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Doc. No. 1979.005

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1241

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For full version of abbreviations click 'Abbreviations' on FB's website.

Introductory Note by Francis Bennion

The following article is followed by two letters from readers in reply and my rejoinder to those letters.

The Sex Disqualification (Removal) Act - 60 Inglorious Years

This year marks the golden jubilee of an Act of Parliament which has virtually proved a dead letter. Yet as was said in the House of Commons by Sir Edward Pollock, Solicitor General in the Lloyd George-Bonar Law coalition Government which sponsored it, the Act gave 'almost a complete measure of relief on the question of sex': *The Times*, 27 November 1919. Using the plainest of words, it satisfied many claims of the women's movement, long before that label became familiar. In some respects it went further in emancipating women than does the Sex Discrimination Act 1975, which is notoriously crammed with exceptions. It probably settled a religious controversy which still rages with great fury. It remains on the Statute Book.

The Sex Disqualification (Removal) Bill was introduced in 1919 to implement the Government's general election pledge that following the admission of women to the Parliamentary franchise the previous year, it would introduce a Bill to remove the remaining legal restrictions on them. Not convinced that this pledge would be honoured, the Labour Party introduced its own Bill early in the session. As well as providing that women might hold any civil or judicial office, the Labour Bill, entitled the Women's Emancipation Bill, enabled women, like men, to vote at 21 (instead of 30). It also entitled peeresses to sit and vote in the House of Lords.

To the surprise of the Government, the Women's Emancipation Bill made progress in the Commons. When, against all expectation, it was given a third reading, the Government acted. The second reading of its Sex Disqualification (Removal) Bill was moved in the House of Lords by the Lord Chancellor. This was no less a figure than Lord Birkenhead (formerly F.E.Smith), who might justly if disrespectfully be termed the archetypal male chauvinist pig. He revealed his sentiments right away. The Bill, he informed their Lordships, would prove surprising 'and to many extremely disagreeable' (35 HL Deb 896).

As finally passed, the Act made detailed provisions about women jurors and civil servants. As with the Sex Discrimination Act 1975, the detail was for the purpose of limiting the degree of emancipation. It was unthinkable, for instance that females should be allowed to participate in trials of the nastier kinds of sex offence. Certain civil service posts were to be reserved to men. Apart from this detail, and specific provisions about solicitors (s.2) and admission to universities (s.3), the main thrust of the Act was splendidly general. In the opening words of section 1 (which the marginal note summarised as 'Removal of disqualification on grounds of sex') it was enacted 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 . . .

For good measure, s.4(2) provided that any other enactment, Order in Council, Royal Charter, *or provision* should cease to have effect so far as inconsistent with the Act.

It might have been confidently expected that so all-embracing a piece of legislation, expressed in such general terms, would have given rise to much litigation, as did the Equal Pay and Sex Discrimination Acts of our own day. Yet we find a Court of Appeal judge remarking in a case nearly 50 years after the Act received Royal Assent: 'This is a most important statutory provision, which, so far as I know, has never yet been considered by the courts' per Salmon L.J. in *Nagle v Fielden* [1966] 1 All E.R. 689,700.

Lord Justice Salmon's remark is accurate only if one treats the Committee for Privileges of the House of Lords as other than a court. In 1922 that Committee considered a case brought under the Act by Viscountess Rhondda, which is reported in the law reports, see *Viscountess Rhondda's Claim* [1922] A.C. 339. Lady Rhondda, a peeress in her own right by succession to her father, claimed that sitting and voting in the House of Lords was a 'public function' within the meaning of s.1 and that therefore she should receive a writ of summons. By an elaborate pretence which Lord Birkenhead said was worthy of the massive irony of a Gibbon, the Committee for Privileges conspired to ignore the fact that two years previously the Lords, in considering the Bill, had rejected a Commons amendment spelling this out in express words.

In moving the rejection of the amendment, Lord Birkenhead had used an argument which recalled the preamble to the Parliament Act 1911 and reads strangely today. He said that although hopes had been entertained in the past which had proved delusive, it was the sincere intention of the Government to introduce proposals with the object of reforming the second chamber. Once more his male chauvinism peeped out. Their Lordships, he said, approached those who were good enough to propose the amendment with the melancholy words *morituri te salutamus* (we who are about to die salute you). If the Lords were to be abolished he thought he would rather perish in the exclusive company of members of his own sex [Laughter]: *The Times*, 12 November 1919.

It was soon clear that the Committee for Privileges, remembering (but not mentioning) the Commons amendment and its fate, were determined to reject Viscountess Rhondda's claim. Naturally, it was Lord Birkenhead who made the leading speech. The patent for the Rhondda peerage expressly granted a seat in Parliament only to male holders of the title. The general words of s.1 could not be held to cover so important a matter. If Parliament had intended peeresses to sit and vote in the House of Lords it could easily have said so. This it had failed to do. The Committee divided by 22 votes to 4, and the claim was rejected.

