WOMEN AND THE EXERCISE OF PUBLIC FUNCTIONS

By Enid Campbell *

There was a time not for distant from the present when social decorum and the law alike strictly forbade females, married or single, from discharging those duties and functions thought to involve an element of public trust. Such were the legal disabilities imposed upon women that they were disqualified by sex from returning members to Parliament, from electing members to local authorities, and from being themselves elected or appointed to any public office or any body exercising legislative or judicial functions. Curiously, however, the precise status of women in public law was not explored and defined with any certainty until concerted efforts were made by English femininists to break down the old barriers of prejudice and prevailing notions of propriety. Only when a sufficient number of determined female litigants appeared on the scene did the English courts determine authoritatively the extent of the common law disqualifications and pronounce upon the appropriate legislative formulae for the removal of these disqualifications.

Although the movement for emancipation of women in England began in the early part of the nineteenth century, removal of legal disabilities respecting the exercise of public functions was not fully realised until 1958 when peeresses were permitted for the first time to sit in the House of Lords.[1] The experience of Australian women in some respects was more fortunate, for in such matters as the franchise, common law disqualifications were removed earlier and with far less opposition and civil disturbance than accompanied suffragette activity in Britain. Adult female suffrage was not granted in Britain until 1928, whereas in Australia, Victoria, the last State to give equal voting rights to men and women, conferred female franchise in 1908, ten years before the British Parliament made the first concession by extending the franchise to women of thirty years and over. In other respects, the time lag between British and Australian reforms was less pronounced: only Queensland and Victoria unequivocally declared women qualified to be elected to Parliament before, or about the same time as the British Parliament in 1918 enacted that women should "not be disqualified by sex or marriage from being elected to or sitting or voting as a member

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1. See Norman St. John-Stevas, "Women in Public Law", in *A Century of Family Law*, edited by R. H. Graveson and F. R. Crane, London, 1957 See also *Viscount Rhondda's Claim* [1922] 2 A.C. 339.

of the Commons House of Parliament".[2] Only New South Wales took the lead from Britain in enacting a general sex disqualification removal statute (in 1918), whilst the corresponding Victorian and Western Australian statutes of 1926 and 1923[3] respectively have been modelled on the British Sex Disqualification (Removal) Act of 1919[4] which provided that:

> A person shall not be disqualified by sex or marriage from the exercise of any public function, or from being appointed to or holding any civil or judicial office or post, or from entering or assuming or carrying on any civil profession or vocation, or for admission to any incorporated society (whether incorporated by Royal charter or otherwise) and a person shall not be exempted from the liability to serve as a juror.

In the absence of express disqualifications removal provisions, the question of whether women are eligible for the exercise of public functions regulated by statute, usually turns on interpretation of the word "person". Notwithstanding that in 1850 the British Parliament declared that words of the masculine gender should import words of the feminine gender,[5] English courts have taken the view that this provision in itself is not sufficient to remove common law disqualifications. How far the construction of Australian statutes containing clauses defining the qualifications of "persons" for the exercise of public functions is controlled by the strict interpretation of similar clauses in British statutes is now open to doubt. While there is no modern Australian authority on this issue, an opinion of the Judicial Committee of the Privy Council given on appeal from Canada in 1931, clearly suggests that less exacting requirements in legislative drafting need be fulfilled in the colonies and self-governing dominions than in Britain.[6] In over-ruling the advisory opinion rendered by the Canadian Supreme Court upon a case submitted

2. Representation of the People Act, 1918 (7 & 8 Geo. 5, c.64), Qualification of Women Act, 1918 (8 & 9 Geo. 5, c. 47) and Representation of the People (Equal Franchise) Act (18 & 19 Geo. V. c. 12).
3. N.S.W.: Women's Legal Status Act, 1918; Vic.: Women's Qualification Act, 1928 (this replaced an Act of the same title passed in 1926); W.A.: Women's Legal Status Act, 1923. The South Australian Sex Disqualification (Removal) Act, 1921, deals only with the offices of Justice of the Peace and Notary.
4. 9 & 10 Geo. 5, c. 71. This Act did not confer on women the right to be admitted to the civil service on the same terms as men. The Crown was empowered to regulate civil service recruitment by Order in Council and to reserve posts in the foreign and overseas service to males. Further, judges were empowered to restrict juries to men or women only and to exempt women from jury service if they objected to the type of evidence involved in a trial.
5. Lord Brougham's Act, 1850 (13 & 14 Vict. C.21), s.4. Corresponding clauses appear in Australian statute interpretation Acts: See N.S.W. Interpretation Act, 1897, s.21(a); Victoria: Acts Interpretation Act, 1958, s.17; Queensland: Acts Shortening Act, 1867, s.11; South Australia: Acts Interpretation Act, 1915-1936, s.26; Western Australia: Interpretation Act, 1918, s.26(a); Tasmania: Acts Interpretation Act, 1931, s.24 III.
6. *Edwards* v. *A.-G. for Canada* [1930] A.C. 124.

by the Governor-General, the Judicial Committee said that for the purposes of the British North America Act, the "persons" who might be summoned to the Senate included qualified females. Although this conclusion was reached after careful examination of the use of the word "person" throughout the Canadian Constitution, their Lordships made it plain that they did "not think it right to apply rigidly to Canada of today the decisions and reasons 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".7

It is not proposed here to discuss in detail what interpretation might be placed upon every relevant Australian statute in which qualifications for the exercise of public functions are defined without express reference to females. Rather, it is proposed to survey the development of the common law in England, to outline the steps and devices by which Australian legislatures have sought to remove the common law disabilities, and to draw attention to some of the present anomalies and uncertainties which should merit legislative attention.

