that women were incapable at common law of exercising the franchise, said (p. 96):—

> "But the case goes further. It says that, this being the common law of England, when you have a statute which deals with the exercise of public functions, unless that statute expressly gives power to women to exercise them, it is to be taken that the true construction is, that the powers given are confined to men, and that Lord Brougham's Act does not apply."

15. *The Queen* v. *Harrald* (1872) L.R. 7 Q.B. 361, strikingly exemplifies the reluctance of English courts to extend political rights to women. By the Imperial Act, 32-33 Vict., c. 55, s. 9, it was enacted that:

> "In this Act and the 5 & 6 Wm. 4, c. 76, and the Acts amending the same, wherever words occur which import the masculine gender the same shall be held to include females, for all purposes connected with and having reference to the right to vote in the election of councillors, auditors, and assessors."

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Objection was taken to the election of the defendant (who had a majority of one over the next candidate) to the office of town councillor of the Borough of Sunderland, on the ground that two married women had voted for him. The objection was allowed.

Cockburn C.J., said (p. 362) :—

> " This rule must be made absolute. It appears to me impossible to say that the vote of one of these married women is good, and the vote of the other (married after being put on the roll) is also most probably bad. . . . It is quite certain that, by the common law, a narried woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions. It was thought to be a hardship, that when women bore their share of the public burthens in respect of the occupation of property they should not also share the rights of the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The 32 & 33 Vict., c. 55, accordingly, gave effect to these views, and enacted that wherever men were entitled to vote, women, being in the same situation, should thereafter be entitled; but this only referred to women possessed of the necessary qualification in respect of property and the payment of rates, and I cannot believe that it was intended to alter the status of married women. It seems quite clear that this statute had not married women in its contemplation."

Mellor J., said (p. 363) :—

> " But s. 9 of 32 & 33 Vict., c. 55, only removes the disqualification by reason of sex, and leaves untouched the disqualification by reason of status. So the Married Women's Property Act as to this leaves the status of a married woman untouched."

Hannen J., expressed the same opinion.

16. In *Bebb* v. *Law Society* (1914) 1 Ch. 286, in which the plaintiff sought a declaration against the Law Society that she was " a person " within the meaning of the Solicitors Act, 1843, and the Acts amending the same, and, therefore, entitled to admission to the law examinations, the Court of Appeal (composed of Cozens-Hardy M.R., and Swinfen Eady and Phillimore L.JJ.) dismissed her appeal from the judgment of Joyce J., on these grounds : That before the passing of the Solicitors Act, 1843, women were by the common law of England under a general disability, by reason of their sex, to become attorneys or solicitors; that this disability could be and was proved by inveterate usage, and that it could not be removed by a mere interpretation clause, such as that contained in the Solicitors Act, 1843, sec. 48, which enacted that, " Every word importing the masculine gender only shall extend and be applied to a female as well as a male," and unless " there be something in the subject or context repugnant to such construction."

17. It is submitted that these decisions afford strong authority for the view that the framers of the British North America Act cannot be presumed to have intended, in the absence of clear expression of such an intention,—

(1) to modify the English common law by conferring upon women the legal capacity or qualification to be appointed to a place in the Senate of Canada; and

(2) to render women eligible to sit in the Canadian Upper House, though excluded from the British.

It is to be noted that when Parliament intends to remove a legal disability existing under the common law, it does so by express language. The provisions of the Sex Disqualification (Removal) Act, 1919 (9-10 Geo. V, Imp., c. 71) have already been referred to. Illustrative also are the Parliament (Qualification of Women) Act, 1918, 8-9 Geo. V, (Imp.), c. 47), which, by sec. 1, provides that a woman shall not be disqualified by sex or marriage from being elected to or sitting or voting as a member of the House of Parliament; and the Representation of the People Act, 1918, (7–8 Geo. V. (Imp.), c. 64), which by sec. 4, confers upon women the parliamentary franchise.

18. *The Antecedent Situation in the Provinces.*—In its character of an Act enacted for the avowed object of giving effect to a treaty of union between the several provinces affected, the British North America Act, 1867, may not unreasonably be presumed to have been passed with a knowledge by the makers, not only of the existing state of the law in England (upon the model of whose constitution it was the intention that the new constitution should be fashioned) but also of the known facts of the political history of the united provinces—the existence, character and operations of the various provincial governments, and of the state of the common and constitutional law in the provinces in relation to the qualifications and disqualifications affecting the eligibility of persons to be admitted to a share in the legislative functions of government. Considered in the light of these additional aids to interpretation, the construction of the British North America Act, 1867, upon the point under discussion, stated above, receives strong confirmation.

19. *First*, what were the systems of government which existed in these provinces prior to and at the time of the Union in 1867, and were women ever admitted to a place in the legislative departments of the provincial governments?

The Province of Canada was formed by the union, under the Act of Union, 1840, (App. pp. 10–15), of the two provinces of Upper and Lower Canada, respectively, into which the Province of Quebec, as originally created by the Royal Proclamation of the 7th October, 1763, and enlarged by the Quebec Act, 1774, (App. pp. 3–5), had been divided under the Constitutional Act of 1791, (App. pp. 6–10). In the Province of Quebec, from its first establishment in 1763 until 1774, the government was carried on by the Governor and a Council composed of four named persons and

" eight other persons to be chosen by you from amongst the most considerable of the inhabitants of or persons of property in our said province." (App. p. 63). The boundaries of the Province of Quebec were greatly extended by the Quebec Act, 1774, (App. pp. 3–5), and the government of the province was entrusted to a Governor and a Legislative Council, it being, as the Act declared, " at present inexpedient to call an Assembly." (App. p. 5). This Council was to consist " of such persons resident there ", not exceeding twenty-three nor less than seventeen, " as His Majesty . . . . . shall be pleased to appoint," and was empowered, with the consent of the Governor, to make ordinances for the peace, welfare and good government of the province. (App. p. 5). The Constitutional Act, 1791, upon the division of the Province of Quebec into two separate provinces, to be called the Provinces of Upper and Lower Canada, respectively, by Imperial Order in Council of the 24th August, 1791, established for each province a legislature, composed of the three estates of Governor, Legislative Council and Assembly, empowered to make laws for the peace, order and good government of the province. The Legislative Council was to consist of " a sufficient number of discreet and proper persons ", not less than seven for Upper Canada and fifteen for Lower Canada, appointed by the Crown for life. (App. p. 7). A curious provision (never acted on) was contained in this Act, viz., sec. 6, that whenever the King should confer any hereditary title of honour upon any subject, he might annex thereto an hereditary right to sit in the Legislative Council—that was, of course, by analogy to the House of Lords. The Assembly was to consist of a number of persons elected by the people, the constituencies and the number of representatives to be fixed by the Governor or Lieutenant-Governor in the first instance, the whole number in Upper Canada to be not less than sixteen, and in Lower Canada not less than fifty, to be chosen by a majority of the voters in either case. Under the Act of Union, 1840, the provinces of Upper and Lower Canada were reunited so as to constitute one province under the name of the Province of Canada, and provided with a legislature comprising a Legislative Council composed of " such persons, being not fewer than twenty, as Her Majesty shall think fit " to be appointed for life and having certain defined qualifications, and a Legislative Assembly in which each of the united provinces would be represented by an equal number of members. (App. pp. 12–13). In 1856, the Canadian legislature, under the authority of Imperial Act 17-18 Vict., c. 118, passed an Act (19-20 Vict., c. 140) which altered the constitution of the Legislative Council by rendering the same elective (App. pp. 42–45). The new Constitution, as thus altered, continued until the Union in 1867.

20. From 1719, when civil government was first established in the Province of Nova Scotia (following its cession to Great Britain by the Treaty of Utrecht, 1713), until 1758, the provincial government consisted of a Governor and a Council, which was both a legislative and executive body, composed of " such fitting and discreet persons," not exceeding twelve in number, as the Governor should nominate (App. p. 86). A

General Assembly for the province was called in 1757 (App. p. 90), and thereafter, the legislature consisted of a Governor and Council and General Assembly. In 1838 the Executive authority was separated from the Legislative Council which became a distinct legislative branch only. (App. pp. 91–92).

21. In 1784, part of the territory of the Province of Nova Scotia was erected into a separate province to be called New Brunswick, and a separate government was established for the province consisting of the Governor, a Council composed of certain named persons and " other persons to be chosen by you from amongst the most considerable of the inhabitants of or persons of property in our said province," but required to be " men of good life, well affected to our Government and of ability suitable to their employments," and a General Assembly " of the freeholders and settlers in the Province " (App. pp. 93–94). In 1832 the executive authority was separated and made distinct from the Legislative Council.

22. The establishment of legislatures of the bicameral type in each of these provinces was in imitation of the constitution of the British Parliament. The Constitutional Act of 1791 was, for instance, framed with the avowed object of " assimilating the Constitution of Canada to that of Great Britain as nearly as the difference arising from the manners of the people and from the present situation of the province will admit." (Despatch of Lord Grenville to Lord Dorchester, 20th October, 1789, quoted in Bourinot's Manual of the Constitutional History of Canada, p. 19) and with the recognition to the fullest extent, by 1848, of the principle of responsible government in the provinces of Canada, Nova Scotia and New Brunswick, the constitutions of these provinces became in the truest sense " similar in principle to that of the United Kingdom," or, in the words of Lieutenant Governor Simcoe, " an image and transcript of the British Constitution."

