The Application of Miss Lavinia Goodell

On December 14, 1875, an attorney (male) filed a motion in the Wisconsin Supreme Court on behalf of Miss Lavinia Goodell (female) to admit her to practice before that Court.

Chief Justice Ryan—in a unanimous opinion for himself and the two Associate Justices who then comprised the Court—denied the application, squarely on the basis of her sex.

Three and a half years later, Miss Goodell (again through her male attorney) was back with a fresh motion, based this time on a statutory change—adopted in 1878 by the Wisconsin Legislature—which purported to bar discrimination on the basis of sex in the admission to practice before the State's courts.

By this time the Court's membership had been enlarged to include a Chief and four Associate Justices. This time, the Court granted Miss Goodell's motion but over the objection of Chief Justice Ryan who dissented without opinion.

The Court's orders disposing of both of Miss Goodell's applications were accompanied by opinions which appear in the official Wisconsin Reports. Below are set forth in full the two opinions of the Court, under the respective headings of APPLICATION I and APPLICATION II. Connoisseurs wishing to pursue the story somewhat further will find a bit more information in the Wisconsin Reports than is reproduced here, for only the opinions appear below and the official Wisconsin Reports set out in addition a summary of the arguments advanced by counsel on Miss Goodell's behalf and a few comments added by the Court's Reporter.

A search conducted on behalf of the GARGOYLE had failed by the time this note was written to surface either a photograph or any further information concerning Miss Goodell. If any of our readers have more light to shed on the history of Miss Goodell, the GARGOYLE would be interested in additional information.

Motion to admit Miss Lavinia Goodell to the Bar of this Court.

In the Matter of the Motion to admit Miss LAVINIA GOODELL to the Bar of this Court.

CONSTITUTIONAL LAW. *Women not admitted to the bar of this court.*

1. Whether the constitution of this state, by vesting the whole judicial power in the courts therein provided for, does not entrust the rule of admission to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, *quære.*
2. To entitle any person to practice in this ~~statute~~

Application I

(Reported at 39 Wis. 232 (1876))

RYAN, C. J. In courts proceeding according to the course of the common law, a bar is almost as essential as a bench. And a good bar may be said to be a necessity of a good court. This is not always understood, perhaps not fully by the bar itself. On the bench, the lesson is soon learned that the facility and accuracy of judicial labor are largely dependent on the learning and ability of the bar. And it well becomes every court to be careful of its bar and jealous of the rule of admission to it, with the view of fostering in it the highest order of professional excellence.

The constitution makes no express provision for the bar. But it establishes courts, amongst which it distributes all the jurisdiction of all the courts of Westminster Hall, in equity and at common law. *Putnam v. Sweet,* 2 Pin., 302. And it vests in the courts all the judicial power of the state. The constitutional establishment of such courts appears to carry with it the power to establish a bar to practice in them. And admission to the bar appears to be a judicial power. It may therefore become a very grave question for adjudication here, whether the constitution does not entrust the rule of admissions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts.

The legislature has, indeed, from time to time, assumed power to prescribe rules for the admission of attorneys to practice. When these have seemed reasonable and just, it has generally, we think, been the pleasure of the courts to act upon such statutes, in deference to the wishes of a coordinate branch of the government, without considering the question of power. We do not understand that the circuit courts generally yielded to the unwise and unseemly act of 1849, which assumed to force upon the courts as attorneys, any person of good moral character, however unlearned or even illiterate; however disqualified, by nature, education or habit, for the important trusts of the profession. We learn from the clerk of this court that no application under that statute was ever made here. The good sense of the legislature has long since led to its repeal. And we have

too much reliance on the judgment of the legislature to apprehend another such attempt to degrade the courts. The state suffers essentially by every such assault of one branch of the government upon another; and it is the duty of all the coordinate branches scrupulously to avoid even all seeming of such. If, unfortunately, such an attack upon the dignity of the courts should again be made, it will be time for them to inquire whether the rule of admission be within the legislative or the judicial power. But we will not anticipate such an unwise and unbecoming interference in what so peculiarly concerns the courts, whether the power to make it exists or not. In the meantime, it is a pleasure to defer to all reasonable statutes on the subject. And we will decide this motion on the present statutes, without passing on their binding force.

This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection; something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.

The statute provides for admission of attorneys in a circuit court upon examination to the satisfaction of the judge, and for the right of persons so admitted to practice in all courts here except this; but that to entitle any one to practice in this court he shall be licensed by order of this court. Tay. Stats., ch. 119, sections 31, 32, 33. While these sections give a rule to the circuit courts, they avoid giving any to this court, leaving admission here, as it ought to be, in the discretion of this court. This is, perhaps, a sufficient answer to the present application, which is not addressed to our discretion, but proceeds on assumed right founded on admission in a circuit court. But the novel positions on which the motion was pressed appear to call for a broader answer.

The language of the statute, of itself, confessedly applies to males only. But it is insisted that the rule of construction found in subd. 2, sec. 1, ch. 5, R.S., necessarily extends the terms of the statute to females. The rule is that words in the singular number may be construed in plural, and in the plural, singular; and that the words of the masculine gender may be applied to females; unless, in either case, such construction would be inconsistent with the manifest intention of the legislature.