The only other reference to the Act in the law reports occurred in 1966 in *Nagle v Fielden*, already mentioned. Even this concerned an interlocutory matter only, so there appears never to have been a substantive decision by a court of justice. The plaintiff, Mrs Nagle, sued the Jockey Club for a declaration that their practice of refusing to licence a trainer if she was a woman was illegal and void. Mrs Nagle also claimed an injunction restraining the Jockey Club from implementing their practice in her case. Surprisingly, the statement of claim was struck out as disclosing no cause of action. This order (plainly incorrect) was reversed on appeal.

Mrs Nagle relied mainly on the doctrine of restraint of trade, but the Sex Disqualification (Removal) Act is mentioned in all three judgments. Lord Denning M.R. thought that the training of horses might not be a 'vocation' within s.1, and did not consider whether it was a 'profession'. The other two judges were similarly doubtful. The point never had to be decided as the case was settled.

So that is the total history of the Sex Disqualification (Removal) Act 1919. If Acts of Parliament possessed feelings, this one would be suffering extremes of mortification from being persistently cold-shouldered throughout its life of 60 years. Should you search for it in *Halsbury's Statutes*, you will run it to earth in the title *Juries*. In his wide ranging survey of sex discrimination and law, given before the advent of the Sex Discrimination Act 1975, Lord Scarman mentions it not at all (*Women and Equality before the Law*, the 1971 Fawcett Lecture). The 1975 Act leaves it in force, but says nothing about it.

It is fruitless to speculate about why the 1919 Act has been ignored. More interesting is the question

whether there is still any kick still left in it. Might it be one of those who come to life only in old age? Could it be used, for example, to get round some of the restrictions in the Sex Discrimination Act 1975?

Section 6 (1) of the 1975 Act renders it unlawful for an employer to discriminate against a woman in the arrangements he makes for the purpose of determining who should be offered any employment (eg selection for interview or drawing up a short list). It also renders unlawful the refusal or omission to appoint a woman on the ground of her sex. There are many cases however, where the 1975 Act expressly disapplies these rules. They do not apply, for example, where being a man is a genuine occupational qualification for the job (s.7). Since the 1919 Act does not contain corresponding restrictions can it be prayed in aid by a woman who seeks a job for which a man is usually thought necessary? There seems no reason why not.

A similar argument applies elsewhere. For example, s.19 of the 1975 Act states that s.6(1), and the other anti-discrimination provisions, do not apply to employment for purposes of an organised religion where the employment is limited to one sex so as to comply with the doctrines of the religion or avoid offending the religious susceptibilities of its followers. Again, there is no corresponding exception in the 1919 Act.

Finally, it may be asked what is the effect of the 1919 Act on the religious dispute referred to at the beginning of this article? This is of course the controversy over the ordination of women by the Anglican Church in Britain, the Church by law established. It is surely beyond dispute that the celebration of holy communion in the local parish church is a 'public function'. Plainly therefore to prevent a woman priest ordained by an overseas Anglican church from performing the celebration is contrary to section 1.

What though of the rule still enforced by the Anglican Church in Britain, that prevents a woman from being ordained, or of course from becoming an ordination candidate? The reference to a 'public function' would seem to apply here too. Or one may look at the words removing the disqualification of women 'from entering or assuming or carrying on any civil profession or vocation'. There is some ambiguity here. Is 'vocation' qualified by 'civil'? One may talk of civil professions, but one does not normally talk of civil vocations. The word vocation literally means calling, and the calling is usually understood to be by the Almighty. The pre-eminent vocation or calling is of course the priesthood.

If on the other hand the reference is to be read as being to a 'civil vocation' does this exclude the priesthood? There seems no reason why it should. The Act was passed at a time when Parliament was accustomed to legislate directly for the Established Church (the prolonged Parliamentary disputes over the 1928 prayer book were less than ten years ahead). The word 'civil' can be contrasted with 'ecclesiastical' just as it can with 'military', 'criminal' or 'political'. It is clear in this context however that the contrast intended is with 'judicial'.

So the conclusion, no doubt surprising to many, is that in Britain for the past 60 years it has been unlawful to prevent women becoming Anglican priests, or officiating as such. The wrangles of Synods and Church Assemblies have been in vain therefore, and pointless. The situation, as Lord Birkenhead would undoubtedly have put it, is worthy of the massive irony of a Gibbon.

F A R Bennion
129 New Law Journal (13 Dec 1979) 1088.
1979.005

Sex Disqualification

Dear Madam,

The history of the Sex Disqualification (Removal) Act 1919, as related by Francis Bennion (NLJ, November 8, p 1088), is not absolutely complete. The Act was canvassed in the Preamble to the well-known Guardianship of Infants Act 1925, in the following words:

“WHEREAS Parliament by the Sex Disqualification (Removal) Act, 1919 and various other enactments, has sought to establish equality in law between the sexes, and it is expedient that this principle should obtain with respect to the Guardianship of Infants and the rights and responsibilities conferred thereby: Be it therefore enacted by the King's Most Excellent Majesty {etc, etc} as follows:-”

What followed was s 1 which embodied the “paramourty principle” by which the court was to decide any question relating to the custody or upbringing of an infant or the administration of any property belonging to or held on trust for an infant, or the application of the income thereof, by reference to the welfare of the infant and not to competing claims of the father and mother.

