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*March 14.
*April 24.

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

Constitutional law—Statute—Senate—Eligibility of women—" Qualified persons "—Meaning—B.N.A. Act, 1867, ss. 23, 24.

Women are not " qualified persons " within the meaning of section 24 of the B.N.A. Act, 1867, and therefore are not eligible for appointment by the Governor General to the Senate of Canada.

Per Anglin C.J.C. and Mignault, Lamont and Smith JJ.—The authority of *Chorlton* v. *Lings* (L.R. 4 C.P. 374) is conclusive 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, so that (if otherwise applicable) Lord Broughams' Act (which enacts that " words importing the masculine gender shall be deemed and taken to include females) cannot be invoked to extend the term " qualified persons " to bring " women " within its purview.

*PRESENT:—Anglin C.J.C. and Duff, Mignault, Lamont and Smith JJ.

Per Anglin C.J.C. and Lamont and Smith JJ.—The various provisions of the B.N.A. Act passed in the year 1867 bear to-day the same construction which the courts would, if then required to pass upon them, have given to them when they were enacted. If the phrase "qualified persons" in section 24 includes women to-day, it has so included them since 1867. But it must be inferred that the Imperial Parliament, in enacting sections 23, 24, 25, 26 and 32 of the B.N.A. Act, when read in the light of other provisions of the statute and of relevant circumstances proper to be considered, did not give to women the power to exercise the public functions of a senator, 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.

Per Duff J.—It seems to be a legitimate inference that the B.N.A. Act, in enacting the sections relating to the "Senate," 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 Legislative Councils established by the earlier statutes of 1791 and 1840; and, under those statutes, it is hardly susceptible of dispute that women were not eligible for appointment.

REFERENCE by His Excellency the Governor General in Council to the Supreme Court of Canada, under and pursuant to the *Supreme Court Act* of certain question for hearing and consideration as to the meaning of the word "persons" in section 24 of the British North America Act, 1867.

The Order in Council providing for the reference was dated 19th October, 1927 and reads as follows:

"The Committee of the Privy Council have had before "them a Report, dated 18th October, 1927, from the Min- "ister of Justice, submitting that he has had under con- "sideration 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 consid- "eration certain questions touching the power of the Gov- "ernor General to summon female persons to the Senate of "Canada.

"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

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'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 oc- "casion 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?"

Pursuant to an order of the court, notification of the hearing of the reference was sent to the Attorneys General of Ontario, Quebec, Nova Scotia, New Brunswick, Manitoba, British Columbia, Prince Edward Island, Alberta and Saskatchewan and to the above petitioners. The Attorneys General of the provinces of Quebec and Alberta were represented by counsel at the hearing.

Hon. Lucien Cannon K.C., Solicitor-General, *Eug. Lafleur K.C.* and *C. P. Plaxton K.C.* for the Attorney General of Canada.

N. W. Rowell K.C. and *G. C. Lindsay* for the petitioners.

Chas. Lanctot K.C. for the Attorney General for Quebec.

N. W. Rowell K.C. for the Attorney General for Alberta.

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:

(2) 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 Francalleu 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

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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 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 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 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

(1) [1922] 2 A.C. 339, at pp. 384-5.

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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*) (1) 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* (2), 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.

"In deciding the question before us", said Turner L. J., in *Hawkins* v. *Gathercole* (3),

> 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* (4)); 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* (5).

Two outstanding facts or circumstances of importance bearing upon the present reference appear to be

(1) [1887] 12 A.C. 575, at p. 579.
(2) 1 Plowd. 203, at p. 205.
(3) 6 DeG. M. & G., 1, at p. 21.
(4) (1876) 1 Q.B.D. 546 at p. 554.
(5) (1868) L.R. 4 C.P. 374, at p. 398.

(*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 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* (1), 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* (2), 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 be quite inconsistent with one of the glories of our civilization, 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 Colquhon (*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) brethern") in *Beresford-Hope* v. *Sandhurst* (3)

I take the first proposition to be that laid down by Willes J., in the case of *Chorlton* v. *Lings* (4). 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.

(1) (1889) 23 Q.B.D. 79, at p. 91.
(2) L.R. 4 C.P. 374, at p. 392.
(3) 23 Q.B.D. 79, at p. 95.
(4) L.R. 4 C.P. 374.

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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* (1).

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 (2).

> 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* (2), 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* (3) that the absence of all 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* (4); *Hall* v. *Incorporated Society of Law Agents* (5); *Rex* v. *Crossthwaite* (6), and to the judgment of Gray C.J., in *Robinson's Case* (7), 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 recognized 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* (7), 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

(1) [1891] 1 Q.B. 687, at p. 691.
(2) [1922] 2 A.C. 389, at p. 362.
(3) L.R. 4 C.P. 374
(4) (1868) 7 Court of Sess. Cases, 3rd Series, 281.
(5) (1901) 38 Scottish Law Reporter, 776.
(6) (1864) 17 Ir. C.L.R. 157, 463, 479.
(7) (1881) 131 Mass., 371, at p. 379.
(8) 23 Q.B.D. 79, at pp. 91, 92.

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* (1). 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.

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

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

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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* (1). 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* (2).

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

In section 41 of the B.N.A. Act, which deals with the qualifications for membership of the House of Commons and of the voters at elections of such members, "persons" would seem to be used in its wider signification, since, while in both these matters the legislation affecting the former Provincial Houses of Assembly, or Legislative Assemblies, is thereby made applicable to the new House of Commons, it remains so only "until the 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

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

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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 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

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

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 grammer 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 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).

(1) [1919] Ir. R. 1 Ch. 81, at pp. 89, 95.

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Anglin C.J.C.

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* (1), and *Bebb* v. *The Law Society* (2).

The decision in *Chorlton* v. *Lings* (3) is of the highest authority, as was recognized in the House of Lords by Earl Loreburn, L.C., in *Nairn* v. *University of St. Andrews* (4), 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 (5).

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* (3) 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*) (6), 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.

(1) (1872) L.R. 7 Q.B. 361.
(2) [1914] 1 Ch. 286.
(3) L.R. 4 C.P. 374.
(4) [1909] A.C. 147.
(5) [1922] 2 A.C. 339.
(6) [1907] A.C. 179, at p. 184.

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. 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

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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 unmistakeable 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 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 sum-

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mons 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 have 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, *co 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 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

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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 gen-

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eral 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; Nadon* v. *The King* (2); and by the (Australian) *Commonwealth Constitution Act, Webb* v. *Outrim* (3); 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* (4).

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

(1) 15 App. Cas. 506.
(2) [1926] A.C. 482 at pp. 494, 495.
(3) [1907] A.C. 81 at pp. 91, 92.
(4) 22 L.C.P. 627 at p. 630.

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 classes of persons to be appointed, or summoned, to those not affected for the time being by a personal incapacity under some general rule

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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 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

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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.

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 Sen-

ate, 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.

The contentions which the petitoners 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.

LAMONT J.—I concur with the Chief Justice.

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

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SMITH J.—I concur with the Chief Justice.

The formal judgment of the court was as follows:—

"Understood to mean 'Are women eligible for appointment to the Senate of Canada,' the question is answered in the negative."