Privy Council Appeal No. 121 *of* 1928.

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

Henrietta Muir Edwards and others - - - - *Appellants*

v.

The Attorney-General of Canada and others - - - *Respondents*

FROM

THE SUPREME COURT OF CANADA.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 18TH OCTOBER, 1929.

Present at the Hearing:
THE LORD CHANCELLOR.
LORD DARLING.
LORD MERRIVALE.
LORD TOMLIN.
SIR LANCELOT SANDERSON.

[*Delivered by the* LORD CHANCELLOR.]

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."

The question at issue in this appeal is whether the words "qualified persons" in that section include a woman, and consequently whether women are eligible to be summoned to and become members of the Senate of Canada.

Of the appellants, Henrietta Muir Edwards is the Vice-President for the Province of Alberta of the National Council of Women for Canada; Nellie L. McClung and Louise C. McKinney were for several years members of the Legislative Assembly of the said province: Emily F. Murphy is a police magistrate in and for the said province; and Irene Parlby is a member of

the Legislative Assembly of the said province and a member of the Executive Council thereof.

On the 29th August, 1927, the appellants petitioned the Governor-General in Council to refer to the Supreme Court certain questions touching the powers of the Governor-General to summon female persons to the Senate, and upon the 19th October, 1927, the Governor-General in Council referred to the Supreme Court the aforesaid question. The case was heard before Chief Justice Anglin, Mr. Justice Duff, Mr. Justice Mignault, Mr. Justice Lamont and Mr. Justice Smith, and upon the 24th April, 1928, the Court answered the question in the negative; the question being understood to be "Are women eligible for appointment to the Senate of Canada."

The Chief Justice, whose judgment was concurred in by Mr. Justice Lamont and Mr. Justice Smith, and substantially by Mr. Justice Mignault, came to this conclusion upon broad lines mainly because of the Common Law disability of women to hold public office and from a consideration of various cases which had been decided under different statutes as to their right to vote for a member of Parliament.

Mr. Justice Duff, on the other hand, did not agree with this view. He came to the conclusion that women are not eligible for appointment to the Senate upon the narrower ground that upon a close examination of the British North America Act of 1867 the word "persons" in section 24 is restricted to members of the male sex. The result therefore of the decision was that the Supreme Court was unanimously of opinion that the word "persons" did not include female persons, and that women are not eligible to be summoned to the Senate.

Their Lordships are of opinion that the word "persons" in section 24 *does* include women, and that women are eligible to be summoned to and become members of the Senate of Canada.

In coming to a determination as to the meaning of a particular word in a particular Act of Parliament it is permissible to consider two points, viz. :—

(i) The external evidence derived from extraneous circumstances such as previous legislation and decided cases.

(ii) The internal evidence derived from the Act itself.

As the learned Counsel on both sides have made great researches and invited their Lordships to consider the legal position of women from the earliest times, in justice to their argument they propose to do so and accordingly turn to the first of the above points, viz. :—

(i) The external evidence derived from extraneous circumstances.

The exclusion of women from all public offices is a relic of days more barbarous than ours, but it must be remembered that the necessity of the times often forced on man customs which in

later years were not necessary. Such exclusion is probably due to the fact that the deliberative assemblies of the early tribes were attended by men under arms, and women did not bear arms. "*Nihil autem neque publicae neque privatae rei, nisi armati, agunt*": Tacitus Germania, C. 13. Yet the tribes did not despise the advice of women. "*Inesse quin etiam sanctum et providum putant, nec aut consilia earum aspernantur aut responsa neglegunt*": Germania C. 8.

The likelihood of attack rendered such a proceeding unavoidable, and after all what is necessary at any period is a question for the times upon which opinion grounded on experience may move one way or another in different circumstances. This exclusion of women found its way into the opinions of the Roman jurists, Ulpian (A.D. 211) laying it down. "*Feminae ab omnibus officiis civilibus vel publicis remotae sunt*": Dig. 1.16.195.

The barbarian tribes who settled in the Roman Empire, and were exposed to constant dangers, naturally preserved and continued the tradition.

In England 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 was not, nor is, entitled as an incident of peerage to receive a Writ of Summons to the House of Lords.

Various authorities are cited in the recent case of *Viscountess Rhondda's claim* [1922], 2 A.C. 339 where it was held that a woman was not entitled to sit in the House of Lords. Women were, moreover, subject to a legal incapacity to vote at the election of Members of Parliament: Coke, 4 Inst., page 5.

