

100 Years of Women in the Law: From Bertha Cave to Brenda Hale

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Last year we celebrated 100 years since some women got the right to vote in Parliamentary elections and all women got the right to stand for Parliament. That paved the way for this year's celebration of 100 years since the Sex Disqualification (Removal) Act 1919 gave women the right to join those professions which had previously been denied to them, particularly the law, and to hold public office, including judicial office. Today I want to trace the history of the progress women have made in the law over those 100 years, by talking about some of the individual women involved – hence Bertha Cave to Brenda Hale. I have been enormously helped by a wonderful new book, *Women's Legal Landmarks*, edited by Erika Rackley and Rosemary Auchmuty.¹

But before we celebrate the achievements of the first women to join the profession, we ought to celebrate the courage of those women who tried to join before the 1919 Act and were refused. They were refused on a point of law dressed up as statutory interpretation. The first woman in the United Kingdom to try and join the legal profession was a Scotswoman, Margaret Howie Strang Hall. In 1900 she petitioned the Court of Session for permission to take the first examination of the Incorporated Society of Law Agents, as solicitors were then called in Scotland. The Law Agents (Scotland) Act 1873 referred to 'persons' and she claimed to be a person. The Court of Session disagreed:

¹ Hart, December 2018.

“The Court is authorised to admit persons, a term which, no doubt, is equally applicable to male and female. But in the case of an ambiguous term, the meaning must be assigned to it which is in accordance with inveterate usage. Accordingly we interpret the meaning “male persons” as no other has ever been admitted as a law agent.”²

I say dressed up as statutory interpretation, because it is hard to see what is ambiguous about the word ‘persons’. In reality, it was the rather different reasoning, summed up in the well-known judicial dictum – ‘I have nothing against innovation but this has never been done before’.

The pioneer in England was Bertha Cave, who in March 1903 wrote to the Benchers of Gray’s Inn asking to be admitted as a student, with a view to being called to the Bar. By then, there were several women who had studied law at University, often with spectacularly good results. But we know virtually nothing about Bertha’s background and education. What we do know comes from a county court case in December 1904, when she appeared (in a law student’s cap and gown) in the Mayor’s and City of London court applying to set aside a default judgment and for a re-trial of a claim against her father for the price of a bicycle which had been bought for her to ride. She wanted a reduction in the price because the bike was faulty. She succeeded in getting the re-trial. But she had ridden the bike to court, so the judge warned her that she had better not ride it to court on the next appearance – he advised her to lead it up rather than ride it (presumably an equestrian metaphor) – to loud laughter in court. She was less successful on the retrial and they were ordered to pay the full price, but by instalments. This is enough to identify her father, not as a barrister or a solicitor or any sort of professional man, but as a butler

² *Hall v Incorporated Society of Law Agents*, 1901 9 SLT 150.

working away from home in grand houses – so how his daughter was educated or got the law bug we shall probably never know.

But we do know that this was the first time that an Inn of Court had been called upon to decide whether they could admit a woman with a view to being called to the Bar. At a meeting of Pension – the governing body of the Inn over which as Treasurer I had the privilege of presiding in 2017 – it was proposed and seconded that she be admitted. But the opponents urged caution and, as so often happens, employed the delaying tactic of persuading Pension to refer it to a special committee. The committee rejected her application on two grounds. First, that it was not in the power of a single Inn of Court to admit a woman – their power to admit students and call them to the Bar was delegated to them by the Judges and subject to their control.³ And second, that according to two well-known Scottish cases, women were not ‘persons’ – either within the meaning of the statutes of the University of Edinburgh⁴ or the Law Agents (Scotland) Act 1873.⁵ So any other apparently gender neutral terms in texts relating to membership of the Inns should be read as male only.

Nothing daunted, Miss Cave appealed to the Judges, and appeared before the Lord Chancellor and other Judges in the House of Lords in December 1903. The New York Times for 5 December (for which reference I am indebted to the Hon Michael Beloff QC) described the proceedings thus:

‘Clad in a navy blue walking suit with a bolero of the same material trimmed in white, and balancing a rather piquant black hat on her head, she carried her comely self into the presence of the august Judges. She deposited a purse and a

³ *R v Benchers of Gray’s Inn, ex parte Hart* (1780) 1 Doug KB 353, (1780) 99 ER 227.

⁴ *Jex-Blake v Senatus of the University of Edinburgh*, 1873 M 784.

