

Eng. Rep.]

CHORLTON V. LINGS.

[Eng. Rep.]

the judges and the ground of the decision are in my favour. How, then, can you, in such a report as 7 Mod., attach any importance to the alleged production of a MS. case.

There is a unanimous decision of the Scotch Court of Session of October 30, 1868, in my favour though Lord Romilly's Act applies to Scotland. As to my friend's observations on the fitness of women for the franchise, I wholly decline to follow him into that question.

*Coleridge Q. C.*, in reply.

*Cur. adv. vult.*

The judgments were delivered on November 9. Those of BYLES and KEATING, JJ., were written, and are given here *verbatim*. Those of his Lordship and of WILLES J., are taken from the shorthand writer's notes of what they said.

[We have only space for the judgment of the Chief Justice.—Ed. L. J.]

BOVILL, C. J.—It is quite unnecessary to consider the question, whether it is desirable that women should possess the franchise of voting at the elections of members of Parliament. What we have to determine is, whether by law they now possess that right. In the present case, it is agreed, the right of the appellant to be placed on the list of voters for the borough of Manchester must depend on the construction to be placed on the Representation of the People Act, 1867. Under that statute two questions arise, one whether women are included under the words "every man," and the other, whether women are subject to legal incapacity. If women are not included in the terms of the Act, or are so incapacitated, our judgment must be in favour of the respondent.

On the question of whether they are incapacitated Mr. Coleridge, on the part of the appellant, contended that women had a right to the franchise at common law, that nothing has taken it away from them, and that they were therefore not incapacitated from voting. Indeed, in the first instance, I rather understood him to contend that the present appellant was entitled to the franchise as a common law right, and he fully argued that question.

The appellant has failed to produce before us any reported decision of any Court in favour of the right of women to the exercise of the franchise, in voting for members of Parliament, with the exception of the notes of cases which are referred to in 7 Mod. Mr. Coleridge was obliged to admit that for several hundred years no instance is to be found of the exercise by women of any such right. This alone is sufficient to raise a very strong presumption against the existence of the right in point of law.

It is true that a few instances have been brought before us where in ancient times—namely, in the reigns of Henry II., Henry V., and Edward VI., women appear to have been parties to returns of members of Parliament; and, possibly, other instances may be found in early times, not only of women having voted, but also of their having assisted in the deliberations of the Legislature, and, indeed, it is mentioned by Selden in his *England's Epinomis*, c. 2, s. 19, that they did so. But these instances are of comparatively little weight as opposed to uninterrupted usage to the contrary for several cen-

turies. What has been commonly received and acquiesced in as the law, raises a strong presumption of what the law is. At least those who question it have the burden of proving that it is not what it has been so understood to be.

The statute 52 Hen. 3, c. 10, in relieving women from attending at the sheriff's tourn does not prove that they were entitled to or did vote at the elections. Neither is this shown by the names of women being included in the roll of burgesses and freemen of the borough of Lyme Regis as mentioned in 2 Luters. The records that were produced of the time of Philip and Mary show that dame Elizabeth Copely was a party to an indenture as returning officer, and that may possibly be the explanation of the previous return in the reign of Edward VI.

The same observation applies to the case of Lady Packington joining in an election for Aylesbury, as appears from 7 Mod. 268. The precept was directed to her as lady of the manor to return two members of Parliament. With regard to the two cases mentioned in the report of *Olive v. Ingram*, 7 Mod. 263, they appear to have been cited from a MS. by Hakewell. The statement of them varies in different parts of the report, and though the argument was several times adjourned it does not appear that anything satisfactory was discovered respecting them. They are not even mentioned in the report of the same case by Sir John Strange, and I think that very little weight is to be attached to them. If there was any such decision—and one of the cases is said to have been decided in 14 James I—it is difficult to understand why no farther notice or trace of it is to be found or why it should not have been acted upon.

At this distance of time we have not the means of ascertaining accurately the particulars of those cases, or under what circumstances the returns produced to us were made, or whether any question was ever raised respecting them. The decisions as to what offices women may hold, and whether they come within the description of particular statutes does not materially affect us in this case. On the other hand Lord Coke, 4 Inst. 5, treats it as clear law, in the time of James I., that women were incapacitated from voting, and in the case of *Olive v. Ingram* (temp. 12 Geo. 2) the majority at least of the judges, notwithstanding the two cases referred to, seem to have been of the same opinion.

In the work (published in 1812) of Mr. Sergeant Heywood, who was well acquainted with election law, women are classed among those who are incapacitated from voting. The same view has been accepted by Mr. Hallam and others in modern times, and was to some extent recognised in the Act of 1832, by the Legislature when it conferred the franchise on "male persons."

There can be no doubt that at the time of the passing of the Act of 1867 the common understanding both of lawyers and laymen was that women were incapacitated from voting, and the Legislature must, I think, be presumed to have acted under that impression.

The 56th section of the Act of 1867 also expressly preserves all laws, customs, and enactments then in force.

Mr. Coleridge has very forcibly contended that if women were ever entitled to the franchise