Chorlton v. *Lings* (1868), L.R. 4 C.P. 374; or of Town Councillor: *The Queen* v. *Harrold* (1872), L.R. 7 Q.B. 361; or to be elected members of the County Council: *Beresford Hope* v. *Sandhurst* (1889) 23 Q.B.D. 79.

They were excluded 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, 3 Bl. Comm. 362.

Other instances are referred to in the learned judgment of Mr. Justice Willes in *Chorlton* v. *Lings* (*supra*).

No doubt in the course of centuries there may be found cases of exceptional women and exceptional instances, but as Lord Esher said in *de Souza* v. *Cobden* [1891] 1 Q.B. 687, at page 691, "By the Common Law of England women are not in general deemed capable of exercising public functions, although there are certain exceptional cases where a well recognised custom to the contrary has become established." An instance may be referred to in the case of women being entitled to act as churchwardens and as sextons, the latter being put upon the ground that a sexton's duty was in the nature of a private trust: *Olive* v. *Ingram* (1738)

7 Mod. 263. Also of being appointed as overseer of the poor: *The King* v. *Stubbs* (1788) 2 T.R. 395. The tradition existed till quite modern times: see *Bebb* v. *Law Society* [1914] 1 Ch. 286, where it was held by the Court of Appeal that by inveterate usage women were under a disability by reason of their sex to become attorneys or solicitors.

The passing of Lord Brougham's Act in 1850 does not appear to have greatly affected the current of authority. Section 4 provided that in all acts words importing the masculine gender shall be deemed and taken to include female unless the contrary as to gender is expressly provided.

The application and purview of that Act came up for consideration in *Chorlton* v. *Lings*, *ubi supra*, where the Court of Common Pleas was required to construe a statute passed in 1861, 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 the words "every man" included women. Chief Justice Bovill, 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, declined to accept the view that Parliament had made that change by using the term "man" and held that the word was intentionally used expressly to designate the male sex. Willes, J., said: "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."

Great reliance was placed by the respondents to this appeal upon that decision, but in our view it is clearly distinguishable.

The case was decided on the language of the Representation of the People Act, 1867, which provided that "every man" with certain qualifications and "not subject to any legal incapacity" should be entitled to be registered as a voter. Legal incapacity was not defined by the Act and consequently reference was necessary to the Common Law disabilities of women.

A similar result was reached in the case of *Nairn* v. *University of St. Andrews* [1909], A.C. 147, where it was held under section 27 of the Representation of the People (Scotland) Act, 1868, which provided that every person whose name is for the time being on the register of the General Council of such university shall, being 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, that the word "person" did not include women, but the Lord Chancellor, Lord Loreburn, referred to the position of women at Common Law and pointed out that they were subject to a legal incapacity. Both in this case and in the case of the Viscountess Rhondda the various judgments emphasise the fact that the legislature in dealing with the matter cannot be taken to have departed from the usage of

centuries, or to have employed loose and ambiguous words to carry out a so momentous and fundamental change.

The judgment of the Chief Justice of the Supreme Court of Canada refers to and relies upon these cases, but their Lordships think that there is great force in the view taken by Mr. Justice Duff with regard to them, when he says that section 24 of the British North America Act, 1867, must not be treated as an independent enactment. The Senate, he proceeds, 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 other institution set up by the Act one is bound to consider the Act as a whole and its bearings on this subject of the exclusion of women from public office and place.

Their Lordships now turn for a moment to the special history of the development of Canadian legislature as bearing upon the matter under discussion.

The Province of Canada was formed by the Union under the Act of Union, 1840, 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, had been divided under the Constitutional Act of 1791. In the Province of Quebec from its first establishment in 1763 until 1774, the Government was carried on by the Governor and the Council, composed of four named persons and eight other "*persons*" to be chosen by the Governor from amongst the most considerable of the inhabitants or of other persons of property in our said Province.

The Quebec Act of 1774 entrusted the government of the Province to a Governor and Legislative Council of such "*persons*" resident there, not exceeding 23, nor less than 17, as His Majesty shall be pleased to appoint.

The Constitutional Act of 1791 upon the division of the Province of Quebec into two separate provinces to be called the Provinces of Upper and Lower Canada 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 provinces The Legislative Council was to consist of a sufficient number of discreet and proper "persons" not less than 7 for Upper Canada and 15 for Lower Canada.

Under the Act of Union, 1840, these two provinces were reunited so as to constitute one province under the name of the Province of Canada and the Legislative Council was to be composed of such "persons" being not fewer than 20 as Her Majesty shall think fit.