⁵ *Hall v Incorporated Society of Law Agents*, 1901 9 SLT 150.

package that looked like corsets on the table, and then pleaded her case. There was no question of ability raised, it was solely a matter of sex. So she told the Judges what other countries were doing for women who desired to practice law.

“The Judges listened smilingly, and when Miss Cave was through promptly advised her that there was no precedent for admitting women students at any of the Inns of Court, and that they did not feel justified in creating one. “I wish your lordships good morning,” said the little woman frigidly, and picking up her purse and her corsets she quitted the judicial presence and went out in the cold, cold world.’

That decision meant that it was inevitable that in January 1904, Lincoln’s Inn would turn down an application by the far more famous Christabel Pankhurst, daughter of the even more famous Emmeline Pankhurst and a radical Manchester barrister. She was then reading law at the University of Manchester and destined to graduate with a first class degree in 1906.

Later that January, the Union Society of London (a debating society founded in 1835 by members of the Oxford and Cambridge Unions) held its annual ladies’ night debate in Lincoln’s Inn old hall. The motion (proposed by Mr Edward Atkin, a former stipendiary magistrate in West Africa, who was not called to the Bar himself until 1913) ‘that this house rejoices in the decision of the Lord High Chancellor of England protecting the Inns of Court from invasion by the gentler sex, and records its belief that ladies ought not to be allowed to practise at the Common Law Bar or to hold judicial office’.⁶ Both Bertha Cave and Christabel Pankhurst spoke against the motion – apparently Christabel was the better speaker, which is no surprise as she

⁶ *The Times*, 21 January 1904.

was to become a notable orator. At all events, Mr Atkin's motion was defeated by 103 votes to 85, but of course it changed nothing.

Quite why there was such opposition to women joining the Bar is a mystery. Miss Pankhurst duly obtained a first class university degree, so there could be no doubt that women could have the necessary intellectual ability. By then, thanks to the pioneering efforts of Millicent Fawcett's sister, Elizabeth Garrett Anderson, women were able to qualify as doctors. So the old idea that the law would offend women's 'delicate sensibilities' surely would not wash. The Gray's Inn archives suggest another reason: qualifying for the Bar involved eating a great many dinners – 36 when I was called in 1969 – and it was thought unseemly that men and women should take their meals together, either because the men would vie for the honour of sitting at a woman students' mess or because they would resent the presence of women who might spoil their fun. The latter attitude was still evidence in 1969, when the admission of women to be full members of the Northern Circuit Bar mess was resisted on just that ground (but fortunately good sense prevailed and we were allowed to join on equal terms with the men).

It is thought that Christabel may have founded the Committee for the Admission of Women to the Legal Profession in 1904, which later organised the test case about admitting women to The Law Society. But thereafter she devoted her oratorical skills to the women's suffrage movement and by the time the 1919 Act was passed her interests had moved elsewhere. So she never qualified as a barrister.

Meanwhile, women had been employed as clerks in solicitors' offices since at least the 1880s, but attempts to get private members' bills passed to allow them to qualify as solicitors had failed. England's equivalent to Margaret Howie Strang Hall was Gwyneth Bebb. She studied law at St Hugh's College Oxford and gained first class marks in Jurisprudence in 1911. For most of her

time at Oxford she was the only woman law student among almost 400 men. And although she could take the examinations she was not allowed to take a degree. She then became an investigating officer for the Board of Trade, enforcing the minimum conditions then laid down for women industrial workers.

But she really wanted to practise law. There were influential people in favour, but the legal profession was firmly against. The Law Society agreed to a test case. In December 1912 four 'carefully selected' women – Gwyneth Bebb, Karin Costelloe, Maud Ingram (later Crofts) and Nancy Nettlefold - sent off applications to The Law Society, and when they were refused they took the Society to court. Miss Bebb's case was chosen as the lead case. Before Mr Justice Joyce in the High Court, she argued that a woman was a 'person' within the meaning of the Solicitors Act 1843, which expressly provided (in section 48) that 'every word importing the masculine gender shall extend and be applied to a female as well as a male', and that being a solicitor was not a public office but a private profession, so they were not disqualified at common law. She lost. Before the Court of Appeal, she went further and argued that women were not disqualified from public office either. She lost again.⁷ Inveterate usage being the whole foundation of the common law, the fact that there had never been a woman solicitor was enough to disqualify her. This was even though, as Cozens-Hardy MR admitted (p 294)

'in point of intelligence and education and competency women – and in particular the applicant here, who is a distinguished Oxford student – are at least equal to a great many, and, probably, far better than many, of the candidates who will come up for examination.'

