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IN THE SUPREME COURT OF ALBERTA.

Appellate Division.

R E X

Respondent.

vs.

LIZZIE CYR

alias

WATERS.

Appellant.

J U D G M E N T

of

The Hon. Mr. Justice Stuart.

I concur
Hugh Stuart C.J.
A. O'Dea J.
W. L. Walsh J.

IN THE SUPREME COURT OF ALBERTA

(APPELLATE DIVISION).

R E X

v.

LIZZIE CYR, alias WATERS.

Judgment of the Honourable, Mr. Justice Stuart.

This is an appeal from a decision of Mr. Justice Scott refusing to quash, upon certiorari, a conviction for vagrancy made against the defendant by Alice J. Jamieson, a Police Magistrate in and for the City of Calgary.

One ground upon which the conviction was attacked was thus stated: "that the said Mrs. Alice J. Jamieson is not a Police Magistrate and has no capacity for holding the appointment of Police Magistrate and is incompetent and incapable of holding the said appointment."

Mr. Justice Scott did not find it necessary to decide the point thus raised because he was of opinion that inasmuch as Mrs. Jamieson had acted de facto as a police magistrate the legality of her appointment could not be questioned or enquired into upon such an application.

It would seem to one to be advisable, however, for this court to decide the point directly raised by the objection particularly in view of the fact that convictions are being made quite frequently at the present time by two women who have been appointed police magistrates by the Lieutenant Governor in Council, one in Edmonton and the other, the one now in question, in Calgary.

The general question of the capacity of a woman to hold a

public office in this Province is therefore squarely presented to the Court. There are, as will be seen, some twenty-four acts, chiefly municipal acts, but one or two of them referring to the Legislative Assembly as well, under which by virtue of the special provisions of Chapter 5 of the Statutes of 1916, women have ~~become capable of holding office~~ the "same rights and privileges" as men. But Chapter 5 of 1916 does not refer to the Act assuming it to affect the question of holding office, respecting Police Magistrates and Justices of the Peace, Cap. 13, of 1906, under which Alice J. Jamieson was appointed. There is therefore no statute directly declaring that a woman is qualified to hold the office of Police Magistrate in this Province. The contention made by the defendant is that the qualification must depend upon the common law and that under this a woman is not qualified to hold any public office.

In a number of the American States this question has come up for discussion. Perhaps the most exhaustive review of the precedents is to be found in a note to the case of Missouri vs. Hastetter, 38 Lawyers Reports Annotated, page 208. From this note I extract the following interesting facts:-

Lord Campbell in his Lives of the Lord Chancellors felt bound to include Queen Eleanor, wife of Henry III, in his list of the Lord Chancellors because she had held the office of Lord Keeper of the Great Seal for a whole year and had performed its duties both judicial and ministerial.

Coke upon Littleton, 326(a) says that Anne, Countess of Pembroke, held ~~of~~ the office of hereditary sheriff, then a judicial as well as ministerial office, and exercised it in person, sitting on one occasion at the Assizes with the Justices on the bench.

It appears from 2 Keble, 345, and 3 Keble, 32, 89, 92, 106, that Lady Braughton was Keeper of the Gate House Prison. Proceedings by information for an escape were brought against her and her right

right to hold the office was questioned on other grounds but no suggestion of incapacity on account of sex appears to have been made.

In "Anonymous", 3 Salkeld, 2, justices of the peace had appointed a woman to ~~the~~ governess of a workhouse and a motion was made to the Court of King's Bench to quash the order appointing her as the office "was not suitable to her sex", and the report says "but per Powell and the rest, absente Holt, C. J., it is a good appointment and she may be capable of executing the office either by herself or deputy as the Lady Braughton did."

It also appears that a woman held the office of custodian of a castle, 5 Comyns' Digest, 189, the office of forrester, 4 Coke, Inst. 311, the hereditary office of Constable of England, 3 Dyer, 285, marshal of the Court of King's Bench, Callis on Sewers, 253 , and Lord Chamberlain of England, 2 Bro. P. C., 146.