In 1865 the Canadian Legislature under the authority of the Imperial Act passed an Act which altered the constitution of the Legislative Council by rendering the same elective.

The new constitution as thus altered continued till the Union of 1867.

It will be noted that in all the Acts the word " persons " is used in respect of those to be elected members of the Legislative Council, and there are no adjectival phrases so qualifying the word as to make it necessarily refer to males only.

In Quebec, just as in England, there can be found cases of exceptional women and exceptional instances. For example, in certain districts, namely, at Trois Rivières in 1820 women apparently voted, while in 1828 the Returning Officer in the constituency of the Upper Town of Quebec refused to receive the votes of women.

In 1834 the Canadian Parliament passed an Act of Parliament excluding women from the vote, but two years later the Act was disallowed because the Imperial Government objected to another section in it.

The matter, however, was not left there and in 1849 by a statute of the Province of Canada, 12 Vict. c. 27, s. 46, it was declared and enacted that no woman is or shall be entitled to vote at any Election, whether for any county or riding, city or town, of members to represent the people of this Province in the Legislative Assembly thereof.

The development of the maritime provinces proceeded on rather different lines. From 1719 to 1758 the Provincial Government of Nova Scotia consisted of a Governor and a Council which was both a legislative and an executive body composed of such fitting and discreet " *persons,*" not exceeding 12 in number, as the Governor should nominate. A General Assembly for the Province was called in 1757, 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.

In 1784 a 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 a Governor and 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 " but required to be men of good life and of ability suitable to their employment.

In 1832 the Executive Authority was separated and made distinct from the Legislative Council.

In 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, but by the revised statutes of Nova Scotia (second series) in 1859 the exercise of the franchise was confined to male subjects over 21 years of age and a candidate for election was required to have the qualification which would enable him to vote.

In the Province of New Brunswick by the Provincial Act,

11 Vict. c. 65, s. 17, the Parliamentary franchise was confined to male persons of the full age of 21 years who possessed certain property qualifications.

It must, however, be pointed out that a careful examination has been made by the assistant Keeper of Public Records of Canada of the list containing the names of the executive and Legislative Councils and Houses of Assembly in Quebec (including those of Upper and Lower Canada), of the Province of Canada, of the Province of Nova Scotia and of the Province of New Brunswick down to 1867, and on none of the lists did he find the name of a person of the female sex.

Such briefly is the history and such are the decisions in reference to the matter under discussion.

No doubt in any code where women were expressly excluded from public office the problem would present no difficulty, but where instead of such exclusion those entitled to be summoned to or placed in public office are described under the word " person " different considerations arise.

The word is ambiguous and in its original meaning would undoubtedly embrace members of either sex. On the other hand, supposing in an Act of Parliament several centuries ago it had been enacted that any person should be entitled to be elected to a particular office it would have been understood that the word only referred to males, but the cause of this was not because the word " person " could not include females but because at Common Law a woman was incapable of serving a public office. The fact that no woman had served or has claimed to serve such an office is not of great weight when it is remembered that custom would have prevented the claim being made, or the point being contested.

Customs are apt to develop into traditions which are stronger than law and remain unchallenged long after the reason for them has disappeared.

The appeal to history therefore in this particular matter is not conclusive.

As far back as *Stradling* v. *Morgan* (1560), 1 Plowd. 209, it was laid down that extraneous circumstances may be admitted as an aid to the interpretation of a statute and in *Herron* v. *Rathmines and Rathgar Improvement Commissioners* [1892], A.C. 498, Lord Halsbury said " The subject matter with which the Legislature was dealing, and the facts existing at the time with respect to which the Legislature was legislating, are legitimate topics to consider in ascertaining what was the object and purpose of the Legislature in passing the Act," but the argument must not be pushed too far and their Lordships are disposed to agree with Farwell, L.J., in *Rex* v. *West Riding of Yorkshire County Council*, [1906] 2 K.B. 676, " although it may, perhaps, be legitimate to call history in aid to show what facts existed to bring about a statute, the inferences to be drawn therefrom are exceedingly slight " : see Craies Statute Law, Edit. III, p. 118.

Over and above that, their Lordships do not think it right to apply rigidly to Canada of to-day the decisions and the reasonings therefor which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries to countries in different stages of development. Referring therefore to the judgment of the Chief Justice and those who agreed with him, their Lordships think that the appeal to Roman Law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act of 1867.