THE COMMON LAW

Neither legal historians nor counsel have yet discovered anything more than isolated and perfunctory references to the status of women in public law before the latter part of the nineteenth century. The absence of judicial authority forced the courts to find their law in "the inveterate practice of the centuries",8 namely, that women had been excluded consistently from public offices and from participation in governmental affairs.9 Several instances were cited by counsel in which women appeared to have discharged functions normally assigned to men, but the courts found either the sources of information unreliable or the examples given so isolated in occurrence as to provide no basis for the inference that the law was otherwise than as custom indicated.

In the eighteenth century at least two cases involving the eligibility of women to occupy minor offices were contested. In these we find the judges groping for principle, some of them unabashed in proclaiming their conviction in the inferiority of women's intelligence, wit and judgment, and fully persuaded of the impropriety and foolhardiness of conceding to women even a qualified right to fulfil the duties attached to offices of public trust.10 No attempt was

7. id. at 134-5.
8. *Per* Swinfen Eady L.J. in *Bebb* v. *Law Society* [1914] 1 Ch. 286 at 297.
9. *Reg.* v. *Crosthwaite* (1864) 17 Ir. C.L. 157 at 163; *Chorlton* v. *Lings* (1868-9) L.R. 4 C.P. 374; *The Queen* v. *Harrald* (1871-2) L.R. 7 Q.B. 361; *Beresford-Hope* v. *Lady Sandhurst* (1889) 23 Q.B.D. 79; *De Souza* v. *Cobden* [1891] 1 Q.B. 687; *Ex parte Ogden* (1893) 14 L.R. (N.S.W.) 86; *Nairn* v. *University of St. Andrews* [1909] A.C. 147.
10. *Olive* v. *Ingram* (1739) 7 Mod. 263 (87 E.R. 1230; 93 E.R. 1067); *R.* v. *Stubbs* (1788) 2 T.R. 395 (100 E.R. 213).

made to catalogue exhaustively what came within the category of public functions, but in removing such offices as that of sexton and churchwarden from the range of offices of public trust the criteria seemed to be the importance of the office, the responsibilities it involved and in particular, the quality of judgment expected of occupants of the office. In much later years and in different contexts, the definition of public officers was framed not so much in terms of the weight of responsibility but in terms of the source of the remuneration and the nature of the duties of the office. If the public were directly interested in the discharge of the duties and if the officer was paid out of public funds, he was a public officer.11

The origin of the common law exclusion of women from public offices is clouded in obscurity. In *Edwards* v. *A.G. for Canada* (1931) Lord Sankey, L.C.,12 citing Tacitus on the German tribes, surmised that the rule probably arose from the fact that persons attending at the deliberative assemblies of the tribes were required to attend with arms, a practice which automatically excluded women.13 When we come to post-Conquest times in England, the close association between offices and property and the difficulties of drawing the line between them makes it impossible to consider the exercise of public functions apart from property rights. Offices personal in origin became attached to land and as such hereditary. Pollock and Maitland suggest that this was particularly true of the shrievalties and that ornamental offices and grand serjeanties became offices which women could carry to their husbands and transmit to their heirs.14 Whether a woman could perform in person the duties attached to hereditary offices in person appears doubtful: in Coke on Littleton it is noted that Anne, wife of the Earl of Pembroke, Sir John Hastings, who held the manor of Ashley in Norfolk by grand serjeanty, "was adjudged to make a deputy because a woman cannot do it in person".15 However, in Hargraves' annotations to Coke on Littleton it is also noted that Anne, Countess of Pembroke, Dorset and Montgomery, held the office of hereditary sheriff of Westmoreland and exercised it in person and that she also sat with the judges at the Appleby Assize.16 During Henry III's reign, Ela, Countess of Salisbury was for some years sheriff of Wiltshire.17 In the *Duke of Buckingham's Case* (1569)18 it was held that if a man holds manors of the king by service of constable and dies leaving daughters, they may, while unmarried, exercise the office of grand

11. *Re Mirams* [1891] 1 Q.B. 594 at 596, 597; *Bowers* v. *Harding* [1891] 1 Q.B. 560; *R.* v. *Whitaker* [1914] 3 K.B. 1283.
12. [1930] A.C. 124 at 128.
13. Tacitus, *Germ.* c. 8 and c. 13. See also Ulpian, *Dig*, 1:16:195.
14. *History of English Law, London*, 1895, vol. I, p. 466 (hereafter cited as "P. & M., I").
15. 1 Inst. 326a.
16. P. & M., I, 466.
17. 3 Dyer 285b, (73 E.R. 640).