23. Were women, although legally disqualified from sitting or voting in either of the two Houses of the British Parliament, ever admitted to those functions in the legislature of any of the provinces; The answer is clearly in the negative. Although the word " persons " was in each instance used to describe the individuals who might be appointed to the Legislative Council in each province, and equally indefinite expressions such as " members " or " freeholders," to describe the persons qualified for election to the General Assembly, with no express disqualification of women for appointment or election (save as hereinafter mentioned), yet women were evidently considered to be disqualified by law, or at all events by inveterate usage, from serving in either capacity. An examination of the records fails to disclose a single instance in which a woman was either appointed a legislative councillor or elected to the Assembly in any of the provinces. (Vide, Certificate of Wm. Smith, (App. p. 99).

24. *Secondly,* were women ever admitted to the exercise of the parliamentary franchise in any of these provinces? In the first instance, they do not appear to have been expressly disqualified from voting in any of

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these provinces, but there is no record of their ever having voted in parliamentary elections except in the Province of Lower Canada. In 1820, during the general election of that year in Lower Canada, the votes of women appear to have been received at Trois Rivières (App. p. 70). On the other hand, the Returning Officer during the election in 1828 appears to have refused to receive the votes of women in the constituency of Upper Town, Quebec. His action was the subject of an indignant protest and reasoned plea for women suffrage to the House of Assembly in Lower Canada (App. pp. 71–73). The petitioners demanded that Andrew Stuart, the successful candidate, be unseated. Another petition on behalf of James Stuart, involving the right of women to vote, submitted the same day to the Assembly of Lower Canada, respecting the election in the Borough of William Henry (Sorel), alleged that the votes of women married and unmarried and in a state of widowhood had been illegally received in favour of Wolfred Nelson, the successful candidate, and therefore rendered void his election (App. pp. 74–76). A counter-petition was promptly drawn up and submitted to the House by Stuart's opponents, who, besides declaring that the allegations were unfounded, affirmed that Stuart had received the votes of many women. The House was reluctant to take up either case and after a number of postponements both were thrown over to the ensuing session and no action was taken on either of them. All doubts as to the position of women in regard to the exercise of the franchise were, however, definitely settled for the Province of Canada by the provincial statute 12 Vict. (1849) c. 27, which, by sec. 46, declared that " No woman is or shall be entitled to vote at any such election whether for any County, Riding, City or Town," (App. p. 42), a disqualification which was continued up to the time of the Union and no doubt beyond. (App. pp. 45–46).

25. In the case of the Province of Nova Scotia, there was in the early Acts governing the election of members of the General Assembly no express disqualification of women from voting (App. pp.47–48), but by the Revised Statutes of Nova Scotia, 1859, the exercise of the franchise was confined to *male* British subjects over twenty-one years of age, and a candidate for election was required to have the qualification which would entitle him to vote (App. p. 49). A similar restriction of the franchise to male persons was incorporated in Chap. 28 of the Acts of Nova Scotia of 1863 which was still in force at the time of the Union. In the Province of New Brunswick, the parliamentary franchise, though originally not so limited, was by the provincial Act, 11 Vict., c. 65, confined to male persons of the full age of twenty-one years who possessed certain property qualifications. (App. pp. 50–51).

26. *Thirdly*, what was the position of women by the common law in force in each province, at the time of the Union, in regard to their capacity to exercise public functions? The answer seems to be that they were under the same disabilities in the provinces that women were then subject to by the common law of England. In the provinces of Nova Scotia and New Brunswick, those provinces having been acquired by settlement of

British subjects, the whole of the English common law, with the exception of such parts only as were obviously inconsistent with the situation and condition of the colonists, has been held to be in force (see as to Nova Scotia, *Uniacke* v. *Dickson* (1848) James 287, 289, 299 and 300, and as to New Brunswick, *The King* v. *McLaughlin* (1830) 1 New Br.B. 218-221.) In the Province of Upper Canada the laws of England were, by the provincial Act 32 Geo. III., Chap. I, U. C., made the rule of decision in all matters of controversy relative to property and civil rights, and the English common law, except so far as purely local, was thereby introduced in its entirety. (*Keewatin Power Company* v. *Kenora*, 16 Ont. L.R. 184, 189, 190). In the province of Lower Canada, on the other hand, the French civil law was by the Quebec Act, 1774, made the rule of decision in all matters of controversy relative to property and civil rights. The decision of the Supreme Court of New Brunswick in the case of In *re Mabel P. French* (1905) 37 New Br. 359, affords authority for the view that the common law of England touching the disqualifications of women from exercising public functions formed part of the common law which was introduced by the settlement of Nova Scotia, of which New Brunswick was originally a part. The Court held in that case that at common law a woman could not be admitted to practice as an attorney and that this disability had not been removed either by Con. Stat. N.B. 1903, c. 68, by rule of Court, or by the regulations of the Barristers' Society. A similar decision was pronounced by the Court of Appeal of British Columbia in a case affecting the same woman—In *re Mabel P. French*, (1911) 17 B.C.R. 1. In the province of Ontario, as Irving, J.A., observed in the latter case, the benchers declared that they had no power to call a woman to the bar, and the Ontario Legislature recognized the correctness of their decision, empowering them to do so, if they thought proper: See Statutes of Ontario, 1892, Chap. 32 as amended by Chap. 27 of 1895. Under the French civil law in force in Lower Canada, the exclusion of women from the exercise of public functions was not less stringent than it was under the common law of England.

> "Les femmes ne sont pas," says de Ferrière, "Dictionnaire de Droit et de Pratique" (Paris, 1762), Vol. 1, p. 902, "admises aux Charges publiques, suivant les Lois Romaines, qui sont à cet égard suivies dans ce Royaume. Faeminae ab omnibus officiis civilibus vel publicis remotae sunt. Et ideo nec Judices esse possunt, nec Magistratum gerere, nec postulare, nec pro alio intervenire, nec procuratores existere."

As another French jurist forcibly described the position of women under French law, "Elle vit comme assujettie; mais elle meurt comme libre: voilà son véritable état." ("Le Droit Commun de la France," by Bourjon, (Paris, 1770) Tom 1, chap. 2, p. 2). The decision in *Langstaff* v. *Bar of the Province of Quebec*, 1916, 25 R.J. (K.B.) is illustrative. In that case the Court of King's Bench at Montreal, affirming the decision of the Superior Court, (Mr. Justice Saint-Pierre), reported in (1915) 47 R.J. (C.S.) 131, held that by the common and public law in force in the province

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of Quebec, women, on account of their sex, have always been excluded from the practice of the law and that the interpretative rule of the Civil Code, Art. 17, par 9, and of R.S.Q. 1909, Art. 21, which declares that the masculine gender includes both sexes, has no application in such a case.

It is submitted for these and other reasons which will be urged at the hearing, that the opinion expressed by the law officers of the Crown upon the question of the power of the Governor General to summon female persons to the Senate of Canada was correct and well founded and that the question referred ought, accordingly, to be answered in the negative.

LUCIEN CANNON,
EUGENE LAFLEUR,
CHARLES P. PLAXTON.

(The Appendix to this Factum has been incorporated in the Joint Appendix prepared for the use of the Privy Council.)

No. 8. Factum of the Attorney-General of Quebec.

No. 8.

Factum of the Attorney General of Quebec.

His Majesty's Attorney General for the Province of Quebec under Order, dated 29th of October 1927, made by the Honourable Mr. Justice Newcombe, one of the Judges of this Honourable Court, appears on this Reference and submits that:

The question referred by His Excellency the Governor General in Council to this Honourable Court for hearing and consideration is:—

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

The Province of Quebec is specially interested in the determination of this question since by section 73 of the British North America Act, " the qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec."

The constitution of Canada, as it is expressly recognized in the opening recital of the British North America Act, 1867, is one similar in principle to that of the United Kingdom.

The intention of the provisions in that Act with respect to the Parliament of Canada was that, as nearly as different circumstances would permit, it should be modelled on and conform to the established principles and usages by which in the course of centuries the mother Parliament had come to be regulated.

Senators so far as may be resemble those of the Lords of Parliament, who are appointed for life by the Crown.

It is to be noted that section 24 referred to in the question does not direct the Governor General to summon " persons " to the Senate but only " qualified persons ".

The sections of the British North America Act, 1867, calling for consideration are the following:—

" 18. The Privileges, Immunities, and Powers to be held, enjoyed, and exercised by the Senate and by the House of Commons and by the Members thereof respectively shall be such as are from Time to Time defined by the Act of the Parliament of Canada, but so that the same shall never exceed those at the passing of this Act held, enjoyed, and exercised by the Commons House of Parliament of the United Kingdom of Great Britain and Ireland and by the Members thereof."

* * * * * *

" 23. The Qualification of a Senator shall be as follows:

(1) He shall be of the full age of Thirty Years;

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain or of the Parliament of the United Kingdom of Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture, within the Province for which he is appointed, of the Value of Four Thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division."

" 24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator."

* * * * * *

" 31. The Place of a Senator shall become vacant in any of the following Cases :—

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate;

(2) If he takes an Oath or makes a Declaration or Acknowledgment of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or a Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or of any infamous crime;

(5) If he ceases to be qualified in respect of Property or of Residence; provided, that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there."

" 32. When a Vacancy happens in the Senate by Resignation, Death or otherwise, the Governor General shall by Summons to a fit and qualified Person fill the Vacancy."