⁷ *Bebb v Law Society* [1914] 1 Ch 286.

Phillimore LJ mentioned ‘incidentally’ what was by then the purely technical objection that theoretically a married woman still did not have an ‘absolute liberty’ to enter into binding contracts, so that it would be a serious inconvenience if in the middle of a piece of litigation a woman was suddenly unable to make contracts because she had got married. This was ridiculous, because by then women did have contractual capacity in relation to their separate property and as a solicitor she would be bound to have some separate property. But it is interesting that all three judgments are based on ‘inveterate usage’ and the great authority of Lord Coke’s opinion in the 17th century. There is no suggestion that women were not capable of being lawyers or that it was incompatible with their natural role as wives and mothers.

This is in stark contrast to the approach of the American courts in the 19th century. In 1872, Mrs Myra Bradwell argued before the Supreme Court of the United States that the 14th amendment to the Constitution made it unconstitutional for the State of Illinois to deny her the ‘privilege and immunity’ guaranteed to all United States citizens of pursuing any lawful employment, including that of a lawyer. She lost.⁸ Justice Bradley famously declared:

‘The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interest and views which belong, or should belong, to the family institution is repugnant to women adopting a distinct and independent career from that of her husband.’

⁸ *Bradwell v Illinois* 83 US 130 (1872).

To the objection that not all women got married, he declared that ‘these are exceptions to the general rule. The paramount destiny and mission of woman are to fulfil the noble and benign offices of wife and mother’. Civil law had to be adapted to the general constitution of things and could not be based upon exceptional cases.

It was not only that women had better things to do. The American courts were also worried that the law was a nasty place for them to be. When Miss Lavinia Goodell applied to be admitted to the state Bar of Wisconsin in 1875,⁹ the Chief Justice said:

‘[Our profession] has essentially and habitually to do with all that is selfish and malicious, knavish and criminal, coarse and brutal, repulsive and obscene in human life. It would be revolting to all female sense of the innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in women, on which hinge all the better affections and humanities of life, that women should be permitted to mix professionally in all the nastiness of the world which finds its way into the courts of justice . . . This is bad enough for men. . .’

These decisions were swiftly overturned by legislation at both state and federal level. So by the time of the *Bebb* case women had been allowed to practise law in Canada, the United States, Australia and New Zealand¹⁰. Perhaps that is why the English judges relied upon immemorial custom rather than innate lack of ability to defeat their claims.

⁹ *In matter of Motion to admit Goodell*, 39 Wis 232 (1875), 245.

¹⁰ Clara Brett Martin joined the Law Society of Upper Canada in 1867; Arabella Mansfield was admitted to the Iowa Bar in 1869; Ethel Benjamin was admitted as a barrister and solicitor in New Zealand in 1897; and Flos Greig was admitted to the Victoria Bar in 1905. See also Mary Jane Mossman, *The First Women Lawyers, A Comparative Study of Gender, Law and the Legal Profession*, Hart, 2006.

Miss Bebb went on to a professional career as a civil servant and was awarded an OBE for her war work. She married a solicitor and the day after the 1919 Act came into force she was accepted by Lincoln's Inn to read for the Bar, shortly after she had given birth to a daughter. She was also among the first batch of women to be able, at long last, to take their Oxford degrees in 1920. Sadly she could not realise her ambition to be called to the Bar and practise law, as she died aged 31 in 1921 from the complications of child birth. Child birth was still very dangerous in the 1920s.¹¹

Ivy Williams was the first woman to be called to the English Bar, in May 1922. She was the first because she gained first class marks in the Bar Final examination and so was excused from two terms' worth of dinners before being called. She had been the third woman to study law at Oxford, passing the Jurisprudence exams in 1900 and the BCL in 1902. At the same time, she studied for the external London LL.B and graduated in 1901. Oxbridge women sometimes did this, so that they could actually get degrees. In 1904, her complaints about the refusal to admit women to the Bar had been regarded as a 'threat' by the *Law Journal*.¹² She had declared that 'The legal profession will have to admit us in their own defence...a band of lady University lawyers will say to the Benchers and the Law Society "Admit us or we shall form a third branch of the profession and practise as outside lawyers"'. The *Law Journal* characterised this as 'a futile attempt of a persistent lady to gain admission to the Bar'. Even when the same publication grudgingly marked her call to the Bar in 1922, it noted that she did not intend to practise and from this concluded that the admission of women 'was never likely to be justified by any success they will achieve in the field of advocacy'. Tell that to Rose Heilbron, the star advocate of her day, and to anyone who has had the pleasure of witnessing the advocacy of some of the many