constable by deputy. In 1603 the grant to Lady Russell of the custody of the castle of Dunnington was held good.[19]

The privilege of returning members to Parliament was yet another which attached to land and though a few instances have been produced of women exercising the privilege,[20] the evidence is too meagre to warrant a conclusion that there may have been recognised exceptions to Coke's catagorical denial that women enjoyed such a right.[21] The question was raised incidentally in *Olive* v. *Ingram* (1739)[22] but no firm opinion was expressed one way or the other; Probyn J.'s doubts were strengthened by his conviction that selection of members for Parliament "requires an unimpaired understanding which women are not supposed to have".[23] It is unlikely that in the search for precedents favourable to their clients, counsel for the suffragettes in the memorable series of cases beginning with *Chorlton* v. *Lings* (1869) left many stones unturned, but the courts were unimpressed and possibly wearied of the antiquarian miscellany which counsel had so studiously collected. Finally in 1909, Loreburn, L.C. closed the historical disputation by observing:[24]

> It may be that in the vast mass of venerable documents buried in our public repositories, some of authority, others of none, there will be found traces of women having taken part in parliamentary elections. No authentic and plain case of a woman giving a vote was brought before your Lordships. But students of history know that at various periods members of the House of Commons were summoned in a very irregular way, and it is quite possible that just as great men in a locality were required to nominate members, so also women in a like positon may have been called upon to do the same; or other anomalies may have been overlooked in a confused time. I say it may be so, though it has not been established.

Liability to suit at the hundred or county court probably was not imposed upon women or their land, but there was no legal bar against attendance if women so desired.[25] During Henry III's reign, personal attendance at the sheriff's turns or plenary meetings of the county courts was demanded but Pollock and Maitland suggest that "this exaction was regarded as an abuse and forbidden" and that probably suit was performed by deputies.[26] In the *Mirror of Justices* the exemption of women from doing suit to inferior courts was given as their reason why the law forbade women to act as judges.[27] Coke,

19. Cro. Jac. 18 (79 E.R. 15).
20. See documents referred to by counsel for the appellants in *Chorlton* v. *Lings* and *Nairne* v. *University of St. Andrew's.*
21. 4 Inst. 4 and 5.
22. 7 Mod. 263 at 265, 267, 268.
23. id. at 265.
24. *Nairne* v. *University of St. Andrews* [1909] A.C. 147 at 159-60
25. 2 Inst. 119, 121; Fitz., N.B. 359.
26. P. & M., I, 466-7.
27. Book II, Ch. II (vol. 7, *Selden Soc. Publcns.*, p. 44).

who commended the *Mirror* highly, probably based his statement that women might not be judges on this source.[28]

At no time were women qualified as jurors and this applied both when jurors were summoned as witnesses and later when jurors were summoned to perform their present day function of triers of fact. Bracton listed one exception, namely, that women jurors were summoned where an expectant heir alleged that there was a plot to supplant him by the production of a supposititious child.[29] The law had not changed by the sixteenth century for Lambard said there were but two exceptions to the general exclusionary rule, the first being that women jurors might be summoned in cases of the writ *de ventre incipiendo*, the second, in enquiries into the pregnancy of women capitally convicted upon pleas in stay of execution.[30]

The decline of the office of constable in the post-restoration period and the increasing tolerance of the practice of appointing deputies from amongst the disabled and disreputable was accompanied by a modification of the older rule that a woman could not act as constable either in person or by deputy.[31] The office rotated annually and by the eighteenth century it was firmly established that the burdens of acting as constable fell upon women and men alike but that a woman was obliged to appoint a deputy.[32]

Whether women might participate in elections for the parish office of sexton or be elected sexton was decided in the affirmative in *Olive* v. *Ingram* (1739), the court there characterizing the office as one of private trust, not requiring either skill or judgment.[33] Similar considerations led Ashurst J. in *R.* v. *Stubbs* (1788) to rule that there was nothing in the nature of the office of overseer of the poor to render women incompetent to discharge the duties appurtenant to the office.[34] In 1704 a woman was appointed by order of the justices to be governess of the workhouse in the town of Chelmsford,[35] and one may infer from the ruling in 1672 that Lady Braughton had disqualified herself by misconduct from continuing in office as keeper of the prison at the Gatehouse of Dean and Chapter of Westminster that had she conducted herself with all propriety, her sex alone would not operate as a disqualification.[36]