" 33. If any Question arises respecting the Qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate."

" 34. The Governor General may from Time to Time, by Instrument under the Great Seal of Canada, appoint a Senator to be Speaker of the Senate, and may remove him and appoint another in his Stead."

* * * * * *

" 72. The Legislative Council of Quebec shall be composed of Twenty-four Members, to be appointed by the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, one being appointed to represent each of the Twenty-four Electoral Divisions of Lower Canada in this Act referred to, and each holding Office for the Term of his Life, unless the Legislature of Quebec otherwise provides under the Provisions of this Act."

" 73. The Qualifications of the Legislative Councillors of Quebec shall be the same as those of the Senators for Quebec."

" 74. The Place of a Legislative Councillor of Quebec shall become vacant in the Cases, *mutatis mutandis*, in which the Place of Senator becomes vacant."

" 75. When a Vacancy happens in the Legislative Council of Quebec by Resignation, Death, or otherwise, the Lieutenant-Governor, in the Queen's Name, by Instrument under the Great Seal of Quebec, shall appoint a fit and qualified Person to fill the Vacancy."

" 76. If any Question arises respecting the Qualification of a Legislative Councillor of Quebec, or a Vacancy in the Legislative Council of Quebec, the same shall be heard and determined by the Legislative Council."

" 77. The Lieutenant-Governor may from Time to Time by Instrument under the Great Seal of Quebec, appoint a Member of the Legislative Council of Quebec to be Speaker thereof, and may remove him and appoint another to his stead."

* * * * * *

" 128. Every Member of the Senate or House of Commons of Canada shall before taking his Seat therein take and subscribe before the Governor General or some Person authorized by him, and every Member of a Legislative Council or Legislative Assembly of any Province shall before taking his Seat therein take and subscribe before the Lieutenant-Governor of the Province or some Person authorized by him, the Oath of Allegiance contained in the Fifth Schedule to this Act; and every Member of the Senate of Canada and every Member of the Legislative Council of Quebec shall also, before taking his Seat therein, take and subscribe before the Governor General, or some Person authorized by him, the Declaration of Qualification contained in the same Schedule."

" THE FIFTH SCHEDULE.

OATH OF ALLEGIANCE.

I, A.B., do swear, That I will be faithful and bear true Allegiance to Her Majesty Queen Victoria.

NOTE.—The name of the King or Queen of the United Kingdom of Great Britain and Ireland for the Time being is to be substituted from Time to Time, with Proper Terms of Reference thereto.

DECLARATION OF QUALIFICATION.

I, A.B., do declare and testify, That I am by Law duly qualified to be appointed a Member of the Senate of Canada [*or as the Case may be*], and that I am legally or equitably seised as of Freehold for my own Use and Benefit of Lands or Tenements held in Free and Common Socage [*or* seised or possessed for my own Use and Benefit of Lands or Tenements held in Franc-alleu or in Roture (*as the Case may be*),] in the Province of Nova Scotia [*or as the case may*

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be] of the Value of Four thousand Dollars over and above all Rents, Dues, Debts, Mortgages, Charges, and Incumbrances due or payable out of or charged on or affecting the same, and that I have not collusively or colourably obtained a Title to or become possessed of the said Lands and Tenements or any Part thereof for the Purpose of enabling me to become a Member of the Senate of Canada [*or as the Case may be*], and that my Real and Personal Property are together worth Four thousand Dollars over and above my Debts and Liabilities."

The meaning of the word "persons" as it occurs in section 24 of the British North America Act, 1867, can only be ascertained like that of any other word from its context. This principle of interpretation is of general application. In Hardcastle on Statutory Law, 4th ed., p. 146, it is said, "The best dictionary is but a guide to the true meaning of a word in a particular context . . . ."

"The true mode of ascertainment is that said to have been first used by Sir Thomas More, namely, that words cannot be construed effectively without reference to their context."

The definition in dictionaries does not help in the present case for it must be admitted that the word "person" may and apart from any context must include a woman.

Neither do the Interpretation Acts which both the Parliament of Great Britain and the Parliament of Canada have passed afford any assistance for each of them recognizes to the full the principle that the context in which words appear must be considered in determining their meaning.

The Imperial Statute, the Interpretation Act, 1889, 52-53 Victoria, c. 63, was not of course passed until long after the British North America Act but it professedly was a recognition of existing rules of construction. The full title of the Act is:

> "An Act for consolidating enactments relating to the construction of Acts of Parliament and for further shortening the language used in Acts of Parliament."
>
> "RE-ENACTMENT OF EXISTING RULES
>
> "1. (1) In this Act and in every Act passed after the year 1850, whether before or after the commencement of this Act, unless the contrary intention appears
>
> (a) words importing the masculine gender shall include females."
>
> . . . . . .
>
> The first Canadian Interpretation Act, 31 Victoria, c. 1, it may be noted, is fuller, and perhaps better. It provides:—
>
> "INTERPRETATION
>
> * * * * * *
>
> "3. This section and the fourth, fifth, sixth, seventh and eighth sections of this Act, and each provision thereof, shall extend and apply to every Act passed in the Session held in this thirtieth year of

Her Majesty's Reign, and in any future Session of the Parliament of Canada, except in so far as the provision is inconsistent with the intent and object of such Act, or the interpretation which such provision would give to any word, expression or clause is inconsistent with the context,—and except in so far as any provision thereof is in any such Act declared not applicable thereto;—Nor shall the omission in any Act of a declaration that the " Interpretation Act " shall apply thereto, be construed to prevent its so applying, although such express declaration may be inserted in some other Act or Acts of the same Session."

* * * * * *

" 6. In construing this or any Act of the Parliament of Canada, unless it is otherwise provided or there be something in the context of other provisions thereof indicating a different meaning or calling for a different construction."

(1) * * * * * *

" 7. Subject to the limitations aforesaid,—in every Act of the Parliament of Canada, to which this section applies :—

First. * * * * *

Tenthly. Words importing the singular number or the masculine gender only shall include more persons, parties or things of the same kind than one and females as well as males and the converse.

Eleventhly. The word " person " shall include any body corporate and politic or party . . . . . to whom the context can apply according to the law of that part of Canada to which such context extends."

Many Acts of course contain their own interpretation clause and from some of these it might be gathered that the word " person " is not always to be taken in its widest sense. Thus in the English Trustee Act of 1850, it is provided that " person " used and referred to in the masculine gender shall include females as well as a male and shall include a body corporate.

Again it has been held that the word " person " in section 4 of the Vagrancy Act of 1824, 5 Geo. IV, c. 83 does not include a woman, (*Peters* v. *Cowie*, 46 L.J., M.C., 177, 2 Q.B.D. 131).

The expression " Male British Subject " does not occur in the British North America Act except in a special proviso to sections 41 and 84 regarding the election of a member for the district of Algoma.

We are therefore thrown back upon the context for the meaning of the word " person " in section 24 and very wide considerations are open for implications as to the restriction to be put on the word in the particular section.

As above pointed out, the British North America Act recites that the constitution is to be similar in principle to that of the United Kingdom and of course this must be held as of the constitution of the United Kingdom in the year 1867 not as it may be altered by any subsequent legislation.

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No. 8. Factum of the Attorney-General of Quebec—*continued.*

In the year 1867, women had never been admitted to the floor of either House of Parliament; they did not even possess the suffrage. That was the law, a custom centuries old dating indeed from the institution of Parliaments.

A leading case on the subject to which reference will be made is that of *Chorlton* v. *Lings*, L.R. 4 C.P. p. 384, decided in 1868. The head note of that case reads as follows :—

> " The Representation of the People Act 1867 (30–31 Vict., c. 102) sec. 3, enacts that every ' man ' shall, in and after the year 1868, be entitled to be registered as a voter, and when registered to vote for a member or members to serve in Parliament for a borough who is qualified as follows, first, is of full age, and not subject to any legal incapacity.
>
> By Lord Brougham's Act (13–14 Vict., c. 21) sec. 4, in all Acts words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided.
>
> *Held*, that women are subject to a legal incapacity from voting at the election of members of Parliament.
>
> *Held*, also, that the word ' man ' in the Representation of the People Act does not include woman."

In the case of *Nairn* v. *University of St. Andrews* [1909] A.C. 147 in the House of Lords, the head note is as follows :—

> " By s. 27 of the Representation of the People (Scotland) Act, 1868, ' Every person whose name is for the time being on the register . . . . of the general council of such university, shall, if of full age, and not subject to any legal incapacity, be entitled to vote in the election of a member to serve in any future Parliament for such university in terms of this Act ' ; and by s. 28, sub-s. 2, the following persons shall be members of the general council of the respective universities : ' All persons on whom the university to which such general council belongs has after examination conferred ' certain degrees, ' or any other degree that may hereafter be instituted.' The appellants were five women graduates of the University of Edinburgh, and as such had their names enrolled on the general council of that university, and they claimed as graduates and members of the general council the right to vote at the election of a member of Parliament for the university :—
>
> *Held* (affirming the decision of the Extra Division of the Court of Session), that the appellants were not entitled to vote in the election of the parliamentary representative of the university.
>
> There is no evidence of any ancient custom for women to vote in parliamentary elections."