¹¹ Rosemary Auchmuty, *Whatever happened to Miss Bebb? Bebb v The Law Society and Women's Legal History* (2013) 31 *Legal Studies* 199-230.

¹² 34, 1904, 1-2.

women stars of today. Ivy Williams became a star of another kind, the first woman academic lawyer, teaching law at Oxford for the next 25 years, and obtaining a doctorate in civil law for a thesis on the Swiss Civil Code.

Helena Normanton was actually the first woman to join an Inn of Court. Having turned down her application in 1918 in a glare of publicity, the Middle Temple went out of its way to help her to join the very day the 1919 Act came into force in Royal Assent, at 3.00 pm on 23 December.¹³ They rang her to say that the office would be open until 4.00 pm. She was called in November 1922 and was the first to practise at the English Bar. She attracted an astonishing amount of negative comment. Her biographer, Judith Bourne, quotes one who described her as:

‘A warhorse from the old feminist days and the terror of her male colleagues . . . a comic character quite without fear, and physically unattractive. She can only be described as large and blowsy . . . incredibly common not to say vulgar . . . a menace to the movement for she was always trying to organise the women into forming separate groups from the men.’

Despite that, she became one of the first two English women to ‘take silk’, being appointed King’s Counsel in 1949 alongside Rose Heilbron.

She was not however the first to practise at the Bar in the United Kingdom. That honour must go to Averill Deverill, who with Frances Kyle was called to the Bar by the King’s Inns in Dublin in November 1921, and joined the Law Library in January 1922 (before the creation of the Irish

¹³ Judith Bourne, *First Woman to be Admitted to an Inn of Court, Helena Normanton, 1919*, Chapter 19 in *Women’s Legal Landmarks, op cit*; also *Helena Normanton and the Opening of the Bar to Women*, Waterside Press, 2016.

Free State).¹⁴ Apparently they had petitioned the Lord Chief Justice to be allowed not to wear wigs, but without success. I have often wondered why the first women barristers adopted the male barristers' 18th century wig, thus denying their femininity as well as their modernity. Reading the story of Ethel Benjamin, the first woman to practise law in New Zealand,¹⁵ supplied me with the best reason I have ever heard: in an age where all women wore hats, to be required to go bare-headed would have been much worse. But the senior judges in England turned down the idea that the new women barristers should wear the Tudor-style biretta, a soft cornered black cap, and insisted instead that they wear a wig 'which shall completely cover and conceal the hair'¹⁶ and, as the Evening Standard reported, made them all look like men¹⁷ – except that, incongruously, they were required to wear it with a skirt until the 1990s.

Despite the courage and determination of these early pioneers, only a trickle of women were called to the English Bar during the twenties, thirties and forties, and many of them did not stay in independent practice. Matters were even worse in Scotland, where Margaret Kidd was called to the Scottish Bar in 1923 and remained the only woman advocate for 25 years.¹⁸ She was, however, the first to take silk, doing so in 1948, the year before Helena Normanton and Rose Heilbron. As late as 1970, women were only 8.2 per cent of those called to the Bar; nearly half of all sets of chambers had not yet plucked up courage to have a woman member. The proportion increased to 37 per cent in the 1980s; 42.7 per cent in the early 1990s; and now hovers around 50 per cent. But they are still only 36 per cent of the practising Bar and nearly 16 per cent of

¹⁴ Liz Goldthorpe, *First Woman to Practise as a Barrister in Ireland and the (then) United Kingdom*, chapter 23 in *Women's Legal Landmarks*, *op cit*.

¹⁵ Janet November, *In the footsteps of Ethel Benjamin, New Zealand's first woman lawyer*, Victoria University Press, 2009.

¹⁶ Thomas Woodcock, *Legal Habits: A brief sartorial history of wig, robe and gown*, Ede and Ravenscroft, 2003, p 42.