In King v. Stubbs, 2 T. R., 395 (in 1788) it was held by the Court of King's Bench that a woman could hold the office of overseer of the poor under the statute of Elizabeth. In delivering the judgment of the Court Ashhurst, J., said, "As to the second objection we think that the circumstance of one of the persons appointed being a woman does not vitiate the appointment; the only qualification required by 43 Eliz., is that they shall be substantial householders; it has no reference to sex. The only question then is whether there be anything in the nature of the office that should make a woman incompetent? And we think there is not. There are many instances where in offices of a higher nature they are held not to be disqualified; as in the case of the office of High Chamberlain, High Constable and Marshal and that of a common constable which is an office of trust and likewise, in a degree, judicial." And he goes

on to speak of there being "no absolute incapacity."

Robert Callis, Esq., a learned lecturer at Grays Inn, declared in 1622 in his lectures upon the statute respecting sewers that a woman could be Commissioner of Sewers in London.

Four modern cases must now be quoted. In Chorlton vs. Lings, L. R., 4 C. P., 374, it was held that women could not vote for members of Parliament. The Representation of the People Act, 1867, had used the words "every man" in stating the qualifications and it was held that the provision of a general interpretation act that words importing the masculine gender ~~shall~~ should be deemed to include females unless the contrary ~~is~~ was expressly provided was not sufficient to justify the Court in interpreting the words "every man" as including women. The Court did, of course, go further and express the opinion that women were legally incapable at common law of voting for members of Parliament. Bovill, C. J., said, "Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise nothing has occurred to take it away. But if no legislative enactment has taken it away the fact of its not having been asserted or acted upon for many centuries raises a strong presumption against its having legally existed; and considering that no reported decision or authority can be produced in favor of the right, that there are the opinions against it to which I have referred, and that there has been so long and uninterrupted an usage to the contrary, I come to the conclusion that there is no such right". The other judges, including Willes, J., expressed similar opinions. The question of usage was undoubtedly considered of the utmost importance in determining the law.

In Beresford-Hope vs. Lady Sandhurst, L. R., 23 Q. B. D., 79, it was decided that a woman was not qualified to be a member of a county-council under the Local Government Act 1888. The case

was decided by Lord Coleridge, C. J., Lord Esher, M. R., and Cotton Lidley Fry and Lopes, L. JJ. Every one of them except the Master of the Rolls rested ~~their~~ his decision upon special words of the statute from which they concluded that it was intended that women should not be qualified. Lord Esher alone referred to the common law rule. He said, "I take it that by neither the common law nor the constitution of this country from the beginning of the common law until now can a women be entitled to exercise any public function. Willes, J. stated so in that case (Chorlton vs. Lings) and a more learned judge never lived. He took notice of the case of the Countess of Pembroke who was hereditary sheriff, which was an exceptional case. The cases of overseer and of constable were before him, and what I deduce from his judgment is that for such somewhat obscure offices as those exercised often in a remote part of the country where nobody else could have been found to exercise them, women had been admitted into them by way of exception." Lopes, J., on the other hand indicated that he would have probably arrived at a contrary conclusion had it not been for the words of the Statute.

In DeSouza vs. Cobden (1891), 1 Q. B., Lord Esher again re-iterated his view. Referring to the general decision in Beresford-Hope vs. Lady Sandhurst, he said, "I went further and thought that apart from Section 63 it appeared from the subject matter that women were not intended to be included. I think so still. The ground I took was that by the common law of England women are not in general deemed capable of exercising public functions though there are certain exceptional cases where a well recognised custom to the contrary has become established asin the case of overseers of the poor."

Regina v. Harrald, L. R., 7 Q. B., 361, is in some respects a remarkable case. It reveals how reluctant the English Courts were to extend political rights to women. By 32 and 33 Vict. C. 55, Sec. 9, it was enacted that "In this Act and the 5 and 6 Wm. 4, C. 76 and the Acts amending the same, wherever words occur which import the masculine gender the same shall include females for all purposes connected with and having reference to the right to vote in the election of councillors, auditors and assessors." Objection was taken to the election because two married women had voted. The objection was allowed. Cockburn, C. J., said: "This rule must be made absolute. It appears to me impossible to say that the vote of one of these married women is good and the vote of the other (married after being put on the roll) is also most probably bad.....It is quite certain that by the common law a married woman's status was so entirely merged in that of her husband that she was incapable of exercising almost all public functions. It was thought to be a hardship that when women bore their share of the public burthens in respect of the occupation of property they should not also share the rights to the municipal franchise and be represented; and it was thought that spinsters and unmarried women ought to be allowed to exercise these rights. The 32 and 33 Vict., C. 55 accordingly gave effect to these views and enacted that wherever men were entitled to vote women being in the same situation should thereafter be entitled; but this only referred to women possessed of the necessary qualification in respect of property and the payment of rates and I cannot believe that it was intended to alter the status of married women. It seems quite clear that this

statute had not married women in its contemplation." Mellor and Harmen, JJ., expressed the same opinion. I doubt if a better example of the express words of a statute being whittled down by judicial interpretation could be discovered.