In his judgment the Lord Chancellor, with reference to the right to vote of women in the past, said : " It is incomprehensible to me that any one " acquainted with our laws or the methods by which they are ascertained " can think, if, indeed, any one does think, there is room for argument on

" such a point. It is notorious that this right of voting has, in fact, been " confined to men. Not only has it been the constant tradition, alike of " all the three kingdoms, but it has also been the constant practice, so far " as we have knowledge of what has happened from the earliest times down " to this day. Only the clearest proof that a different state of things " prevailed in ancient times could be entertained by a Court of law in pro- " bing the origin of so inveterate an usage. I need not remind your " Lordships that numberless rights rest upon a similar basis. Indeed, the " whole body of the common law has no other foundation.

" I will not linger upon this subject, which, indeed, was fully " discussed in *Chorlton* v. *Lings*. If this legal disability is to be removed " it must be done by Act of Parliament." And the judgment concluded that the Representation of the People (Scotland) Act 1868 did not confer on women any right to vote.

The incapacity of women was really recognized by the Imperial Parliament in the legislation of 1918, the Representation of the People Act, 1918, 7-8 Geo. V, c. 64, which provides :—

" PART I.

FRANCHISES.

1. (1) A man shall be entitled to be registered as a parliamentary elector . . . . . if he, etc.

* * * * * *

4. (1) A woman shall be entitled to be registered as a parliamentary elector . . . . . if she, etc.

* * * * * *

And the Act 8-9 Geo. V, c. 47 " An Act to amend the law with respect to the capacity of women to sit in Parliament."

" 1. A woman shall not be disqualified by sex or marriage for being elected to or sitting or voting as a member of the Commons House of Parliament."

The position of women in this connection in this country prior to Confederation may be briefly traced as showing both from the legislation by which it was governed and the uniform practice thereunder what may have entered into the intention of the legislature in passing the British North America Act.

In the Province of Canada, as erected by the Royal Proclamation of the 7th of October 1763, immediately after the conquest the Government was carried on by the Governor and a Council composed of the persons who had been appointed Lieutenant-Governors of Montreal and Trois-Rivières, Chief Justice of the Province and the Surveyor General of Customs, and eight other persons to be chosen amongst the most considerable of the inhabitants of, or persons of property in the Province.

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No. 8. Factum of the Attorney-General of Quebec—*continued.*

By the Quebec Act, provision was made for the government by a Governor and a Legislative Council to consist of such persons resident there as His Majesty shall be pleased to appoint.

The Constitutional Act, 1791, dividing the Province of Quebec into the two separate Provinces of Upper and Lower-Canada, provided for a legislature in each Province composed of "a sufficient number of discreet and proper persons not fewer than seven to the Legislative Council for the Province of Upper-Canada and not fewer than fifteen to the Legislative Council for Lower-Canada."

By the Act of Union of 1840, 3 & 4 Vict. c. 35, the Provinces of Upper and Lower Canada were reunited and formed the Province of Canada with a legislature composed of the Legislative Council and Assembly of Canada. The Legislative Council to be composed of such persons being not fewer than twenty as Her Majesty shall think fit, such Legislative Councillors holding their seat for life, and the other provisions regarding them being largely similar to those concerning Senators under the British North America Act.

Very similar provisions were made for the Legislature of Nova Scotia from the date of its cession to Great Britain in 1713 and after the separation of a part of the Province into a separate Province to be called New-Brunswick, for such Province.

It is however to be observed that by section 88 of the British North America Act, 1867, it is provided that "The Constitution of the Legislature of each of the Provinces of Nova Scotia and New-Brunswick shall, subject to the Provisions of this Act, continue as it exists at the Union until altered under the Authority of this Act."

As in the case of England there is practically no trace of women having at any time either by express legislation or by custom or usage a right to vote.

How far the laws and customs of the former Provinces survived after Confederation in 1867 need not be enquired but it may well be that the Imperial Parliament in passing the British North America Act would have had some regard to the circumstances of the Provinces to be affected by the Act and have not introduced such a change into the supreme authority of government as would be involved in the admission of women to the franchise without express enactment.

It being scarcely questionable that it was a principle of the constitution at the time of Confederation that females had no share in the legislation of the country either directly or through persons representing them, legislation was considered necessary in order to enable women to sit in the House of Commons of Canada.

The Dominion Elections Act, 10-11 George V, c. 46, "An Act respecting the election of Members of the House of Commons and the Electoral Franchise."

" QUALIFICATION OF ELECTORS.

" 29. (1) Save as in this Act otherwise provided every person, male or female, shall be qualified to vote at the election of a member who, not being an Indian ordinarily resident on an Indian Reservation,—

(*a*) is a British subject by birth or naturalization, and
(*b*) is of the full age of twenty one years, and
(*c*) .....
(*d*) .....

" QUALIFICATION OF CANDIDATES.

" 38. Except as in this Act otherwise provided, any British subject, male or female, who is of the full age of twenty one years, may be a candidate at a Dominion election."

If any such fundamental change had been contemplated as the placing of women on an equal footing with men there must certainly have been much consideration devoted to it at the time when the constitution to be provided for Canada was being settled. Certainly in the conferences leading up to the passing of the Act there never was any suggestion of such a possible change from the principle then to be found in the British constitution.

It cannot be overlooked in the consideration of the above quoted cases that the Representation of the People Act, 1867, was passed in the same session of the Imperial Parliament as the British North America Act, and it can hardly be supposed that if by the use of the word " man " in the former Act that Legislature did not intend to include women, it did so intend when using the word " person " in the British North America Act, this although the circumstances of the position of women had ever been the same in the two countries.

Finally it is necessary to look to the provisions of the Act itself relating to the Senate and Senators with the evidence which they furnish of the intention of the legislature.

Throughout the provisions, in speaking of senators, and the word itself is strictly a masculine term, the masculine gender alone is used. This affords a presumption that the appointment of male persons alone was intended since if so important an alteration, in then hitherto established constitutional practice, had been intended it would not have been left to depend on such a doubtful construction as might be gathered from the rule that the masculine includes the feminine when the context permits.

The privileges, immunities and powers of senators as provided in section 18 would certainly present great difficulties in the case of females. It cannot be overlooked in this connection that there is an essential difference between the status of single women and those who having entered the marriage state are under obedience to their husbands.

In the Supreme Court of Canada.

No. 8. Factum of the Attorney-General of Quebec—*continued.*

If it was the intention to include any females under the word " persons " a necessary distinction between the two classses would have been made with provision accordingly.

The same considerations must apply and with even greater force with regard to the qualifications in section 23 and the provisions for the vacating of the place of a senator in section 31.

It must be doubtful if in the year 1867 any married woman could strictly have the property qualification or be able to make the declaration in the Fifth Schedule to the Act.

All sorts of difficulties may be presented under section 31, for instance, a woman may become the subject or citizen of a foreign power if her husband does so.

For the above and other reasons to be presented at the argument, the Attorney General of Quebec submits that the question referred should be answered in the negative.

CHARLES LANCTOT.
AIMÉ GEOFFRION.

No. 9. Formal Judgment, 24th April, 1928.

No. 9.

Formal Judgment.

IN THE SUPREME COURT OF CANADA.

Tuesday, the twenty-fourth day of April, A.D. 1928.

Present :

The Right Honourable FRANCIS ALEXANDER ANGLIN, P.C., Chief Justice.
The Right Honourable Mr. JUSTICE DUFF, P.C.
The Honourable Mr. JUSTICE MIGNAULT.
The Honourable Mr. JUSTICE LAMONT.
The Honourable Mr. JUSTICE SMITH.

In the matter of a Reference with respect to the meaning to be assigned to the word " Persons " in section 24 of the British North America Act 1867.

Whereas by Order-in-Council of His Majesty's Privy Council for Canada bearing date the nineteenth day of October in the Year of Our Lord One Thousand Nine hundred and Twenty-seven " P.C. 2034," the question hereinafter set out was referred to the Supreme Court of Canada for hearing and consideration pursuant to section 60 of the Supreme Court Act, namely—

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

In the Supreme Court of Canada.

No. 9. Formal Judgment, 24th April, 1928—*continued.*

As whereas the said question came before this Court for hearing on the fourteenth day of March in the Year of Our Lord One thousand Nine Hundred and Twenty-eight, in the presence of Counsel for the Attorney General of Canada, the Attorney General of the Province of Quebec and Henrietta Muir Edwards, and others, petitioners.

Whereupon and upon hearing what was alleged by Counsel aforesaid, this Court was pleased to direct that the said Reference should stand over for consideration and the same having come on this day for determination, the following judgment was pronounced :—

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

(Sgd.) E. R. CAMERON,
Registrar.

No. 10.

Reasons for Judgment.

No. 10. Reasons for Judgment. (*a*) Anglin, C.J.C.

(*a*) ANGLIN C.J.C.—By Order of the 19th of October, 1927, made on a petition of five ladies, His Excellency the Governor in Council was pleased to refer to this court " for hearing and consideration " the question :

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

Notice of this reference was published in the *Canada Gazette* and notice of the hearing was duly given to the petitioners and to each of the Attorneys General of the several provinces of Canada. Argument took place on the 14th of March last when counsel were heard representing the Attorney General of Canada, the Attorneys General of the provinces of Quebec and Alberta and the petitioners.

Section 24 is one of a group, or fasciculus of sections in the *British North America Act*, 1867, numbered 21 to 36, which provides for the constitution of the Senate of Canada. This group of sections (omitting three which are irrelevant to the question before us) reads as follows :

" THE SENATE.