¹⁷ Judith Bourne, *op cit*, p 111 and fn 156.

¹⁸ Catriona Cairns, *First Woman Member of the Faculty of Advocates, Margaret Kidd, 1923*, chapter 26 in *Women's Legal Landmarks*, *op cit*.

practising QCs – however, that figure has been rising by roughly one per cent a year for the last ten years, so things are definitely speeding up.

Turning to the solicitors' branch of the profession, once again the other parts of the United Kingdom were ahead of England and Wales. The first woman solicitor in the United Kingdom was Madge Easton Anderson.¹⁹ She was a graduate of the University of Glasgow and was taken on as a law apprentice in 1917, despite the fact that women could not then qualify as law agents, because her sponsor thought that the disqualification was bound to be removed. And of course he was right. So when the 1919 Act was passed, she had already served two years as a law apprentice and was about to graduate with a law degree, which she did in April 1920. All that remained was to take an examination set by the Incorporated Society of Law Agents. At first the Society refused to let her take it, because her apprenticeship had begun before the 1919 Act. So she petitioned the Court of Session, which took a more sympathetic view than it had done with Margaret Hall and directed that she should be allowed to sit the exam. She did and was admitted as a law agent before the end of 1920.

South of the border, the first woman solicitor was admitted in 1922. Carrie Morrison had worked for MI5 during the First World War and had helped a solicitor with a travel permit application. He had offered her a clerical position after the war and articles after the 1919 Act came into force.²⁰ Because of her war service, she qualified for a reduction in her articles from three years to two, and so was admitted ahead of the other three women who passed their Finals in December 1922. After qualifying, she gave legal advice as a Poor Man's Lawyer at Toynbee Hall in East London, where she met Ambrose Appelbe, with whom she established a legal

¹⁹ Alison Lindsay, *First Woman Law Agent, Madge Easton Andrews, 1920*, chapter 21 in *Women's Legal Landmarks, op cit.*

²⁰ Elizabeth Cruickshank, *First Woman Solicitor in England and Wales, Carrie Morrison, 1922*, chapter 24 in *Women's Legal Landmarks, op cit.*

practice in Whitechapel in 1928. They married in 1929 and actively campaigned for many radical causes, including the ordination of women.

However, the first woman to hold a practising certificate, in 1923, was Maud Crofts, who as Maud Ingram had been one of the four who had challenged their exclusion in Miss Bebb's case in 1913. She was the only one of the four to become a practising solicitor.

Once again, progress was slow, with only eight or nine admissions a year during the 1920s and an average of fewer than 16 during the 1930s. This was a far lower proportion of the profession than were the women called to the Bar. However, it is thought that a rather higher proportion of women solicitors than women barristers were able to establish themselves in practice, either by joining a family firm, or by setting up as sole practitioners, or by forming partnerships such as Applebe and Morrison. By 1957, however, there were still only 356 women holding practising certificates, out of a total of some 19,000 practising solicitors. This had risen to 1563 out of roughly the same total in 1975 but by 2017 it was over 60%. But the overall proportion of partners is only 33% (with big variations according to the size of firm) and it seems that the proportion of equity partners is much smaller. It took until 1995 for Lesley MacDonagh to become the first woman managing partner of a top ten law firm.²¹

So much for the professions. The 1919 Act also opened up public and judicial office to women on the same terms as men. Women were soon appointed lay magistrates in considerable numbers, where they proved so useful that in 1933, domestic and juvenile courts were required to include a woman on the bench 'where practicable'. By the end of the second world war there

²¹ *First Woman to Lead a Top 10 Law Firm in England and Wales, Lesley MacDonagh, 1995, chapter 67 in Women's Legal Landmarks, op cit.*

were more than 3000 of them. But it took much longer for the first women to be appointed professional judges.

The very first was Sybil Campbell, who like so many of the first women judges, had been a student at Girton College, Cambridge. She was the grand-daughter of a judge but read science and economics at Girton. Like Gwyneth Bebb, she worked as an investigating officer for the Board of Trade and then as an enforcement officer for the Ministry of Food. Indeed, she was god-mother to Gwyneth's daughter Diana. She too was called to the Bar in 1922, had chambers in the Temple and practised on the Midland Circuit. She returned to work for the Ministry of Food during the Second World War. In 1945, she was appointed a Metropolitan Stipendiary Magistrate. Significantly, this appointment was in the hands of the Home Secretary, Herbert Morrison, who may have practised a little positive discrimination. Her appointment was controversial, as she had not had a large practice and latterly had been a civil servant. She was certainly deeply unpopular at first, as her sentences were very harsh, in particular upon food pilferers in the London docks, which were in her patch. We are told that 5,000 trade unionists marched against one of her early sentences. But she seems to have calmed down and become an enthusiastic user of probation when it was introduced in 1948.