This was pressed upon us, as if it were a new rule of construction, of particular application to our statutes. We do not so understand it. It appears to be but a particular application of the general rule thus stated by TINDALL, C.J: "The only rule for the construction of acts of parliament is, that they should be construed according to the intent of the parliament which passed the act." And it is not new or peculiar here. Potter's Dwarris, 111. The last clause of the rule, relating to sex, seems to be almost as old as Magna Charta. Coke, 2 Inst., 45. We apprehend that, unless in the construction of penal statutes, it has been little questioned since the much considered case of *King v. Wiseman,* Fortescue, 91. The rule is permissive only, as an aid in giving effect to the true intent of the legislature. Even of a statutory rule positive in terms, Lord DENMAN said: "It is not to be taken as substituting one set of words for another, nor as strictly defining what the meaning of a word must be under all circumstances. We rather think that it merely declares what persons may be included within a term, when the circumstances require that they should." *Queen v. Justices, etc.,* 7 A. & E., 480. So, *a fortiori,* of the permissive rule here.

And the argument for this motion is simply this: that the application of this permissive rule of construction to a provision applicable in terms to males only, has effect, without other sign of legislative intent, to admit females to the bar from which the common law has excluded them ever since courts have administered the common law. This is sufficiently startling. But the argument cannot stop there. Its logic goes far beyond the bar. The same peremptory rule of construction would reach all or nearly all the functions of the state government, would obliterate almost all distinction of sex in our statutory *corpus juris,* and make females eligible to almost all offices under our statutes, municipal and state, executive, legislative and judicial, except insofar as the constitution may interpose a virile qualification. Indeed the argument appears to overrule even this exception. For we were referred to a case in Iowa, which unfortunately we do not find in the reports of that state, holding a woman not excluded by the statutory description of "any white male person." If we should follow that authority in ignoring the distinction of sex, we do not perceive why it should not emasculate the constitution itself and include females in the constitutional right to male sufferage and male qualification. Such a rule would be one of judicial revolution, not of judicial construction. There is nor sign nor symptom in our statute law of any legislative imagination of such a radical change in the economy of the state government. There are many the other way; an irresistible presumption that the legislature never contemplated such confusion of functions between the sexes. The application of the permissive rule of construction here would not be in aid of the legislative intention, but in open defiance of it. We cannot stultify the court by holding that the legislature intended to bring about, *per ambages,* a sweeping revolution of social order, by adopting a very innocent rule of statutory construction.

Some attempt was made to give plausibility to the particular construction urged upon us, founded on ch. 117 of 1867, and ch. 79 of 1870. It was represented that the former admits women to every department of the university, excepting the military only, and so necessarily including the law department; that the latter directs admission of female graduates of the law school, and ought therefore to be understood as intending the admission of women under the general statute. If the legislature had so provided for the admission of female graduates, we do not perceive how that could aid the construction of the general statute, or this lady, who does not appear to be a graduate. But, unfortunately for the position, the statutes were not stated with the fair accuracy which becomes counsel, and do not support it.

The act of 1867 is an amendment of sec. 4 of the act of 1866, reorganizing the university. The section of 1866 provided, without qualification, that "the university in all its departments and colleges shall be open alike to male and female students." The section of the 1867 substitutes the provision, that "the university shall be open to female as well as male students, under such regulations and restrictions as the board of regents may deem proper." In both statutes, the section provides that all able bodied male students shall receive military instruction, and makes no other reference to a military department. And the argument that the admission of females under the statute of 1867, to all departments except the military, necessarily contemplated their admission to the law department, falls to the ground, because the statute neither mentions all departments nor excepts the military—if there be a military—department.

The inaccuracy is the more striking from the fact that the section of 1866 does expressly include all departments and colleges, and the amendment of 1867, evidently *ex industrial,* omits them. The change of an absolute right of admission to all departments and colleges of the university in 1866, to admission to the university under discretionary regulations and restrictions of the regents in 1867, is very significant; the more so that it is the only amendment made. It seems likely that the legislature came to regard the absolute and indiscriminate right of

1866 as dangerously broad, and to consider it necessary to make the right subordinate to the judgment of the regents. And if the law school had then been established by statute, it would be very doubtful whether the admission of females to it would be sanctioned by the act of 1867. But there was no such statute; and the law school was in fact established, not by statute, but, as we learn, by the authority of the university, some time in 1868, after enactment of the section in both forms. The first class of students, all males, graduated in 1869, without color of right to practice. Hence the statute of 1870, to give the right, presumably passed without thought of the admission of females to the bar. And the general argument for this motion takes nothing by these statutes.