" 21. The Senate shall, subject to the Provisions of this Act, consist of Seventy-two Members, who shall be styled Senators.

* * * * * *

" 23. The Qualification of a Senator shall be as follows :

(1) He shall be of the full age of Thirty Years ;

(2) He shall be either a Natural-born Subject of the Queen, or a Subject of the Queen naturalized by an Act of the Parliament of Great Britain, or of the Parliament of the United Kingdom of

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Great Britain and Ireland, or of the Legislature of One of the Provinces of Upper Canada, Lower Canada, Canada, Nova Scotia, or New Brunswick, before the Union, or of the Parliament of Canada after the Union;

(3) He shall be legally or equitably seised as of Freehold for his own Use and Benefit of Lands or Tenements held in free and common Socage, or seised or possessed for his own Use and Benefit of Lands or Tenements held in Franc alleu or in Roture, within the Province for which he is appointed, of the value of Four thousand Dollars, over and above all Rents, Dues, Debts, Charges, Mortgages, and Incumbrances due or payable out of or charged on or affecting the same;

(4) His Real and Personal Property shall be together worth Four Thousand Dollars over and above his Debts and Liabilities;

(5) He shall be resident in the Province for which he is appointed;

(6) In the case of Quebec he shall have his Real Property Qualification in the Electoral Division for which he is appointed, or shall be resident in that Division.

" 24. The Governor General shall from Time to Time, in the Queen's Name, by Instrument under the Great Seal of Canada, summon qualified Persons to the Senate; and, subject to the Provisions of this Act, every Person so summoned shall become and be a Member of the Senate and a Senator.

" 25. Such Persons shall be first summoned to the Senate as the Queen by Warrant under Her Majesty's Royal Sign Manual thinks fit to approve, and their Names shall be inserted in the Queen's Proclamation of Union.

" 26. If at any Time on the Recommendation of the Governor General the Queen thinks fit to direct that Three or Six Members be added to the Senate, the Governor General may by Summons to Three or Six qualified Persons (as the Case may be), representing equally the Three Divisions of Canada, add to the Senate accordingly.

" 27. In case of such Addition being at any Time made the Governor General shall not summon any Person to the Senate, except on a further like Direction by the Queen on the like Recommendation, until each of the Three Divisions of Canada is represented by Twenty-four Senators and no more.

" 28. The Number of Senators shall not at any Time exceed Seventy-eight.

" 29. A Senator shall, subject to the Provisions of this Act, hold his Place in the Senate for Life.

" 30. A Senator may by Writing under his Hand addressed to the Governor General resign his Place in the Senate, and thereupon the same shall be vacant.

"31. The Place of a Senator shall become vacant in any of the following Cases:—

(1) If for Two consecutive Sessions of the Parliament he fails to give his Attendance in the Senate.

(2) If he takes an Oath or makes a Declaration or Acknowledgement of Allegiance, Obedience, or Adherence to a Foreign Power, or does an Act whereby he becomes a Subject or Citizen, or entitled to the Rights or Privileges of a Subject or Citizen, of a Foreign Power;

(3) If he is adjudged Bankrupt or Insolvent, or applies for the Benefit of any Law relating to Insolvent Debtors, or becomes a public Defaulter;

(4) If he is attainted of Treason or convicted of Felony or any Infamous Crime;

(5) If he ceases to be qualified in respect of Property or of Residence; provided that a Senator shall not be deemed to have ceased to be qualified in respect of Residence by reason only of his residing at the Seat of the Government of Canada while holding an Office under that Government requiring his Presence there.

"32. When a Vacancy happens in the Senate by Resignation, Death, or otherwise, the Governor General shall by summons to a fit and qualified Person fill the Vacancy.

"33. If any question arises respecting the qualification of a Senator or a Vacancy in the Senate the same shall be heard and determined by the Senate.

* * *

"35. Until the Parliament of Canada otherwise provides, the Presence of at least Fifteen Senators, including the Speaker, shall be necessary to constitute a Meeting of the Senate for the Exercise of its Powers."

* * *

The *British North America Act*, 1867, does not contain provisions in regard to the Senate corresponding to its sections 41 and 52, which, respectively, empower the Parliament of Canada from time to time to alter the qualifications or disqualifications of persons to be elected to the House of Commons and to determine the number of members of which that House shall consist. Except in regard to the number of Senators required to constitute a quorum (s. 35), the provisions affecting the constitution of the Senate are subject to alteration only by the Imperial Parliament.

Section 33 which empowers the Senate to hear and determine any question that may arise respecting the qualification of a Senator, applies only after the person whose qualification is challenged has been appointed or summoned to the Senate. That section is probably no more than

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declaratory of a right inherent in every parliamentary body. (*Vide* clause 1 of the preamble to the B.N.A. Act and the quotation of Lord Lyndhurst's language made from MacQueen's Debates on The Life Peerage Question, at p. 300, by Viscount Haldane in Viscountess Rhondda's Claim (1).

It should be observed that, while the question now submitted by His Excellency to the court deals with the word " Persons," section 24 of the B.N.A. Act speaks only of " qualified persons "; and the other sections empowering the Governor General to make appointments to the Senate (26 and 32) speak, respectively, of " qualified Persons " and of " fit and qualified Persons." The question which we have to consider, therefore, is whether " female persons " are qualified to be summoned to the Senate by the Governor General; or, in other words—Are women eligible for appointment to the Senate of Canada? That question it is the duty of the court to " answer " and to " certify to the Governor in Council for his information * * * its opinion * * * with the reasons for * * * such answer." *Supreme Court Act*, R.S.C. [1927] c. 35, s. 55, subs. 2.

In considering this matter we are, of course, in no wise concerned with the desirability or the undesirability of the presence of women in the Senate, nor with any political aspect of the question submitted. Our whole duty is to construe, to the best of our ability, the relevant provisions of the B.N.A. Act, 1867, and upon that construction to base our answer.

Passed in the year 1867, the various provisions of the B.N.A. Act (as is the case with other statutes, *Bank of Toronto* v. *Lambe*) (2) bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were first enacted. If the phrase " qualified persons " in s. 24 includes women to-day, it has so included them since 1867.

In a passage from *Stradling* v. *Morgan* (3), often quoted, the Barons of the Exchequer pointed out that :

> " The Sages of the Law heretofore have construed Statutes quite contrary to the Letter in some appearance, and those Statutes which comprehend all things in the Letter they have expounded to extend but to some Things, and those which generally prohibit all people from doing such an Act they have interpreted to permit some People to do it and those which include every Person in the Letter they have adjudged to reach to some Persons only, which Expositions have always been founded upon the Intent of the Legislature, which they have collected sometimes by considering the cause and Necessity of making the Act, sometimes by comparing one part of the Act with another, and sometimes by foreign Circumstances. So that they have been guided by the Intent of the Legislature, which they have always taken according to the Necessity of the Matter, and according to that which is consonant with Reason and good Discretion."

(1) [1922] 2 A.C. 339, at pp. 384–5. (2) [1887] 12 A.C. 575 at p. 579.
(3) 1 Plowd. 203, at p. 205.

" In deciding the question before us," said Turner L.J., in *Hawkins* v. *Gathercole* (1),

> " we have to construe not merely the words of the Act of Parliament but the intent of the Legislature as collected, from the cause and necessity of the Act being made, from a comparison of its several parts and from foreign (meaning extraneous) circumstances so far as they can be justly considered to throw light upon the subject."

Two well-known rules in the construction of statutes are that, where a statute is susceptible of more than one meaning, in the absence of express language an intention to abrogate the ordinary rules of law is not to be imputed to Parliament (*Wear Commissioners* v. *Adamson* (2)); and,

> " as they are framed for the guidance of the people, their language is to be considered in its ordinary and popular sense," per Byles, J., in *Chorlton* v. *Lings* (3).

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 the 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* (4), per Lord Coleridge, C.J.);

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

> " referable to the fact (as Willes J., said in *Chorlton* v. *Lings* (5), that 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 such 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."

The same very learned judge had said, at p. 388:

> " Women are under a legal incapacity to vote at elections. What was the cause of it, it is not necessary to go into: but, admitting that fickleness of judgment and liability to influence have sometimes been suggested as the ground of exclusion, I must protest against its being supposed to arise in this country from any underrating of the sex either in point of intellect or worth. That would

(1) 6 DeG. M. & G., 1, at p. 21.
(2) (1876) 1 Q.B.D. 546, at p. 554.
(3) (1868) L.R. 4 C.P. 374, at p. 398.
(4) (1889) 23 Q.B.D. 79, at p. 91.
(5) L.R. 4 C.P. 374, at p. 392.

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be quite inconsistent with one of the glories of our civilisation, the respect and honour in which women are held. This is not a mere fancy of my own, but will be found in Selden, de Synedriis Veterum Ebraeorum, in the discussion of the origin of the exclusion of women from judicial and like public functions, where the author gives preference to this reason, that the exemption was founded upon motives of decorum, and was a privilege of the sex (*honestatis privilegium*): Selden's Works, vol. 1, pp. 1083-1085. Selden refers to many systems of law in which this exclusion prevailed, including the civil law and the canon law, which latter, as we know, excluded women from public functions in some remarkable instances. With respect to the civil law, I may add a reference to the learned and original work of Sir Patrick Colquhoun (*sic*) on the Roman Law, vol. 1, c. 580, where he compares the Roman system with ours, and states that a woman 'cannot vote for members of parliament, or sit in either the House of Lords or Commons.' "

As put by Lord Esher, M. R. (who, however, says he had "a stronger view than some of (his) brethren") in *Beresford-Hope* v. *Sandhurst* (1)

> "I take the first proposition to be that laid down by Willes J., in the case of *Chorlton* v. *Lings* (2). I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a woman be entitled to exercise any public functions. Willes J., stated so in that case, and a more learned judge never lived."