According to the *Mirror of Justices* the law would not suffer

28. 2 Inst. 119.
29. *Bracton's Notebook*, f. 69, pl. 198; P. & M., I, 467; I Inst. 119; 3 Bl. Comm. 362.
30. *Eirenarcha*, p. 397.
31. *Prouse's Case* (1635) Cr. Car. 389, (79 E.R. 940); Fitz. N.B. 359.
32. 2 Hawk. P.C., c. 10, s.36; *Olive* v. *Ingram* (1739) 7 Mod. 263 at 274; *R.* v. *Stubbs* (1788) 2 T.R. 395.
33. 7 Mod. 263.
34. 2 T.R. 395. This appears to have over-ruled the decision in *Reg.* v. *Henley*, 10 Anne, referred to in Lee C.J.'s judgment in *Olive* v. *Ingram.*
35. 2Ld. Raym. 1014 (92 E.R. 174).
36. 3 Keb. 32 (84 E.R. 578).

women to be attorneys,[37] a view which Coke supported and qualified only by pointing out that a woman might be an attorney to deliver seisin to her husband, by which he meant, of course, that a woman might execute a power of attorney.[38]

Whether the disqualification from exercising public functions depended in any way upon the civil and proprietary disabilities imposed on married women by the common law, is not revealed in any of the cases and authorities discussed in the preceding pages.[39] Undoubtedly these disabilities provided part of the rational foundation of the rule regarding public functions because for many centuries eligibility for exercise of public functions was directly linked with land-holding. Further, it needs be remembered that until the present century, the *femme sole* was regarded more of a social abnormality, than she perhaps is today. Hence, as long as social pressure to marry at an early age, and civil and proprietary disabilities remained, removal of sex disqualifications was not likely to produce any significant change in a system which still reserved voting rights, public offices and places in the learned professions to the propertied classes.

THE SUFFRAGE CASES

Although the franchise was not extended to all adult women in Britain until 1928, the campaign for votes for women had gathered vocal adherents as early as the eighteen forties and fifties. A resolution to extend the franchise to women was moved in the House of Commons in 1848; in 1867 John Stuart Mill moved a similar amendment to the Reform Bill which, if carried, would have conferred on unmarried women householders the same right to vote as men. Not long after the Representation of the People Act, 1867, came into effect it was discovered that Mrs. Lily Maxwell's name had been entered in error on the Manchester electoral register; Mrs. Maxwell, moreover, insisted that her vote be registered. Her initial success prompted 5,346 other ladies of Manchester to claim entitlement to being enrolled as voters.[40] On appeal from the ruling of the Revising Barrister of Manchester that the female claimants were not so entitled the Court of Common Pleas in *Chorlton* v. *Lings*[41] unanimously held that although Lord Brougham's Act of 1850 had provided that "all words importing masculine gender shall be deemed and taken to include females", the provision in the 1867 Act providing that "every man" of full age and "not subject to any legal capacity" was entitled on compliance with certain conditions to be registered as an elector, did not entitle adult females to be so registered.

37. Book II, Ch. xxxi (vol. 7 *Selden Soc. Publications*, p. 88).
38. 1 Inst. 52(a), 128(a).
39. In *Bebb* v. *Law Society* [1914] 1 Ch. 286, Phillimore L.J. pointed out that one difficulty formerly standing in the way of admission of women to the profession of attorney was that a married woman, lacking independent contractual capacity, could not enter into binding contracts with clients or execute articles of clerkship.
40. St. John Stevas, *op.cit.*, pp. 263-4.
41. (1868-9) L.R. 4 C.P. 374. The judgment of Willes J. is especially noteworthy for its scholarly review of old common law authorities.

Without referring specifically to the legislative history of the Act of 1867 or to the defeat of Mill's motion, the judges stated that if Parliament had intended so momentous a change of the common law as that contended for by Mr. Chisholm Anstey, counsel for the appellants, it should have left no room for doubt. One might have thought that a clause which stipulated that words importing the masculine gender should include females *for all purposes connected with the vote,* would have brought women into the category of persons entitled to vote. That such a clause did operate to qualify single women to vote at borough elections on the same conditions as men was not denied by the Queen's Bench in The *Queen* v. *Harrald* (1872),[42] but married women, said the Court, could not be within the contemplation of the statute. The reason which commended itself to Cockburn C.J. was "that, by the common law, a married woman's status was so entirely merged with that of her husband that she became incapable of exercising almost all public functions"; that subsequent to the Municipal Corporations Act, 1869, married women had been declared by statute to have capacity to hold property did not affect the analysis, for a statute on property rights could not of itself confer political and municipal rights which did not exist before.

In 1909 five women graduates of Edinburgh University made what proved to be the last bid to win judicial recognition of females as "persons" within the meaning of the electoral law. The appellants claiming the right to vote at the election for the member of Parliament for the University of St. Andrews had been enrolled as members of the University's general council for which reason they alleged that they were persons within the meaning of the Representation of the People (Scotland) Act, 1868, s.27.[43] The House of Lords in effect adopted the same course as had the Court of Common Pleas in *Chorlton* v. *Lings*. Although further argument was adduced to show that women had from time to time voted for members of Parliament prior to the Reform Act, the Law Lords adhered to the accepted view that at common law and according to Scots law, women had no right to vote and that if so vast a change as enfranchisement was intended by Parliament, plain language to that effect should have been used.[44]

42. (1871-7) L.R. 7 Q.B. 361.
43. Sec. 27 provided that "every person" whose name was entered on the general council of a Scottish university should "if of full age, and not subject to any legal incapacity" be entitled to vote at elections for members to represent university constituencies. The members of the university general councils were defined as "all persons" upon whom the universities had conferred degrees.
44. *Nairn* v. *University of St. Andrews* [1909] A.C. 147.