The fact that the 1925 Act described itself in these terms as an “anti-sex discrimination” measure and referred expressly to the father and the mother of the infant appears not only to question the belief held widely today, that. protection of children was the only object of the enactment, but also to; cast doubt upon the decision of the House of Lords in *J v J* [1969] 1 All ER 788, that the paramourty principle: was to apply as between the parents - on the one hand - and third parties (in that case foster-parents) - on the other.

Yours faithfully,

PETER SNOW

Teddington

129 New Law Journal (13 Dec 1979) p 1240

Dear Madam,

Mr Bennion suggested (NLJ, November 8, p 1088) that the Sex Disqualification (Removal) Act 1919 made the Sex Discrimination Act 1975 unnecessary. This would not appear to be the case. The 1919 Act was short and very restricted in scope. It was merely intended to prevent women from being disqualified automatically from being appointed to a job or to prevent their appointment being void on the grounds of their sex.

Unlike the 1975 Act, the 1919 Act's intention was not to give women any right to be considered on equal terms with men as being suitable candidates for a job, nor was the Act judicially interpreted in such a way in the few cases ever brought under it. Mr Bennion omitted to mention an early one of these, which was the case of *Price v Rhondda Urban Council* [1923] 2 Ch 372. This was a case brought by a married woman teacher on behalf of herself and 57 others, who unsuccessfully attempted to use the 1919 Act to prevent the local education authority from dismissing them on the ground that they were married. The early 1920's was a time when, as now, there were large numbers of newly qualified teachers who had just left training college and who were unable to find jobs.

The Rhondda Urban Council decided to ease the situation by dismissing all the married women teachers in their employment who were to make way for their younger unemployed, albeit inexperienced, colleagues. Mrs Price, who had been employed as a teacher for nearly 25 years failed to persuade Eve J that the 1919 Act could be used as a means of invalidating her dismissal. Moreover, in his view, it would have been “an absurdity” to conclude that the Act could: be used to prohibit an employer from making a job available only to members of one sex. Clearly, Eve J would have thought it equally absurd to suggest-that the 1919 Act prevented the Anglican Church from barring women from ordination.

Fortunately for married women teachers today, local education authorities cannot use the method selected by the Rhondda Urban Council for easing the problem of unemployed student teachers. The Sex Discrimination Act 1975 prohibits discrimination on the ground not only of sex-but marital status in the field of employment. It also sets out to achieve what the 1919 Act so conspicuously failed to do. Whereas the 1919 Act simply removed a disqualification, the 1975 Act attempts to remove a discrimination.

Yours faithfully,

J E S FORTIN (MRS)

Kings College, London

Sex Disqualification (Removal) Act 1919

I am grateful to Peter Snow and Mrs Fortin (13 December 1979) for supplementing the information contained in my article on the Sex Discrimination (Removal) Act 1919 [1979.005]. Mrs Fortin is however mistaken in saying that I suggested the 1919 Act made the Sex Disqualification Act 1975 unnecessary. I suggested no such thing, it would have been very foolish of me to do so. What I did say, and is undoubtedly true, was that *in some respects* the 1919 Act went further in emancipating women than does the 1975 Act. I detailed these with great care in the concluding portion of the article, and I invite Mrs Fortin to look again at this. She will find that what I say there is not only right but important for those fighting in the women's movement. Incidentally, Mrs Fortin is also mistaken in claiming as an advantage of the 1975 Act that it 'prohibits discrimination on the ground not only of sex but of marital status in the field of employment'. The 1919 outlaws disqualification generally on grounds of marriage as well as sex.

What people concerned with women's liberation need to realise is that the 1919 Act is still a fully operative Act of Parliament. There is no doctrine of desuetude applying to it. Moreover its interpretation is not subject to any crippling decisions by the House of Lords or even the Court of Appeal.

Judicial attitudes are (one hopes) more enlightened now than they were in the 1920s. There is some prospect therefore that modern judges would give the wide words of the 1919 Act the meaning they plainly bear.

I am told that there is a case awaiting report in which the Employment Appeal were asked to apply the 1919 Act to a woman excluded by one of the many exceptions contained in the 1975 Act. That shows that some people at least are alive to the possibilities offered by the 1919 Act. The history of its ineffectiveness is a disgraceful story of prejudice and inertia triumphing over reform. There is still time to redeem this, even though the absence of remedial machinery from the Act is undoubtedly a serious drawback. An action for a declaration seems to be the only method by which the Act might be applied directly, though the fact that breaches of it are unlawful can be turned to account from a defensive point of view.

F A R Bennion

130 New Law Journal (3 Jan 1980) 22.

1980.030