While Willes, J., had spoken of "judicial and like public functions" at p. 388, the tenor of his judgment indicates unmistakably that it was his view that to the legal incapacity of women for public office there were few, if any, exceptions. See *De Sousa* v. *Cobden* (3).

The same idea is expressed by Viscount Birkenhead L.C., in rejecting The Viscountess Rhondda's Claim to a Writ of Summons to the House of Lords (4).

> "By her sex she is not—except in a wholly loose and colloquial sense—disqualified from the exercise of this right. In respect of her dignity she is a subject of rights which *ex vi termini* cannot include this right."

Viscount Haldane, who dissented in the *Rhondda Case* (4), said, at p. 386:

> "The reason why peeresses were not entitled to it (the writ of summons) was simply that as women they could not exercise the public function. That appears to have been the considered conclusion of James Shaw Willes J., one of the most learned and accurate exponents of the law of England who ever sat on the Bench. He says in *Chorlton* v. *Lings* (5) that the absence of all

(1) 23 Q.B.D. 79, at p. 95.
(2) L.R. 4 C.P. 374.
(3) [1891] 1 Q.B. 687, at p. 691.
(4) [1922] 2 A.C. 339, at p. 362.
(5) L.R. 4 C.P. 374.

rights of this kind is referable to the fact that by the common law women have been excused from taking any part in public affairs."

Reference may also be had to *Brown* v. *Ingram* (1); *Hall* v. *Incorporated Society of Law Agents* (2); *Rex* v. *Crossthwaite* (3), and to the judgment of Gray C.J., in *Robinson's Case* (4), and also to Pollock & Maitland's History of English Law, vol. 1, pp. 465-8.

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

Moreover, paraphrasing an observation of Lord Coleridge C.J., in *Beresford-Hope* v. *Sandhurst* (5), 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* (6). 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."

(1) (1868) 7 Court of Sess. Cases, 3rd Series, 281.
(2) (1901) 38 Scottish Law Reporter, 776.
(3) (1864) 17 Ir. C.L.R. 157, 463, 479.
(4) (1881) 131 Mass., 371, at p. 379.
(5) 23 Q.B.D. 79, at pp. 91, 92.
(6) (1909) A.C. 147, at p. 161.

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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* (1)). 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* (2). 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:

(*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 synonymous 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 constitutional law" *Nairn* v. *University of St. Andrews* (3).

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

(1) [1909] A.C. 147, at p. 161. (2) [1919] Ir. R. 1 Ch. 81, at p. 91.
(3) [1909] A.C. 147, at p. 162.

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 Parliament 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 to 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 for 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* (1):

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

With Lord Robertson (*ibid.* at pp. 165–6), to mere " verbal possibilities " we prefer " subject-matter and fundamental constitutional law as guides of construction." When Parliament intends to overcome a fundamental constitutional 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 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

(1) [1909] A.C. 147, at p. 161.

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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* (1), 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." Having regard to the subject-matter of the statute and its general scope and language and to the important and striking nature of the departure from the common law involved in extending the franchise to women, Bovill C.J., declined to accept the view that Parliament had made that change by using the term " man " and held that

> " this word was intentionally used expressly to designate the male sex; and that it amounts to an express enactment and provision that every man, as distinguished from women, possessing the qualification, is to have the franchise. In that view, Lord Brougham's Act does not apply to the present case, and does not extend the meaning of the word ' man ' so as to include ' women.' " (386-7).

Willes J., said, at p. 387 :

> " I am of the same opinion. The application of the Act, 13-14 Vict., c. 21, (Lord Brougham's Act) contended for by the appellant is a strained one. It is not easy to conceive that the framer of the Act, when he used the word ' expressly,' meant to suggest that what is necessarily or properly implied by language is not expressed by such language. It is quite clear that whatever the language used necessarily or even naturally implies, is expressed thereby. Still less did the framer of the Act intend to exclude the rule alike of good sense and grammar and law, that general words are to be restrained to the subject-matter with which the speaker or writer is dealing."

Byles J., said, at p. 393 :

> " The difficulty, if any, is created by the use of the word ' *expressly.*' But that word does not necessarily mean ' expressly excluded by words ' . . . The word ' expressly ' often means no more than plainly, clearly, or the like; as will appear on reference to any English dictionary."

And he concluded :

> " I trust * * * our unanimous decision will forever exorcise and lay this ghost of a doubt, which ought never to have made its appearance."

Keating J., said, at pp. 394–5 :

> " Considering that there is no evidence of women ever having voted for members of parliament in cities or boroughs, and that

(1) 1868 L.R. 4 C.P. 374.

they have been deemed for centuries to be legally incapable of so doing, one would have expected that the legislature, if desirous of making an alteration so important and extensive as to admit them to the franchise, would have said so plainly and distinctly: whereas, in the present case, they have used expressions never before supposed to include women when found in previous Acts of Parliament of a similar character. * * * But it is said that the word 'man' in the present Act must be construed to include 'woman' because by 13-14 Vict., c. 21, s. 4, it is enacted that 'In all Acts, words importing the masculine gender shall be deemed and taken to include females, unless the contrary is expressly provided.' Now all that s. 4 of 13 and 14 Vict., c. 21 could have meant by the enactment referred to was, that, in future Acts, words importing the masculine gender should be taken to include females, where a contrary intention should not appear. To do more would be exceeding the competency of Parliament with reference to future legislation."

The later *Interpretation Act* of 1889 (52–53 Vict., c. 63), which (s. 41) repealed Lord Brougham's Act, substituted by s. 1, under the heading "Re-enactment of Existing Rules" for its words "unless the contrary as to Gender and Number is expressly provided" their equivalent, suggested by Mr. Justice Keating, "unless the contrary intention appears." *Frost* v. *The King* (1).

Keating J. concluded his judgment by saying (p. 396):

> "Mr. Coleridge, who ably argued the case for the appellant, made an eloquent appeal as to the injustice of excluding females from the exercise of the franchise. This, however, is not a matter within our province. It is for the legislature to consider whether the existing incapacity ought to be removed. But, should Parliament in its wisdom determine to do so, doubtless it will be done by the use of language very different from anything that is to be found in the present Act of Parliament."

Similar views prevailed in *The Queen* v. *Harrald* (2), and *Bebb* v. *The Law Society* (3).

The decision in *Chorlton* v. *Lings* (4) is of the highest authority, as was recognised in the House of Lords by Earl Loreburn, L.C., in *Nairn* v. *University of St Andrews* (5), 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 (6).

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(1) [1919] Ir. R. 1 Ch. 81, at pp. 89, 95.
(2) (1872) L.R. 7 Q.B. 361.
(3) [1914] 1 Ch. 286.
(4) L.R. 4 C.P. 374.
(5) [1909] A.C. 147.
(6) [1922] 2 A.C. 339.

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(*a*) Anglin, C.J.C.—*continued.*

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

> " 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 my judgment on this alone."

In our opinion *Chorlton* v. *Lings* (1) is conclusive 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*) (2), 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.

(*b*) Duff, J.

(*b*) DUFF, J.—The interrogatory submitted is, in effect, this : Is the word " persons " in section 24 of the B.N.A. Act the equivalent of male persons; " Persons " in the ordinary sense of the word includes, of course, natural persons of both sexes. But the sense of words is often radically affected by the context in which they are found, as well as by the occasion on which they are used; and in construing a legislative enactment, considerations arising not only from the context, but from the nature of the subject matter and object of the legislation, may require us to ascribe to general words a scope more restricted than their usual import, in order loyally to effectuate the intention of the legislature. And for this purpose, it is sometimes the duty of a court of law to resort, not only to other provisions of the enactment itself, but to the state of the law at the time the enactment was passed, and to the history, especially the legislative history, of the subjects with which the enactment deals. The view advanced by the Crown is that following this mode of approach, and employing the legitimate aids to interpretation thus indicated, we are constrained in construing section 24, to read the word " persons " in the restricted sense above mentioned, and to construe the section as authorizing the summoning of male persons only.

The question for decision is whether this is the right interpretation of that section.

It is convenient first to recall the general character and purpose of the B.N.A. Act. The object of the Act was to create for British North America, a system of parliamentary government under the British Crown, the executive authority being vested in the Queen of the United Kingdom.

(1) L.R. 4 C.P. 374. (2) [1907] A.C. 179, at p. 184.

While the system was to be a federal or quasi federal one, the constitution was nevertheless, to be "similar in principle" to that of the United Kingdom; a canon involving the acceptance of the doctrine of parliamentary supremacy in two senses, first that Parliament and the Legislatures, unlike the legislatures and Congress in the U.S., were, subject to the limitations necessarily imposed by the division of powers between the local and central authorities, to possess, within their several spheres, full jurisdiction, free from control by the courts; and second, in the sense of parliamentary control over the executive, or executive responsibility to Parliament. In pursuance of this design, Parliament and the local legislatures were severally invested with legislative jurisdiction over defined subjects which, with limited exceptions, embrace the whole field of legislative activity.