Regular judicial appointments, on the other hand, were the responsibility of the Lord Chancellor, and he showed no such enterprise. In 1946, Dorothy Knight Dix became the first woman to preside over quarter sessions as a deputy recorder and Edith Hesling became the first to preside over civil cases in a county court. But both did so as deputies, appointed by the local recorder or judge. They were not regular judicial appointments. That had to wait until 1956, when Rose Heilbron was appointed Recorder of Burnley, but even then I suspect that there was strong local involvement.

Rose was the first woman to make a spectacular success of a career at the Bar.²² She was one of the most famous and successful defence advocates of her day. She was also one of the first to combine a successful career with a happy family life and motherhood. She was an icon to those of us who practised on the Northern Circuit in the 1960s and 1970s. But she still had a lot to contend with. It took Gray's Inn much longer to elect her as a bencher than it should have done. It took the Northern Circuit even longer to elect her leader of the circuit, an honour that customarily used to go to the senior silk practising on the circuit, but somehow they managed to avoid her until 1973.

The first woman to become a full-time judge in the ordinary courts was Elizabeth Lane, appointed a county court judge in 1962, and promoted to become the first woman High Court judge in 1965.²³ Like Elizabeth Butler-Sloss, who became the fourth woman High Court judge in 1979, she did not have a university degree. She had married at the age of 20. But then her husband decided to become a barrister and so they studied together. She was called to the Bar in 1940 and quickly made a name for herself. She was the third woman to take silk, after Rose Heilbron and Helena Normanton. She had various deputy appointments before becoming a full-time judge and was no doubt considered a pretty safe appointment. I am told by one of her marshals that she was a really good and caring judge, who was particularly keen that women barristers should be taken seriously and not seen as frivolous dabblers. So she personally took a pair of scissors to the gold buttons on a woman barrister's coat.

²² Laura Lammasniemi, *First Woman to Hold Regular Judicial Office in England and Wales*, chapter 35 in *Women's Legal Landmarks, op cit.* See also Hilary Heilbron, *Rose Heilbron: The Story of England's First Woman Queen's Counsel and Judge*, Hart, 2012.

²³ Judith Bourne and Frances Burton, *First Woman High Court Judge in England and Wales, Elizabeth Lane, 1965*, chapter 37 in *Women's Legal Landmarks, op cit.* See also Elizabeth Lane, *Hear the Other Side: Audi alteram partem: The Autobiography of England's First Woman Judge*, Butterworth, 1985.

Nevertheless, although her practice was in Queen's Bench work, she was appointed to the Probate, Divorce and Admiralty Division, as were the next four appointments, Rose Heilbron, Margaret Booth, Elizabeth Butler-Sloss and Joyanne Bracewell. The appointment of Elizabeth Butler-Sloss to the High Court in 1979 had raised some eye-brows, because she was promoted from Registrar (now District Judge) in the Principal Registry of the Family Division straight to the High Court. But she proved to be such a good judge that she eventually became the first woman Lord Justice of Appeal in 1989.²⁴ She also had the distinction of being the first – and until now the only - head of one of the Divisions of the High Court, becoming President of the Family Division in 1999 (thus creating the vacancy that enabled me to join the Court of Appeal). But it was not until 1992 that they dared to appoint Ann Ebsworth as the first woman in the Queen's Bench Division and 1993 that Mary Arden became the first woman in the Chancery Division. And it was not until 2004 that they appointed the first woman Lord of Appeal in Ordinary.