In all the Australian States the parliamentary franchise was conferred upon adult women on the same terms as men many years before the suffrage was given to women in Britain. In South Australia the vote was conferred in 1894, in Western Australia 1899, in New South Wales 1902, Tasmania 1903, Queensland 1905 and Victoria 1908.[45] Adult franchise for Commonwealth elections dates back to 1902.[46]

The history of the municipal franchise in Australia is even more chequered. In South Australia adult women were entitled to be enrolled as citizens and to vote in municipal elections as early as 1861; in Western Australia they became entitled to vote at municipal elections in 1876 and at elections for road district councils in 1888; in New South Wales they could vote at shire and municipal elections from 1906 and at Sydney City Council elections from 1900; in Queensland, they could vote at local authority elections from 1879 and at Brisbane City Council elections from 1924, the date on which the Council was incorporated; in Tasmania, at rural municipality elections from 1884, at Hobart City Council elections from 1893 and at Launceston City Council elections from 1894; in Victoria, at municipal elections from 1903, if not before.[47]

WOMEN AS PUBLIC OFFICE HOLDERS

In legislation concerning elections for public office the qualifications of candidates are frequently made co-extensive with the right

45. N.S.W.: Women's Franchise Act 1902; see now Parliamentary Electorates and Elections Act, 1912-1953, s.20. Vic.: Adult Suffrage Act, 1908; see now Constitution Amendment Act, 1958, s.59. Q.: Elections Amendment Act, 1905, s.9; see now Elections Act, 1915-36, s.9 S.A.: Constitution Amendment Act, 1894; see now Constitution Act, 1934-59, s.48. W.A.: Constitution Act Amendment Act, 1899, ss. 15 and 26. Tas.: Constitution Act, Amendment Act, 1903; see now Constitution Act, 1934, ss. 28 and 29.
46. Commonwealth Franchise Act, 1902; see now Commonwealth Electoral Act, 1918, s.39.
47. N.S.W.: Local Government Act, 1906, ss. 48 and 55; Sydney Corporation (Amending) Act, 1900 s.5; see now Local Government Act, 1919, ss.50, 51, and Sydney Corporation Act, 1932-1934, s.9. Vic.: Local Government Act, 1903, s.71; see now Local Government Act, 1958, s.73. Q.: Local Government Act, 1878, s.49; see now Local Government Act, 1936, s.7; City of Brisbane Act, 1924, s.7. S.A.: Municipal Corporations Act, 1861; see now Local Government Act, 1934, s.88. W.A.: Municipal Institutions Act, 1876, s.10; Roads Act, 1888, s.13; see now Municipal Corporations Act, 1906-1956, s.37, and Road Districts Act, 1919-1956, s.23. Tas.: Rural Municipalities Act Amendment Act, 1886, s.4; Hobart Corporation Act, 1893, s.13; Launceston Corporation Act, 1894, s.13; see now Local Government Act, 1906, s.5; Hobart Corporation Act, 1947, s.7; Launceston Corporation Act, 1941, s.7.
Note: The Victorian Act of 1903 did not explicitly enfranchise women on the same terms as men, but declared that a woman should not be disbarred by marriage from voting. It appears that even before 1903 women with the requisite property qualifications were permitted to caste votes, a fact of which the Victorian Parliament in 1903 might be presumed to have knowledge. In the light of usage, it is submitted that s.73 of the Local Government Act, 1958, would now be interpreted as enfranchising single women, any common law disqualification notwithstanding.

to vote. Hence if women are entitled to vote and if persons entitled to vote are declared eligible to be elected it is not unreasonable to assume that women are not disqualified by sex alone from election. However, in 1889 the Queen's Bench Division held that although Lady Sandhurst was entitled to vote at county council elections, the absence of express words in the relevant statute declaring female voters to be qualified for election to county councils, she was not entitled to retain her seat on the council.[48] In the words of Esher M.R., "when you have a statute which deals with the exercise of public functions, unless that statute expressly gives power to women to exercise them, it is to be taken that the true construction is, that the powers given are confined to men, and that Lord Brougham's Act does not apply".[49]

Not until *Edwards* v. *A.G. for Canada* (1931) did it begin to emerge that courts might be prepared to treat the word "person" in relation to statutory qualifications for the exercise of public functions as ambiguous and possibly including females. As far as Canadian legislation was concerned the paramount consideration appeared to be, not the presumptive rule of construction applied by English courts, but the probable intentions of the legislature and the usage of the word "person" throughout the Act. The object of the British North America Act being "to provide a constitution for Canada, a responsible and developing State" it should not be construed according to canons and presumptions evolved in another age and place.[50] Thus far, the Board was only affirming the principle that constitutions are not to be interpreted as ordinary statutes, and being concerned in the instant case only with a constitution, its opinion cannot be taken as having destroyed the relevance of earlier English decisions in the interpretation of non-constitutional statutes. More important from the point of view of general rules of statutory interpretation is the manner in which the Board proceeded to explicate the meaning of "persons" in the context of s.24 of the British North America Act. Reading the Act as a whole it was found that in some sections "persons" must obviously include females; in others "male persons was used, thus suggesting that where no reference was made to sex "persons" should be taken as embracing males and females.