This last mentioned case is not referred to in the note to Missouri vs. Hostetter. The annotator sums up the situation in a passage which appears to me to be well worth reproduction here, and is as follows:

"It may be said to be the general doctrine now held both in England and America that women are ineligible to any important office except when made so by enactment. It is usually said that this is the common law of the subject. But it is somewhat startling to find that there is not a decision earlier than the present generation against their right. In the absence of any adjudication against them, the theory that they are incompetent at common law must be based on the fact that they did not actually hold office except in rare instances and that these instances were usually treated by the judges and law writers as exceptional. But there is quite an array of cases in which they did hold office and their right to do so was upheld.

"Aside from the notable fact that in England, as in many other countries, women have often occupied the throne and have sometimes shown great capacity as rulers, it appears that at least one English Queen has performed judicial duties, and that at least one woman holding the office of sheriff performed judicial duties in the exercise of that office. Another woman is shown by the reports to have rendered an award as arbitrator at an early day, and as her competency does not seem to have been questioned there

is nothing to show that this was deemed extraordinary. Other offices held by women are described in various cases as keeper of prison, keeper of workhouse, governor of workhouse, custodian of castle, overseer of the poor, sexton of the parish, forrester, commissioner of sewers, constable of England, marshal of England, great chamberlain of England, and marshal of the court of King's bench.

"The simplest statement of the common-law situation is that while women did not generally hold office, and the question of their competency was not well settled, they did in fact hold various offices, some of which were of great importance; that some, but not all, of these were hereditary and the duties thereof were often performed by deputy; and that in every instance in which a woman's right to any office was questioned prior to the present generation she was held to be competent, although the court often took occasion to say that women were not competent to hold all offices.

"In addition to the fact that some of the offices they held were hereditary, and that they sometimes exercised their functions by deputy, it is doubtless true that some of the offices were somewhat obscure, and were exercised, in the words of Lord Esher, 'in a remote part of the country where nobody else could have been found who could exercise them.' In view of all these facts the conclusion as to the common law of the subject is that women did not generally hold office, but that they did do so in quite a variety of instances, and that in every contest of a woman's right to any particular office her right was sustained.

The authorities on the subject which are directly against women are all very recent, although the recent authorities are by no means unanimous against them, and there is a marked tendency in modern statutes to enlarge the rights of women in this respect."

It seems quite evident that there is much to support these statements and much to throw doubt still upon the point whether there is any general rule of the English common law that women are incapable of holding an important public office. The case of King v. Stubbs, supra, decided in 1788, seems indeed to be actually the last case dealing upon general common law principles with the question of a woman holding an office. Not until 1868 in Chorlton vs. Lings did anything of the kind, apparently, come up again and then it was a question solely of the Parliamentary franchise. That case was decided as much upon the interpretation of the Statute in question as upon common law, though it is of course true that the court distinctly held that there was a disqualification at common law. The reasoning of Willes, J., above quoted seems rather illogical. The actual holding of important offices by women was treated by him as "exceptional". All that means is surely that it was unusual but not absolutely illegal owing to entire legal incapacity. Since that case we have only Beresford-Hope vs. Lady Sandhurst, xubi supra, decided by all the judges except Lord Esher upon the words of the statute, DeSouza vs. Cobden, and Reg. v. Harrald, ubi supra, both also decided upon the words of the statute with, in the former case, a mere re-iteration by Lord Esher of his former general opinion.