So we find no statutory authority for the admission of females to the bar of any court of this state. And, with all the respect and sympathy for this lady which all men owe to all good women, we cannot regret that we do not. We cannot but think the common law wise in excluding women from the profession of the law. The profession enters largely into the well being of society; and, to be honorably filled and safely to society, exacts the devotion of life. The law of nature destines and qualifies the female sex for the bearing and nurture of the children of our race and for the custody of the homes of the world and their maintenance in love and honor. And all life-long callings of women, inconsistent with these radical and sacred duties of their sex, as is the profession of the law, are departures from the order of nature; and when voluntary, treason against it. The cruel chances of life sometimes baffle both sexes, and may leave women free from the peculiar duties of their sex. These may need employment, and should be welcome to any not derogatory to their sex and its proprieties, or inconsistent with the good order of society. But it is public policy to provide for the sex, not for its superfluous members; and not to tempt women from the proper duties of their sex by opening to them duties peculiar to ours. There are many employments in life not unfit for female character. The profession of the law is surely not one of these. The peculiar qualities of womanhood, its gently graces, its quick sensibility, its tender susceptibility, its purity, its delicacy, its emotional impulses, its subordination of hard reason to sympathetic feeling, are surely not qualifications for forensic strife. Nature has tempered woman as little for the juridical conflicts of the court room, as for the physical conflicts of the battle field. Womanhood is moulded for gentler and better things. And it is not the saints of the world who chiefly give employment to our profession. It 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 innocence and sanctity of their sex, shocking to man's reverence for womanhood and faith in woman, on which hinge all the better affections and humanities of life, that woman should be permitted to mix professionally in all the nastiness of the world which finds its way into courts of justice; all the unclean issues, all the collateral questions of sodomy, incest, rape, seduction, fornication, adultery, pregnancy, bastardy, legitimacy, prostitution, lascivious cohabitation, abortion, infanticide, obscene publications, libel and slander of sex, impotence, divorce: all the nameless catalogue of indecencies, *la chronique scandaleuse* of all the vices and all the infirmities of all society, with which the profession has to deal, and which go towards filling judicial reports which must be read for accurate knowledge of the law. This is bad enough for men. We hold in too high reverence the sex without which, as is truly and beautifully written, *le commencement de la vie est sans secours, le milieu sans plaisir, et le fin sans consolation,* voluntarily to commit it to such studies and such occupations. *Non tali auxilio nec defensoribus istis,* should juridical contests be upheld. Reverence for all womanhood would suffer in the public spectacle of woman so instructed and so engaged. This motion gives appropriate evidence of this truth. No modest woman could read without paid and self abasement, no woman could so overcome the instincts of sex as publicly to discuss, the case which we had occasion to cite[1], *King v. Wiseman.* And when counsel was arguing for this lady that the word, person, in sec. 32, ch. 119, necessarily includes females, her presence made it impossible to suggest to him as *reductio ad absurdum* of his position, that the same construction of the same word in sec. 1, ch. 37, would subject woman to prosecution for the paternity of a bastard, and in secs. 39, 40, ch. 164, to prosecution for rape. Discussions are habitually necessary in courts of justice, which are unfit for female ears. The habitual presence of women at these would tend to relax the public sense of decency and propriety. If, as counsel threatened, these things are to come, we will take no voluntary part in bringing them about.

By the Court.—The motion is denied.

Application II

(Reported as Appendix to Volume, 49 Wis. 693 (1880))

COLE, J. On the former application for the admission of *Miss Lavinia Goodell* to the bar of this court, it was held that there was no statutory authority for the admission of females to the bar of any court of this State. 39 Wis. 232. Since that decision was made, the legislature has provided that "no person shall be denied admission or license to practice as an attorney in any court of this state on account of sex" (subd. 5, sec. 2586, R. S. 1878), which removes the objection founded upon a want of legislative authority to admit females to practice. It may admit of serious doubt whether, under the constitution of this state, the legislature has the absolute and exclusive power to declare who shall be admitted as attorneys to practice in the courts of this state; or whether the courts themselves, as a necessary and inherent part of their powers, have not full control over the subject. It was said by the chief justice, on the previous application, that it was a grave question whether the constitution does not entrust the rule of admissions to the bar, as well as of expulsion from it, exclusively to the discretion of the courts, as part of their judicial power. But it was further remarked by the chief justice, that the legislature had from time to time assumed the power to prescribe rules for the admission of attorneys, and, when those rules have seemed reasonable and just, it has generally been the pleasure of the courts to act upon such states, in deference to the wishes of a coordinate branch of the government, without considering the question of power. A majority of the court are disposed to pursue the same course now, and act upon the statute above cited, waiving for the present the question whether or not the courts are vested with the ultimate power under the constitution of regulating and determining for themselves as to who are entitled to admission to practice. We are satisfied that the applicant possesses all the requisite qualifications as to learning, ability and moral character to entitle her to admission, no objection existing thereto except that founded upon her sex alone. Under the circumstances, a majority think that the objection must be disregarded. *Miss Goodell* will therefore be admitted to practice in this court upon signing the roll and taking the prescribed oath.

By the Court.—So ordered.
RYAN, C. J., dissented.

[1]The publication of this decision, in the reports, has been delayed in the expectation that a dissenting opinion would be prepared by the chief justice.—REPORTER.