No case has arisen for decision in Australia since 1931 in which the authority of *Edward's* case might be tested. All of the State Constitutions except the Tasmanian Constitution now expressly declare women eligible for election as members of Parliament, the

48. *Beresford-Hope* v. *Lady Sandhurst* (1889) 23 Q.B.D. 79.
49. id. at 96.
50. [1930] A.C. 124 at 143.

necessary disqualification removal legislation being passed in New South Wales in 1918 (Legislative Assembly) and 1925 (Legislative Council); Queensland, 1915; Western Australia, 1920; Victoria, 1923; and South Australia, 1959.[51] In view of the fact that South Australia was the first State to give the vote to women (1894), it is perhaps surprising that the right of women to nominate for election to the Houses of Parliament was not spelled out explicitly till 1959. Until then it had been assumed that as qualified electors, women were eligible for election to the Assembly; the eligibility of women to be elected to the Council was not so clear[52] and it was only the nomination of women for election at the Council elections of 1959 that brought notice to the deficiencies of the existing legislation.[53] Preferring not to determine what meaning should be placed on the existing provisions, the South Australian Parliament enacted amending legislation declaring sex no disqualification. Although the Tasmanian Constitution refers only to the "persons" qualified for election to the Houses of Parliament, the fact that in 1921 "person" was substituted for "male person", can signify only that it was intended that henceforth both men and women should be qualified.[54]

Like the Tasmanian Constitution the Commonwealth Constitution is silent on the sex of members of Pariament; s.34 defines persons qualified for election as persons entitled to vote with additional qualifications as to residence and nationality. Although the section refers to persons in the masculine gender, there can be little doubt that at this stage in the history of the Constitution, "persons" eligible for election would be construed as including female electors.

Women became entitled to be elected to local government authorities in South Australia and Victoria in 1914; in Western Australia and New South Wales in 1919; in Queensland in 1920 (local authorities) and 1924 (Brisbane City Council), in Tasmania in 1911

51. N.S.W.: Women's Legal Status Act, 1918, s.2(a); Constitution (Amendment) Act, 1925 (No. 1 of 1926); Parliamentary Electorates and Elections Act, 1912-1953, s.20; Constitution Act, 1902-1960, s.17B. Vic.: Parliamentary Elections (Women Candidates) Act, 1923; see now Constitution Amendment Act, 1958, s.58. Q.: Elections Act, 1915, s.39 (before the Legislative Council was abolished in 1922 no reference was made in the Queensland Constitution, 1867, to the sex of "persons" whom the Governor might appoint to the Council. According to the principles of construction enunciated in *Edwards* case, it is submitted that women were qualified to be summoned to the Council). S.A.: Constitution Act Amendment Act, 1959. W.A.: Parliament (Qualifications of Women) Act, 1920, s.2
52. Constitution Amendment Act, 1894; see now Constitution Act, 1934-1959, ss.20 and 33.
53. *R. v. Hutchins; Ex parte Chapman & Cockington* [1959] S.A.S.R. 189.
54. Constitution Act Amendment Act, 1921 ss.2, 3, 7; Constitution Act, 1934, s.14 Constitution Act Amendment Act, 1952 (No. 96 of 1952).

(rural municipalities), 1929 (Hobart City Council) and 1945 (Launceston City Council).[55]

No woman in Australia has yet been appointed to any judicial office but there are now no express legal bars to their appointment to such posts. All the statutes defining the constitution of superior courts require that appointees to the Bench must be qualified legal practitioners, but make no reference to the sex of judges.[56] It is submitted that even without express words, removing the common law disqualification of women from holding judicial offices, the statutory removal of their disqualification from being admitted to practice as solicitors, barristers and conveyancers, taken together with the relevant clauses in the Acts constituting the State Supreme Courts and the High Court of Australia, is sufficient to render them eligible to hold judicial office. In England the cases of Bertha Cave (1903) and *Bebb* v. *Law Society* (1914)[57] established that nothing short of express statutory provision would suffice to render women eligible for admission as barristers and solicitors, a conclusion which was anticipated by the Western Australian Supreme Court in 1904.[58] All Australian States excepting Tasmania have legislated specifically upon the matter, Victoria as early as 1903, Queensland in 1905, South Australia in 1911, New South Wales in 1918 and Western Australia in 1923.[59] In England the disqualification was not removed until 1919.[60] The Tasmanian Legal Practitioners Act[61] refers only to the "persons" who shall be qualified for admission, but women have been admitted to practice as barristers and solicitors by the Supreme Court and no objection appears to have been taken to the propriety of such action. The federal Judiciary Act[62] confers upon all persons enrolled as legal prac-