Their Lordships fully appreciate the learned arguments set out in his judgment, but prefer, on this part of the case, to adopt the reasonings of Mr. Justice Duff who did not agree with the other members of the Court, for reasons which appear to their Lordships to be strong and cogent. As he says, "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 participating in the working of the institutions set up by the Act."

Their Lordships now turn to the second point, namely,

(ii) the internal evidence derived from the Act itself.

Before discussing the various sections they think it necessary to refer to the circumstances which led up to the passing of the Act

The communities included within the Britannic system embrace countries and peoples in every stage of social, political and economic development and undergoing a continuous process of evolution.

His Majesty the King in Council is the final Court of Appeal from all these communities and this Board must take great care therefore not to interpret legislation meant to apply to one community by a rigid adherence to the customs and traditions of another. Canada had its difficulties both at home and with the mother country, but soon discovered that union was strength. Delegates from the three maritime provinces met in Charlottetown on the 1st September, 1864, to discuss proposals for a Maritime Union. A delegation from the Coalition Government of that day proceeded to Charlottetown and placed before the Maritime delegates their schemes for a Union embracing the Canadian Provinces. As a result the Quebec conference assembled on the 10th October, continued in session till the 28th October and framed a number of resolutions. These resolutions as revised by the delegates from the different provinces in London in 1866 were based upon a consideration of the rights of others and expressed in a compromise which will remain a lasting monument to the political genius of Canadian statesmen. Upon those resolutions the British North America

Act of 1867 was framed and passed by the Imperial Legislature. The Quebec resolutions dealing with the Legislative Council, viz., Nos. 6-24, even if their Lordships are entitled to look at them, do not shed any light on the subject under discussion. They refer generally to the " members " of the Legislative Council.

The British North America Act planted in Canada a living tree capable of growth and expansion within its natural limits. The object of the Act was to grant a Constitution to Canada.

> " Like all written constitutions it has been subject to development through usage and convention." (Canadian Constitutional Studies, Sir Robert Borden (1922), p. 55).

Their Lordships do not conceive it to be the duty of this Board—it is certainly not their desire— to cut down the provisions of the Act by a narrow and technical construction, but rather to give it a large and liberal interpretation so that the Dominion to a great extent, but within certain fixed limits, may be mistress in her own house, as the provinces to a great extent, but within certain fixed limits. are mistresses in theirs.

> " The Privy Council, indeed, has laid down that Courts of law must treat the provisions of the British North America Act by the same methods of construction and exposition which they apply to other statutes. But there are statutes and statutes ; and the strict construction deemed proper in the case, for example, of a penal or taxing statute or one passed to regulate the affairs of an English parish, would be often subversive of Parliament's real intent if applied to an Act passed to ensure the peace, order and good government of a British Colony." See Clement's Canadian Constitution, ed. 3, page 347.

The learned author of that treatise quotes from the argument of Mr. Mowat and Mr. Edward Blake before the Privy Council in *St. Catherine's Milling and Lumber Co.* v. *The Queen* (1888), 14 App. Cas., 46 at p. 50. " The Act should be on all occasions interpreted in a large, liberal and comprehensive spirit, considering the magnitude of the subjects with which it purports to deal in very few words." With that their Lordships agree, but as was said by the Lord Chancellor in *Brophy* v. *The Attorney General of Manitoba* [1895], A.C. 202 at p. 216, the question is not what may be supposed to have been intended, but what has been said.

It must be remembered, too, that their Lordships are not here considering the question of the legislative competence either of the Dominion or its Provinces which arise under sections 91 and 92 of the Act providing for the distribution of legislative powers and assigning to the Dominion and its Provinces their respective spheres of Government.

Their Lordships are concerned with the interpretation of an Imperial Act, but an Imperial Act which creates a constitution for a new country. Nor are their Lordships deciding any question as to the rights of women but only a question as to their eligibility for a particular position. No one either male or female has a right to be summoned to the Senate. The real point at issue is whether the Governor-General has a right to summon women to the Senate.

The Act consists of a number of separate heads.

The preamble states that the provinces of Canada, Nova Scotia and New Brunswick have expressed their desire 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.

Head No. 2 refers to the Union.

Head No. 3, sections 9 to 16, to the executive power.

It is in section 11 that the word "persons" which is used repeatedly in the Act, occurs for the first time.

It provides that the persons who are members of the Privy Council shall be from time to time chosen and summoned by the Governor-General.

The word "person" as above mentioned may include members of both sexes, and to those who ask why the word should include females, the obvious answer is why should it not.