There seems therefore to be the very best of reason for

doubting whether there does exist any decision laying it down as an absolute general rule that under the English common law a woman was disqualified from holding any public office. The Parliamentary franchise alone was in question in Chorlton vs. Lings and so far as the common law goes, aside from statute, no case can be found which directly decides that a woman is disqualified from holding public office. After the extension of the franchise by the Reform Act of 1832 and the further extension in 1867 when Disraeli "dished the Whigs" it was but natural that grave opposition should appear against a claim to the franchise by women, involving as it would an actual doubling of the extension. And obviously a different principle might well apply to the question of the franchise, which could be claimed as a right by all persons coming within the proper class without any power, in the executive, of discrimination or selection, from that applicable not to the right, because no right could be claimed, but to the legal qualification to be appointed to a public office when the Crown and its responsible advisers ~~could~~ can always exercise judgment and discretion in regard to the particular qualification of the individual. In so far as this latter matter is concerned, and it is the whole question involved here, the opinions expressed in Chorlton vs. Lings were entirely obiter and quite unnecessary so far as the real point involved i. e. the electoral franchise, was concerned.

In my opinion therefore it can be said with absolute truth that there is no actual decision to be found later than King vs. Stubbs upon the general question of the common law capacity of women to hold public office. There is no decision at any time

declaring their incapacity. Even the dicta so declaring are by courts whose decisions are not binding upon us. Those dicta, which undoubtedly rest upon practice and usage, were merely made possible by the omission of the Crown through a number of centuries to appoint women to public office, no doubt because the advisers of the Crown thought them unsuitable. This is very far from establishing a legal incapacity if the advisers of the Crown here and now happen to entertain a different view as to their suitability.

With respect to the particular office now in question, that of justice of the peace, there are authorities, of sufficient weight to be quoted in Encyclopaedia of the Laws of England, (Vol. 14, p. 824) which show that women had as late as Henry VI and Queen Mary actually been put in the commission of the peace in several instances.

In view of the direct expression of opinion in King vs. Stubbs, in view of the absence of any decision directly declaring their incapacity, and in view of the well established facts that women had on many occasions held high and important public offices in England, some of a judicial character, in many cases without question, and, where the capacity was questioned, with a decision favorable to the existence of the capacity, I feel disposed with great respect to the names of Willes J. and Lord Esher to say that in my opinion women were not legally disqualified by the common law of England in 1870, being the date as of which it was introduced here, from holding public office in the government of the country.

And in any case even if Willes J. and Lord Esher were

correctb in their view we have still to remember that it is only so much of the common law of England as it stood in July, 1870, as is applicable to this Province that was introduced. In effect therefore what we are asked to say is that, because the advisers of the Crown in England up to 1870 apparently had thought for many years that a woman ought not to be appointed a justice of the peace, even ~~in those~~ if she possessed the necessary property qualification which would be rather seldom, therefore the Crown and its advisers here, even if they are, for reasons which no doubt seem good to them, of opinion that a particular woman is a suitable and proper person to be appointed a justice of the peace, are nevertheless doing an illegal thing in appointing her.

In my opinion in a matter of this kind the Courts of this province are not in every case to be held strictly bound by the decisions of English Courts as to the state of the common law of England in 1870. We are at liberty to take cognizance of the different conditions here, not merely physical conditions, but the general conditions of our public affairs and the general attitude of the community in regard to the particular matter in question. This Court adopted this view in the case of Makowecki vs. Yachimyc, 10 Alta.L.R. 366 in regard to the common law as to water courses and although in that case I was disposed to adopt a different view I now think the general principle upon this point followed there was a sound one. Mr. Justice Beck has referred me to an opinion ~~in~~ expressed in Dayward vs. Carlson, cited in 30 Am. and Eng. Ann. Cases, 1223 by the Supreme Court of the State of Washington. The Court said:

" The common law grew with society not ahead of
'it: as society became more complex and new demands

"were made upon the law by reason of new circumstances
'the Courts originally in England out of the storehouse
'of reason and good sense declared the 'common law'.
'But since courts have had an existence in America they
'have never hesitated to take upon themselves the re-
'sponsibility of saying what is the common law not-
'withstanding current English decisions especially upon
'questions involving new conditions."

And it has also been decided in many American States that in order to be binding on American Courts as evidence of what the common law is the English decisions rendered prior to the Revolution must be clear and unequivocal. See 30 Am. & Eng. Ann. Cas. 1223. Certainly upon the point involved here the English decisions are neither clear nor unequivocal.