55. N.S.W. Women's Legal Status Act, 1918, s.2(b). Vic.: Local Government Act Amendment Act, 1914, s.82; see now Women's Qualification Act, 1928, s.5. Q.: Local Authorities Act Amendment Act, 1929, s.4; see now Local Government Act, 1936, s.7, and City of Brisbane Act, 1924, s.7. S.A.: Municipal Corporations Act, 1914, s.8; see now Local Government Act, 1934-1949, ss.51 and 52; W.A.: Municipal Corporations Amendment Act, 1919, s.2; Road Districts Act, 1919, s.23; see now Municipal Corporations Act, 1906-1956, s.49 and Road Districts Act, 1919, s.33. Tas.: Local Government Act (Amendment) Act, 1940; Hobart Corporation Act, 1947, s.7; Launceston Corporation Act (Amendment) Act, 1945, ss.2 and 3.
56. Cwlth.: Judiciary Act, 1903-1959, s.5. N.S.W.: Supreme Court and Circuit Courts Act, 1900-1957, ss.5 and 9. Vic.: Supreme Court Act, 1958, s.7. Q.: Supreme Court Act, 1867, s.8. S.A.: Supreme Court Act, 1935-1936, s.8. W.A.: Supreme Court Act, 1935, s.8. Tas.: Supreme Cpurt Act, 1887, s.3.
57. *Bertha Caves Case, The Times*, Dec. 3, 1903; *Bebb* v. *Law Society* [1914] 1 Ch. 286.
58. *In re Edith Haynes* (1904) 6 W.A.L.R. 209.
59. Vic.: Legal Profession Practice Act, 1903. Q.: Legal Practitioners Act, 1905. S.A.: Female Law Practitioners Act, 1911. N.S.W.: Women's Legal Status Act, 1918, s.2(d). W.A.: Women's Legal Status Act, 1923.
60. Sex Disqualification (Removal) Act, 1919 (9 and 10 Geo. 5 c. 71).
61. Legal Practitioners Act, 1896.
62. Judiciary Act, s.49.

titioners in the States the right to appear before the High Court and again no doubt has arisen whether such persons include females.

Only in three States is there legislation specifically removing the disqualification from holding judicial office. In Victoria (1928) and Western Australia (1923) this has been done in general terms whereas in New South Wales by the Women's Legal Status Act, 1918, the disqualification is removed for named judicial offices. These Acts also rendered women eligible for appointment to magisterial offices and to the offices of Justice of the Peace and Coroner.[63]

In Tasmania women have been eligible for appointment as District Justices (*i.e.*, Justices for cities and municipalities) since 190764 but Territorial Justices are still appointed under prerogative powers vested in the Governor. Although there are two recorded instances of women being appointed as Territorial Justices, it is doubtful whether such appointments were valid. Women in South Australia have been eligible to be appointed as Justices of the Peace since 1921.[65] Queensland alone of all the States has no legislation unambiguously qualifying women for appointment as Justices, the Justices Act being silent on the sex of appointees.[66]

Women are eligible for jury service in all States except Victoria and South Australia. Liability to service in Tasmania, Queensland and New South Wales is dependent upon notification of a wish to serve, but in Western Australia a woman is liable to serve unless she gives notice of her wish to the contrary.[67]

No judicial decision has been rendered on whether the common law disqualification of women from holding public offices extended to civil service appointments. Since the introduction of competitive recruitment and the regulation of entry and promotions by statute, it has been customary to enact special provisions regarding the employment and tenure of married female officers, but there has been nothing in the way of guarantees in favour of equal treatment of males and females either with respect to admission on the one hand, or on the other hand, eligibility for promotion

63. In Western Australia women could be appointed to Children's Courts as early as 1915 (State Children Amendment Act, 1915 and could be appointed Justices of the Peace as early as 1919 (Justices Act, 1919, s.3).
64. District Justices Act, s.6. This Act has been repealed and incorporated in the Justices Act, 1959 (yet to be proclaimed). Since 1949 District Justices have been invested with the same administrative powers as Territorial Justices.
65. Sex Disqualification (Removal) Act, 1920.
66. Justices Act, 1886. See also Childrens Courts Acts, 1907; Magistrates Court Act, 1921; Coroners Act, 1930. Tas.: Infants Welfare Act, 1935; Coroners Act, 1957.
67. N.S.W.: Jury Act, 1912-1951, s.3A (women became entitled to serve in 1951). Vic.: Juries Act, 1958, and Women's Qualification Act, 1928, s.4. Q.: Jury Act Amendment Act, 1923, s.2; see now Jury Act, 1929, ss.6 and 8 (xvii). S.A.: Juries Act, 1927, s.11. W.A.: Juries Act, 1957. Tas.: Jury Act (Amendment) Act, 1957.

and rates of pay.[67A] The British Sex Disqualification (Removal) Act, 1919, affirmed the right of the Crown to regulate admission to the civil service by Order in Council and to reserve posts in the foreign and colonial services to men. The women's legal status legislation in New South Wales, Victoria and Western Australia makes no reference to public service posts but it is arguable that the terms of the Victorian and Western Australian Acts is wide enough to at least remove any common law disqualifications which might have existed.