In these circumstances the burden is upon those who deny that the word includes women to make out their case.

Head No. 4 (sections 17–21) deals first with the legislative power. Section 17 provides there shall be one Parliament for Canada consisting of the Queen, an Upper House styled the Senate, and the House of Commons. Sections 21–36 deal with the creation, constitution and powers of the Senate. They are the all important sections to consider in the present case and their Lordships return to them after briefly setting out the remaining sections of the Act.

Sections 37–57 deal with the creation, constitution and powers of the House of Commons with special reference to Ontario, Quebec, Nova Scotia and New Brunswick which were the first provinces to come in under the scheme, although power was given under section 146 for other provinces to come in which other provinces have availed themselves of.

Head No. 5 (sections 58–90) deals with the provincial constitutions, and defines both their executive and legislative powers.

Head No. 6 (sections 91–95) deals with the distribution of legislative powers.

Head No. 7 (sections 96–101) deals with the Judicature.

Head No. 8 (section 102–126) deals with revenues, debts, assets and taxation.

Head No. 9 (sections 127–144) deals with miscellaneous provisions.

Head No. 10 (section 145) deals with the intercolonial railway, and

Head No. 11 (sections 146–147) deals with the admission of other colonies.

Such being the general analysis of the Act, their Lordships turn to the special sections dealing with the Senate.

It will be observed that section 21 provides that the Senate shall consist of 72 members who shall be styled senators. The word "member" is not in ordinary English confined to male

persons. Section 24 provides that the Governor-General shall summon qualified persons to the Senate.

As already pointed out, " persons " is not confined to members of the male sex, but what effect does the adjective " qualified " before the word " persons " have.

In their Lordships' view it refers back to the previous section, which contains the qualifications of a Senator. Sub-sections 2 and 3 appear to have given difficulties to the Supreme Court. Sub-section 2 provides that the qualification of a senator shall be that he shall be either a natural born subject of the Queen naturalised by an Act of Parliament of Great Britain or of one of the Provincial Legislatures before the Union or of the Parliament of Canada after the Union. The Chief Justice in dealing with this says that it does not include those who become subjects by marriage, a provision which one would have looked for had it been intended to include women as being eligible.

The attention of the Chief Justice, however, was not called to the Aliens Act, 1844 (7 and 8 Vict. c. 66). Section 16 of which provides that any woman married or who shall be married to a natural born subject or person naturalised shall be deemed and taken to be herself naturalised and have all the rights and privileges of a natural born subject. The Chief Justice assumed that by Common Law a wife took her husband's nationality on marriage, but by virtue of that section any woman who marries a natural born or naturalised British subject was deemed and taken to be herself naturalised. Accordingly, section 23, sub-section 2, uses language apt to cover the case of those who become British subjects by marriage.

Their Lordships agree with Mr. Justice Duff when he says " I attach no importance to the use of the masculine personal pronoun in section 23, and, indeed, very little importance to the provision in section 23 with regard to nationality " and refer to section 1 of the Interpretation Act, 1889, which in section 1 (2) provides that words importing the masculine gender shall include females.

The reasoning of the Chief Justice would compel their Lordships to hold that the word " persons " as used in section 11 relating to the constitution of the Privy Council for Canada was limited to " male persons " with the resultant anomaly that a woman might be elected a member of the House of Commons but could not even then be summoned by the Governor-General as a member of the Privy Council.

Sub-section 3 of section 23 provided that the qualification of a Senator shall be that he is legally and equitably seised of a freehold for his own use and benefit of lands and tenements of a certain value. This section gave some trouble to Mr. Justice Duff who says that subsection points to the exclusion of married women and would have been expressed in a different way if the presence of married women had been contemplated.

Their Lordships think that this difficulty is removed by a consideration of the rights of a woman under the Married Women's

Property Acts. A married woman can possess the property qualification required by this subsection. Apart from statute a married woman could be equitably seized of freehold property for her own use only and by an Act respecting certain separate rights of property of married women consolidated statutes of Upper Canada, cap. 73 sec. 1, it was provided :—

> " Every woman who has married since the 4th May, 1859, or who marries after this Act takes effect, without any marriage contract or settlement, shall and may, notwithstanding her coverture, have, hold and enjoy all her real and personal property . . . in as full and ample a manner as if she continued sole and unmarried . . . ."