But could there be a woman Law Lord? The Appellate Jurisdiction Act 1876 provided for appropriately qualified 'persons' to be appointed Lords of Appeal in Ordinary. But we have already seen that in 1876 women were not 'persons'. The view taken in the two Scottish cases mentioned earlier was confirmed by the House of Lords in *Nairn v University of St Andrews*.²⁵ The Representation of the People (Scotland) Act 1868 provided that 'persons' who held a degree from one of the four Scottish Universities could become entitled to vote in elections for the University Members of Parliament. In 1868, the Scottish Universities did not give women degrees. But then the law changed to enable them to do so. Five women graduates applied to vote in the 1906 election but were refused voting papers by the registrar. The House of Lords rejected their challenge. The Lord Chancellor accepted that prima facie 'persons' would include

²⁴ Dana Denis Smith, *First Woman Court of Appeal Judge in England and Wales, Elizabeth Butler-Sloss, 1988*, chapter 59 in *Women's Legal Landmarks, op cit.*

²⁵ [1909] AC 147.

women, but the 1868 Act excluded people who were subject to any legal incapacity, which women then were.

However, only 21 years later, in 1929, the Privy Council took a very different view, in *Edwards v Attorney General for Canada*.²⁶ The case was brought by the ‘famous five’ or ‘valiant five’ women of Alberta, Emily Murphy, Irene Parlby, Nellie Mooney McClung, Louise McKinney and Henrietta Edwards. They were a remarkable bunch. Emily Murphy was the first woman to be appointed a magistrate in 1916. Irene Parlby was elected to the Alberta legislature in 1921 and became the second woman in the British Empire to hold ministerial rank. Nellie McClung was also elected to the legislature in 1921, having earlier been a member of the Dominion War Council and the only woman representative at the League of Nations. Louise McKinney had been elected even earlier, in 1917, one of the first two women to be elected to Parliament in the British Empire. Henrietta Edwards, who gave her name to the case, was the first woman to serve on a committee advising Government on public policy, among many other things.

The question was whether women could serve in the Senate, the Upper House of the Canadian Parliament. Under the British North America Act 1867, which was then the Canadian Constitution, the Governor-General could summon ‘qualified persons’ to the Senate. In 1927, the Governor-General asked the Supreme Court of Canada to rule on whether women could be ‘persons’. The Supreme Court answered ‘no’, but the Judicial Committee of the Privy Council, still the final Court of Appeal for the whole of the British Empire and Dominions, answered ‘yes’. Their Lordships

²⁶ [1930] AC 124.

‘did not think it right to apply rigidly to Canada of today the decisions and the reasons therefore which commended themselves, probably rightly, to those who had to apply the law in different circumstances, in different centuries, in different stages of development . . . their Lordships think that the appeal to Roman law and to early English decisions is not of itself a secure foundation on which to build the interpretation of the British North America Act 1867.’

That Act had ‘planted in Canada a living tree capable of growth and expansion within its natural limits’. Their Lordships did not wish ‘to cut down its provisions by a narrow and technical construction but rather to give it a large and liberal interpretation so that the Dominion to a great extent . . . may be mistress in her own house’. So, in the name of making Canada mistress in her own house, they overturned the decision which Canada itself had made, but on the whole to general rejoicing.

All that paved the way for my own appointment as a Law Lord. The language of a statute is ‘always speaking’: a word which did not include women when the Appellate Jurisdiction Act was passed in 1876 had changed its meaning in the intervening 130 years and could now do so. But apparently this caused at least some of the Law Lords to move outside their comfort zones. Lord Hope of Craighead records in the latest volume of his diaries, covering his years as a Law Lord, that ‘Brenda will be a source of some anxiety until we adjust to the very different contribution that she will make’.²⁷ I hope that they have got over it by now, as women have recently grown to around one quarter of the High Court, the Court of Appeal and, now, the Supreme Court.

What lessons can we learn from all of this?

²⁷ Lord Hope of Craighead, *House of Lords 1996 – 2009, Lord Hope Diaries*, Avizandum Publishing, 2019.

First, that the judges were very reluctant to take the plunge themselves. They found a range of excuses not to allow women into practice until the legislature forced them to do so. Second, that the first woman lawyers faced some quite remarkable hostility and nastiness. Third, that progress in expanding their numbers was extremely slow until the 1970s, since when the numbers entering the profession have gone up in leaps and bounds. Fourth, however, that there is still a substantial attrition rate, with women not making partner or QC, even if they stay in independent practice, or stepping aside to take more family friendly legal jobs. Fifth, and partly as a result of this, they have been even slower to make substantial in-roads into the judiciary, but that too has changed quite dramatically over the last 10 years or so.

I look forward to the day when we don't even have to have this conversation and I hope and expect that it will not take the 50 years predicted by one of my fellow Justices before that day dawns.