The Commonwealth public service legislation and the public service legislation of all States but Western Australia and New South Wales, prohibits the employment of married women except in special circumstances.[68] In New South Wales, the wives of State public servants are not eligible for employment or continued employment. Acute shortages of school teachers have induced some degree of relaxation of the general prohibition of employment of married women in the service of the State. Female teachers employed by the New South Wales Department of Public Instruction are now employable irrespective of their married status,[69] whilst in Victoria they may continue in employment after marriage if they so elect.[70] Women employed in the South Australian teaching service must notify the Director of Education of their intention to marry, and upon marriage their permanent appointment ceases. They may however, thereafter, be appointed as temporary officers.[71]

67A. Unless it is provided by statute or by regulation that in consideration of application for promotions the promoting authority is to give preference to male applicants, promotion of a less qualified male applicant over a better qualified female candidate may be held to be an improper exercise of the authority's statutory functions. This would appear to have been the view of the New South Wales Crown Employees' Appeal Board in the recent case of Mrs. Evelyn McCloughan. Speaking for the Board Kinsella J. said: 'The social conscience of modern society, as well as the general intendment of the Legislature, demand that in general a woman shall not be debarred by reason only of her sex from any public position or any office under the Crown. . . . The fact that the promotion of a woman may retard the advancement of men in a predominantly male service may discourage men from the service does not appear to be a valid reason for refusing her promotion if she be better qualified than the men who are offering for it". (*The Sydney Morning Herald*, Tuesday, Oct. 25, 1960, p. 10, cols. 3 and 4.)
68. Cwlth.: Public Service Act, 1922-58, s.49; Commonwealth Bank Act, 1945-53, s.185. Broadcasting Act, 1942-59, s.17k; Overseas Telecommunications Act, 1946, s.26. N.S.W.: Public Service Act, 1902, ss.41 and 42. Vic.: Public Service Act, 1958, s.37. Q.: Public Service Act, 1922, s.51 (i) (iii) and Regulation No. 56 (formerly reg. 53 of the Public Service Regulations, 1923). S.A.: Public Service Act, 1936, s.80 (i) (vi). W.A.: Public Service Act, 1904. Tas.: Public Service Act, 1923, s.52.
69. Public Service Act, 1902, s.42. Under the Married Women Teachers and Lecturers Act, 1932-35, women were employable as teachers only in special circumstances and upon proof that the combined income of themselves and their husbands (other than income derived from the woman's personal exertions) was inadequate for the support of the family.
70. Teaching Service Act, 1958, s.2. (This Act incorporates the Teaching Service (Married Women) Act, 1955.
71. Regulations made under the Education Act, 1915-1935.

SUMMARY AND CONCLUSIONS

From the foregoing analysis it will be appreciated that changes in the common law regarding the qualification of women to exercise public functions have been uneven both in point of chronology and in the manner in which they were brought about. Only three of the States—New South Wales, Victoria and Western Australian—have enacted general sex disqualifications removal statutes, and States which have led the field in some areas have been among the last to remove other disqualifications. South Australia, for example, was the first of the Australian States to enfranchise women, yet its Sex Disqualification (Removal) Act, 1921, covers only Justices of the Peace and Notaries.[72] Moreover, the eligibility of women to be elected to Parliament was not resolved finally till 1959 and the right to give jury service continues to be withheld from women. Victoria was the last State to enfranchise women yet was the first to permit women to be legal practitioners.

A review of the relevant State provisions reveals that in some States, notably Queensland, South Australia and Tasmania, the question of whether women are qualified to hold various public offices remains open to doubt and dependent upon the interpretation given to the words "person" or "persons". While *Edwards* case now lends authority to the view that the word should be construed as including females, it is suggested that any doubts should be anticipated and resolved by comprehensive women's legal status legislation such as that which exists in Britain, New South Wales, Victoria and Western Australia. With the possible exception of jury service, no issues of policy are involved in any such legislative changes. The policy of removing common law disqualifications from the exercise of public functions has been long settled and the only issue remaining is whether loopholes should be allowed to continue.

Taken as a whole, the Australian legislation surveyed here reveals little in the way of a consistent and even pattern towards female emancipation. Equal political rights with men were secured for Australian women earlier and with less resistance than was the case in Britain, yet the idea of a general sex disqualifications removal statute was clearly not thought necessary until the English courts had revealed the extent of common law disabilities and the British Parliament provided a model statute. Never has it been doubted by Australian courts that the common law in this respect applies equally in Australia and England and that express disqualifications removal legislation is required. While *Edwards* case has now thrown doubts upon the application of English decisions in the colonies and self-governing dominions, far better is it that present uncertainties be dispelled by unequivocal enactment.

72. On the common law disqualification of women from being appointed Public Notaries; see *Re Kitson* [1920] S.A.L.R. 230.