Their Lordships do not think it possible to interpret the word " persons " by speculating whether the framer of the British North America Act purposely followed the system of Legislative Councils enacted in the Acts of 1791 and 1840 rather than that which prevailed in the Maritime Province for the model on which the Senate was to be formed, neither do they think that either of these subsections is sufficient to rebut the presumption that the word " persons " includes women. Looking at the sections which deal with the Senate as a whole (sections 21–36) their Lordships are unable to say that there is anything in those sections themselves upon which the Court could come to a definite conclusion that women are to be excluded from the Senate.

So far with regard to the sections dealing especially with the Senate—Are there any other sections in the Act which shed light upon the meaning of the word " persons " ?

Their Lordships think that there are. For example, section 41 refers to the qualifications and disqualifications of persons to be elected or to sit or vote as members of the House of Assembly or Legislative Assembly and by a proviso it is said 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 21 years or upwards being a householder shall have a vote. This section shows a distinction between " persons " and " males." If persons excluded females it would only have been necessary to say every person who is a British subject aged 21 years or upwards shall have a vote.

Again in section 84 referring to Ontario and Quebec a similar proviso is found stating that every male British subject in contradistinction to " person " shall have a vote.

Again in section 133 it is provided that either the English or the French language may be used by any person or in any pleadings in or issuing from any court of Canada established under this Act and in or from all of any of the courts of Quebec. The word " person " there must include females as it can hardly have been supposed that a man might use either the English or the French language but a woman might not.

If Parliament had intended to limit the word " persons " in

section 24 to male persons it would surely have manifested such intention by an express limitation as it has done in sections 41 and 84. The fact that certain qualifications are set out in section 23 is not an argument in favour of further limiting the class, but is an argument to the contrary because it must be presumed that Parliament has set out in section 23 all the qualifications deemed necessary for a Senator and it does not state that one of the qualifications is that he must be a member of the male sex.

Finally with regard to section 33, which provides that if any question arises respecting the qualifications of a Senator or a vacancy in the Senate the same shall be heard and determined by the Senate that section must be supplemented by section 1 of the Parliament of Canada Act, 1875, and by section 4 of c. 10 of R.S.C. and their Lordships agree with Mr. Justice Duff when he says, " 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."

The history of these sections and their interpretation in Canada is not without interest and significance.

From Confederation to date both the Dominion Parliament and the provincial Legislatures have interpreted the word " persons " in section 41 and 84 of the British North America Act as including female persons and have legislated either for the inclusion or exclusion of women from the class of persons entitled to vote and to sit in the Parliament and Legislature respectively, and this interpretation has never been questioned.

From Confederation up to 1916 women were excluded from the class of persons entitled to vote in both Federal and Provincial elections.

From 1916 to 1922 various Dominion and Provincial Acts were passed to admit women to the Franchise and to the right to sit as members in both Dominion and Provincial legislative bodies.

At the present time women are entitled to vote and to be candidates :—

(1) At all Dominion elections on the same basis as men.

(2) At all provincial elections save in the Province of Quebec.

From the date of the enactment of the Interpretation Acts in the Province of Canada, Nova Scotia and New Brunswick prior to Confederation and in the Dominion of Canada since Confederation and until the franchise was extended, women have been excluded by express enactment from the right to vote.

Neither is it without interest to record that when upon the 20th May, 1867, the Representation of the People Bill came before a Committee of the House of Commons, John Stuart Mill moved an amendment to secure women's suffrage and the amendment

proposed was to leave out the word " man " in order to insert the word " person " instead thereof. See Hansard, 3rd series, vol. 187, col. 817.

A heavy burden lies on an appellant who seeks to set aside a unanimous judgment of the Supreme Court, and this Board will only set aside such a decision after convincing argument and anxious consideration, but having regard

(1) To the object of the Act, viz., to provide a constitution for Canada, a responsible and developing State ;

(2) that the word " person " is ambiguous and may include members of either sex ;

(3) that there are sections in the Act above referred to which show that in some cases the word " person " must include females ;

(4) that in some sections the words " male persons " is expressly used when it is desired to confine the matter in issue to males, and

(5) to the provisions of the Interpretation Act ;

their Lordships have come to the conclusion that the word " persons " in section 24 includes members both of the male and female sex and that, therefore, the question propounded by the Governor-General must be answered in the affirmative and that women are eligible to be summoned to and become members of the Senate of Canada, and they will humbly advise His Majesty accordingly.

HENRIETTA MUIR EDWARDS AND OTHERS

v.

THE ATTORNEY-GENERAL OF CANADA AND OTHERS.

DELIVERED BY THE LORD CHANCELLOR.

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