More specifically, the legislative authority of Parliament extends over all matters concerning the peace, order and good government of Canada; and it may with confidence be affirmed that, excepting such matters as are assigned to the provinces, and such as are definitely dealt with by the Act itself, and subject, moreover, to an exception of undefined scope having relation to the sovereign, legislative authority throughout its whole range is committed to Parliament. As regards the executive, the declaration in the preamble already referred to, involves, as I have said, as a principle of the system, the responsibility of the executive to Parliament.

The argument advanced before us in favour of the limited construction is this: Women, it is said, at the time of the passing of the B.N.A. Act, were, under the common law, as well as under the civil law, relieved from the duties of public office or place, by a general rule of law, which affected them (except in certain ascertained or ascertainable cases) with a personal incapacity to accept or perform such duties; and, in particular, women were excluded by the law and practice of parliamentary institutions, both in England and in Canada, and indeed in the English speaking world, from holding a place in any legislative or deliberative body, and from voting for the election of a member of any such body. It must be assumed, it is said, that if the authors of the B.N.A. Act had intended, in the system established by the Act, to depart from this law or practice sanctioned by inveterate policy, the intention would have been expressed in unmistakable and explicit words. The word "persons" it is said, when employed in a statute, dealing with the constitution of a legislative body, and with cognate matters, does not necessarily include female persons, and in an enactment on such a subject passed in the year 1867 *prima facie* excludes them.

In support of this view, a series of decisions and judgments, from 1868 to 1922, delivered by English judges of the highest authority, are adduced, in which it was held that such general words were not in themselves adequate evidence of an intention to reverse the inveterate usage and policy in respect of the exclusion of women from the parliamentary franchise, from the legal professions, from a university Senate, from the House of Lords; and in particular, two judgments of Lord Loreburn and Lord Birkenhead, which, pronounced with convincing force, against reading a modern statute in such a manner as to effect momentous changes in the political constitution of the

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continued.
(*b*) Duff, J.
continued.

country, by, in the one case, admitting women to the parliamentary franchise, and in the other, to the House of Lords, in the absence of words plainly and explicitly declaring that such was the intention of Parliament.

Section 24, of course, in applying this principle, must not be treated as an independent enactment. The Senate is part of a parliamentary system; and, in order to test the contention, based upon this principle, that women are excluded from participating in working the Senate or any of the other institutions set up by the Act, one is bound to consider the Act as a whole, in its bearing on this subject of the exclusion of women from public office and place. Obviously, there are three general lines or policy which the authors of the statute might have pursued in relation to that subject. First, they might by a constitutional rule embodied in the statute, have perpetuated the legal rule affecting women with a personal incapacity for undertaking public duties, thus placing this subject among the limited number of subjects that are withdrawn from the authority of Parliament and the legislatures; second, they might, by a constitutional rule, in the opposite sense, embodied in the Act, have made women eligible for all public places or offices, or any of them, and thus, or to that extent, also, have withdrawn the subject from the legislative jurisdiction created by the act. They might, on the other hand, with respect to all public employments, or with respect to one or more of them, have recognized the existence of the legal incapacity, but left it to Parliament and the legislatures to remove that incapacity, or to perpetuate it as they might see fit. For example, they might have restricted the Governor in Council, in summoning persons to the Senate under section 24, by requiring him to address his summons to persons only who are under no such legal incapacity, which would have made women ineligible, but only so long as such incapacity remained and at the same time had left it within the power of the Parliament to obliterate the cause of the disability. The generality of the word "persons" in section 24 is, in point of law, susceptible of any qualification necessary to bring it into harmony with any of those three possible modes of treating the subject.

I have been unable to accept the argument in support of the limited construction, in so far as it rests upon the view that in construing the legislative and executive powers granted by the B.N.A. Act, we must proceed upon a general presumption against the eligibility of women for public office. I have come to the conclusion that there is a special ground, which I will state later, upon which the restricted construction of section 24 must be maintained but before stating that, I think it is right to explain why it is I think the general presumption contended for, has not been established.

And first, one must consider the provisions of the Act themselves, apart from the "extraneous circumstances," except for such references as may be necessary to make the enactments of the Act intelligible.

It would, I think, hardly be disputed that, as a general rule, the legislative authority of Parliament, and of legislatures enables them, each in their several fields, to deal fully with this subject of the incapacity of women. You could not hold otherwise without refusing effect to the language of

secs. 91 and 92; and indeed, one feels 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 I do not think that was seriously pressed.

There can be no doubt that the Act does, in two sections, recognize 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 are 41 and 84.

I quote section 41 in full,

> "Until the Parliament of Canada otherwise provides, all Laws in force in the several Provinces at the Union relative to the following Matters or any of them, namely,—the Qualifications and Disqualifications of Persons to be elected or to sit or vote as Members of the House of Assembly or Legislative Assembly in the several Provinces, the Voters at Elections of such Members, the Oaths to be taken by Voters, the Returning Officers, their Powers and Duties, the Proceedings at Elections, the Periods during which Elections may be continued, the Trial of controverted Elections, and Proceedings incident thereto, the vacating of Seats of Members, and the Execution of new Writs in case of Seats vacated otherwise than by Dissolution,—shall respectively apply to Elections of Members to serve in the House of Commons for the same several Provinces.
>
> "Provided that, until the Parliament of Canada otherwise provides, at any Election for a Member of the House of Commons for the District of Algoma, in addition to Persons qualified by the Law of the Province of Canada to vote, every male British Subject, aged Twenty-one Years or upwards, being a Householder, shall have a Vote."

To appreciate the purport of this section, it is necessary to note that in all the confederated provinces, women were disqualified as voters, that in one of the provinces, they were excluded, *eo nomine*, from places in the Legislative Assembly, and that in another, they were expressly excluded, but referentially, by the disqualification of all persons not qualified to vote; the right to vote having been confined explicitly to males. The phrase therefore "disqualification of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly in the various provinces," denotes disqualifications, which include *inter alia* disqualifications of women, while at the same time, the section recognizes the authority of the Dominion to legislate upon that subject. Mr. Rowell seemed to suggest that the legislative authority of Parliament, on the subject of qualification of members and voters, is derived from this section. I do not think so. It is given, it seems to me, under the general language of section 91, which obviously in its terms embraces it; but that does not affect

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the substance of the argument founded upon the section, which recognizes in the clearest manner, and by express reference, the authority of Parliament to deal with the subject of the disqualification of women in those aspects, women being demonstrably comprehended under the *nomen generale* " persons". This section 41 is taken almost *verbatim* from section 26 of the Quebec Resolutions, upon which the B.N.A. Act was mainly founded. It is difficult to suppose that the members of the Conference, who agreed upon these Resolutions, were unaware that, in that section, they were dealing with the subject. Section 84 is expressed in the same terms, and there can, I think be no warrant for attributing to the phrase quoted (or to the word " persons " which is part of it), diverse effects in the two sections. Indeed, there can be no doubt, that the province of Canada had enjoyed full authority under the Act of Union (and probably the Maritime provinces as well) to legislate upon the constitution of the Legislative Assembly, and the right to vote in the election of members to that body. Nor is it, I think, doubtful that, under section 1 of the *Union Act Amendment Act*, 1854, the legislature of Canada had full power to deal with the subject of qualifications of members of the Legislative Council, and to determine (subject it is true, to any bill upon the subject being reserved for Her Majesty's pleasure), whether or not women (here again comprehended in that section under the generic word " persons ") should be eligible for places therein.

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, is it quite clear that the construction of the general words of section 11 dealing with the constitution of the Privy Council, is 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 recognizes, as stated above, 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 shall be persons possessing its " confidence ", as the phrase is.

The subject of " responsible government," as the phrase went, had been for many years the field of a bitter controversy, especially in the province of Canada. The Colonial office had encountered great difficulties in reconciling, in practice, the full adoption of this principle with proper recognization of the position of the Governor as the representative of the Imperial Government. It was only a few years before 1867 that Sir John Macdonald's suggestion had been accepted, by which " Governor-in-Council " in Commissions, Instructions and Statutes was read as the Governor acting on the advice of his Council, which was thus enabled to transact business in the Governor's absence. There can be no doubt that this inter-relation between the executive and the representative branches of the government was, in the view of the framers of the Act, a most important element in the constitutional principles which they intended to be the foundation of the new structure.

It might be suggested, I cannot 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, I think, be a wholly baseless suggestion.

The word " persons " is 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 appears without an adjective, indubitably it is used in the unrestricted sense as embracing persons of both sexes; while in secs. 41 and 84, where males only are intended, that intention is expressed in appropriate specific words.

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

Nor am I convinced that the reasoning based upon the " extraneous circumstances " we are 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—establishes a rule of interpretation for the *British North America Act*, by which the construction of powers, legislative and executive, bestowed in general terms is controlled by a presumptive exclusion of women from participation in the working of the institutions set up by the Act.