Now at a very early stage in the history of our law in the Territories it was recognized that women should be put in a new position. The disabilities of married women as to owning real property were removed as early as 1877; in fact as soon as legislation could be directed to the matter. In all the early ordinances, also, there is evidence that it was considered necessary if women were not to vote or hold public office that it should be so expressly stated. See the following ordinances, No. 2 of 1883, sec.7., No. 4 of 1884, Sections 11, 18, 19, and the Proclamation of Governor Laird, in regard to elections to the North West Council of 5th. Feb., 1881. Particular care was used to insert the word "male" in all clauses laying down the qualifications of voters and the qualifications for public electors offices, thus indicating the view that otherwise there would be a possibility of women being qualified. It is common knowledge

that at a very early stage in our history women were admitted as members of the Law Society although none were actually called to the bar because they did not proceed with the examinations, and to the practise of medicine, as members of the College of Physicians and Surgeons. Then when we have our statute of 1916 above referred to wiping out the expressly enacted disqualification of women in regard to the franchise under twenty-four statutes and ordinances I think we may take this as indicative, not of any intention that they should be disqualified in regard to offices not mentioned in those statutes, but of the general sense of the community upon the subject of women's political status and of an intention merely to annul disqualifications already expressly enacted in particular cases.

I therefore think that applying the general principle upon which the common law rests, namely that of reason and good sense as applied to new conditions, this Court ought to declare that in this province and at this time in our presently existing conditions there is at common law no legal disqualification for holding public office in the government of the country arising from any distinction of sex. And in doing this I am strongly of opinion that we are returning to the more liberal and enlightened view of the middle ages in England and passing over the narrower and more hardened view which possibly by the middle of the nineteenth century had gained the ascendency in England.

I think therefore that Mrs. Jamieson is not disqualified from holding the office of Police Magistrate and that it is unnecessary to consider the point of de facto occupancy of the office upon which Mr. Justice Scott rested his decision.

A second ground taken against the validity of the conviction

was that the accused being a woman did not come within the meaning of sec. 238, subsection (a) of the Code under which she was accused and convicted. In my opinion the reasons given by Mr. Justice Scott were a quite sufficient answer to this objection and that nothing further need be added to what he said.

A third objection was that the accused was not permitted before conviction to make any defence. After the last witness for the prosecution had given his evidence the notes of the evidence show that what then happened was as follows:-

"The Court: Lizzie Cyr, I sentence you to six months at hard labor at Macleod.

'Mr. Cameron (Counsel for accused); I would ask the stenographer to note that she was not called upon for a defence at all.

'The Court: You defended her. We can bring her back and take the defence if you wish. We will take her own defence if you will bring her back.

'Mr. Cameron: She is now convicted and we cannot put in any evidence now."

From this it would appear that counsel for the accused was more anxious to take advantage of a mistake of the magistrate to secure a ground of attacking the conviction than of the opportunity plainly offered to the accused to produce a defence on the merits. However, if one wishes to be technical one might quite obviously go so far as to say that the words of the magistrate did not convict the accused but were an imposition of punishment before a conviction had been made at all. But it is quite apparent that the magistrate simply overlooked for the moment the right of the

accused to adduce evidence in defence - an error which perhaps it was the duty of any barrister in court in his capacity as as assistant to the court to point out and so have corrected. The error was corrected at once. No doubt the magistrate had made up her mind upon the evidence adduced and assumed from the circumstances that no defence on the merits was intended - an assumption which appears to have really been correct. The accused was not deprived of the opportunity of defence and this objection fails.

It was further objected that there was no evidence to support the conviction. The main argument in support of this contention was that the woman had been supporting herself by prostitution and that prostitution should be considered a visible means of maintenance within the meaning of the section. Of course, this contention is utterly untenable. The words "visible means of maintenance" refer in my opinion to a source of livelihood which is not only lawful, in the sense of not being forbidden by law, but also honest and reputable, that is, such as is generally recognized as not subject to condemnation by the ordinary moral standards of the community. It may be true that a woman is not infringing the Criminal Code merely by being a prostitute as distinct from keeping a house of prostitution but it is impossible to suppose that the legislature intended to cover by the expression used so immoral a method of securing a maintenance. The woman admitted that she had no money, no employment at all and in effect said that she had no means of maintaining herself except prostitution. There was in my opinion quite sufficient evidence to justify the magistrate in

her conclusion that the accused came within the words of the statute. See Rex vs. Munroe, 25 O. L. R., 223.

The appeal should therefore be dismissed with costs.

Chas A Stuart

J. S. C.

Calgary.

Novr. 23rd 1917.