When a statutory enactment expressed in general terms is relied upon as creating or sanctioning a fundamental legal or political change, the nature of the supposed change may, in itself, be such as to leave no doubt that it could have been effected, or authorized, if at all, only after full deliberation, and that the intention to do so would have been evidenced in apt or unmistakable enactments. In *Cox* v. *Hakes* (1), Lord Halsbury was content to rest his judgment on his conviction that, in a matter affecting vitally the legal securities for personal freedom, the " policy of centuries " would not be reversed by Parliament, by the use of a single general phrase; and in the decisions concerning the disabilities of women, from 1868 to 1922, a similar line of reasoning played no insignificant part, as we have seen. Such reasoning has also been considered to give support to the view that the prerogative of Her Majesty in relation to appeals, was left untouched by the *British North America Act; Nadan* v. *The King* (2); and by the (Australian) *Commonwealth*

(1) 15 App. Cas. 506.

(2) [1926] A.C. 482, at pp. 494, 495.

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Constitution Act, Webb v. *Outrim* (1); and was applied by the Supreme Court of the United States in reaching the conclusion that the 14th Amendment of the United States Constitution did not compel the States to admit women to the exercise of the legislative franchise. *Minor* v. *Happissett* (2).

But this mode of approach, though recognized by the courts as legitimate, must obviously be employed with caution. The " extraneous facts " upon which the underlying assumption is founded, must be demonstrative. It will 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.*

Let me illustrate this by reference to the Canadian Privy Council and the Provincial Executives. In 1867, 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, I do not think the " extraneous facts " relied upon are really of decisive importance, especially when the phraseology of the particular sections already mentioned is considered; and their value becomes 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 under the Act) in the law and practice relating to the election branch might be progressively required by changes in public opinion.

Then, assuming that the considerations relied upon are potent enough to enforce some degree of restrictive qualification, what should be the extent of that qualification? Should it go farther than limiting the

(1) [1907] A.C. 81, at pp. 91, 92.

(2) 22 L.C.P. 627, at p. 630.

classes of persons to be appointed, or summoned, to those not affected for the time being by a personal incapacity under some general rule of law, leaving it to Parliament or the legislatures to deal with the rule or rules entailing such disabilities?

For these reasons I cannot say that I am convinced of the existence of any such general resumption as that contended for. On the other hand, there are considerations which I think specially affect, and very profoundly affect, the question of the construction of sec. 24. 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.

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

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(*b*) Duff, J.
—*continued.*

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.

I have not overlooked Mr. Rowell's point based upon section 33 of the *British North America Act.* Sec. 33 must be supplemented by sec. 1 of the *Confederation Act Amendment Act* of 1875, and by section 4 of c. 10, R.S.C., the combined effect of which is that the Senate enjoys the privileges and powers, which at the time of the passing of the *British North America Act* were enjoyed by the Commons House of Parliament of the United Kingdom. In particular, by virtue of these enactments, the Senate possesses sole and exclusive jurisdiction to pass upon the claims of any person to sit and vote as a member thereof, except in so far as that jurisdiction is affected by statute. That, I think, is clearly the result of sec. 33, combined with the Imperial Act of 1875, and the subsequent Canadian legislation. And the jurisdiction of the Senate is not confined to the right to pass upon questions arising as to qualification under sec. 33; it extends, I think, also to the question whether a person summoned is a person capable of being summoned under sec. 24. In other words, when the jurisdiction attaches, it embraces the construction of sec. 24, and if the Governor-General were professing, under that section, to summon a woman to the Senate, the question whether the instrument was a valid instrument would fall within the scope of that jurisdiction. I do not think it can be assumed that the Senate, by assenting to the Statute, authorizing the submission of questions to this Court for advisory opinions, can be deemed thereby to have consented to any curtailment of its exclusive jurisdiction in respect of such questions. And therefore I have had some doubt whether such a question as that now submitted falls within the Statute by which we are governed. It is true that an affirmative answer to the question might give rise to a conflict between our opinion and a decision of the Senate in exercise of its jurisdiction; but strictly that is a matter affecting the advisability of submitting such questions, and therefore within the province of the Governor in Council. As yet, no concrete case has arisen to which the jurisdiction of the Senate could attach. We are asked for advice on the general question, and that, I think, we are bound to give. It has, of course, only the force of an advisory opinion.

The existence of this jurisdiction of the Senate does not, I think, affect the question of substance. We must assume that the Senate would decide in accordance with the law.

(c) MIGNAULT, J.—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. It is not apparent why we are asked merely if the word " persons " in section 24 of that Act includes " female persons." The expression " persons " does not 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. It would be idle to enquire whether women are included within the meaning of an expression which, in the question as framed, is divorced from its context. The real controversy, however, is apparent from the statement in the Order in Council that the petitioners are " interested in the admission of women to the Senate of Canada," and that His Excellency in Council is requested to refer to this court " certain questions touching the power of the Governor-General to summon female persons to the Senate of Canada." It is with that question that we have to deal.

(c) Mignault, J.

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* (1). It appears hopeless to contend against the authority of these decisions.

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.

While concurring generally in the reasoning of my Lord the Chief Justice, I have ventured to state the grounds on which I base my reply to the question submitted, as I construe it. This question should be answered in the negative.

(d) LAMONT, J.—I concur with the Chief Justice.

(d) Lamont, J.

(e) SMITH, J.—I concur with the Chief Justice.

(e) Smith, J.

(1) (1868) L.R. 4 C.P. 374.

In the Privy Council.

No. 11. Order in Council granting special leave to appeal to His Majesty in Council, 20th November 1928.

No. 11.

Order in Council granting special leave to appeal to His Majesty in Council.

AT THE COURT AT BUCKINGHAM PALACE.

The 20th day of November, 1928.

Present.

THE KING'S MOST EXCELLENT MAJESTY.

LORD STEWARD. SECRETARY SIR W. JOYNSON-HICKS.
LORD EUSTACE PERCY. SECRETARY SIR JOHN GILMOUR.
MAJOR-GENERAL SIR F. SYKES.

WHEREAS there was this day read at the Board a Report from the Judicial Committee of the Privy Council dated the 16th day of November 1928 in the words following viz. :—

"WHEREAS by virtue of His late Majesty King Edward the Seventh's Order in Council of the 18th day of October 1909 there was referred unto this Committee a humble Petition of Henrietta Muir Edwards Nellie L. McClung Louise C. McKinney Emily F. Murphy and Irene Parlby in the Matter of an 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 the Petitioners 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 setting forth (amongst other matters) that the Petitioners reside in the Province of Alberta: that Henrietta Muir Edwards is the Vice-President for Alberta of the National Council of Women for Canada: that Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the Province: that Emily F. Murphy is a Police Magistrate for the City of Edmonton: that Irene Parlby is a Member of the Legislative Assembly of the Province and a Member of the Executive Council thereof and that the Petitioners are persons interested in the right of women to participate in both the legislative and executive branches of the Government of Canada and of the Provinces thereof: that doubts having been raised as to the power of the Governor-General to summon a woman to the Senate of Canada the Petitioners on the 27th August 1927 petitioned the Governor-General in Council to refer to the Supreme Court of Canada for hearing and consideration certain questions touching the powers of the Governor-General to summon female persons to the Senate: that by Order in Council of the 19th October 1927 P.C. 2034 the Governor-General in Council referred to the Supreme Court for hearing and consideration pursuant to Section 60 of the Supreme Court Act the following question touching the power of the Governor-General to summon

No. 11.
Order in Council granting special leave to appeal to His Majesty in Council, 20th November 1928 —*continued.*

female persons to the Senate of Canada: 'Does the word "Persons" in Section 24 of the British North America Act 1867 include female persons?' : that the contention of the Petitioners is that the word 'persons' as used in Section 24 of the British North America Act 1867 and in other sections of the Act includes female persons: that the Supreme Court on the 24th April 1928 answered the question in the negative: And humbly praying Your Majesty in Council to order that the Petitioners shall have special leave to appeal from the Judgment of the Supreme Court of Canada dated the 24th April 1928 or for such further or other Order as to Your Majesty may appear fit:

"THE LORDS OF THE COMMITTEE in obedience to His late Majesty's said Order in Council have taken the humble Petition into consideration and having heard Counsel in support thereof and on behalf of the Attorney-General for the Dominion of Canada Their Lordships do this day agree humbly to report to Your Majesty as their opinion that leave ought to be granted to the Petitioners to enter and prosecute their Appeal against the Judgment of the Supreme Court of Canada dated the 24th day of April 1928:

"AND Their Lordships do further report to Your Majesty that the authenticated copy under seal of the Record produced by the Petitioners upon the hearing of the Petition ought to be accepted (subject to any objection that may be taken thereto by the Respondents) as the Record proper to be laid before Your Majesty on the hearing of the Appeal."

HIS MAJESTY having taken the said Report into consideration was pleased by and with the advice of His Privy Council to approve thereof and to order as it is hereby ordered that the same be punctually observed obeyed and carried into execution.

Whereof the Governor-General or Officer administering the Government of the Dominion of Canada for the time being and all other persons whom it may concern are to take notice and govern themselves accordingly.

M. P. A. HANKEY.

In the Privy Council.

No. 121 of 19

On Appeal from the Supreme Court of Canada.

In the matter of a Reference as to the mean of the word "persons" in Section 24 of British North America Act, 1867.

BETWEEN

HENRIETTA MUIR EDWARDS, NELLIE McCLUNG, LOUISE C. McKINNEY, EM F. MURPHY AND IRENE PARLBY

Appell

AND

THE ATTORNEY-GENERAL FOR THE MINION OF CANADA, THE ATTORN GENERAL FOR THE PROVINCE QUEBEC AND THE ATTORNEY-GENEI FOR THE PROVINCE OF ALBERTA

Respond

RECORD OF PROCEEDING

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