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Late Nineteenth Century Married Women's Property Law: Reception of the Early Married Women's Property Acts by Courts and Legislatures

by RICHARD H. CHUSED*

The reform of married women's property has been proceeding for more than a century.¹ Beginning around 1835, states began to alter the common law rules granting husbands management and control of their wives' real estate and ownership of their personal property. The initial wave of acts generally provided that married women's property was to be exempted from attachment by creditors of their husbands. Some of these acts also contained language permitting married women to own property in their own separate estates, although the statutory language gave almost no guidance as to the scope of management authority, if any, wives were to have over their assets. Frequently the statutes were construed narrowly. Subsequent legislation was necessary in all jurisdictions before the major tenets of common law coverture rules had been altered.²

That married women's property reform came in a slow piecemeal fashion suggests that those men dealing with the issue in legislatures and courts must have differed among themselves in their attitudes toward the changes being wrought. Such cultural ambiva-

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1. Perhaps the final chapters in this long historical epic are now being written. The decline of male dominated marital property rules finally has constitutional impetus. See *Kirchberg v. Feenstra*, 450 U.S. 455 (1981). But there are other related issues left to resolve, particularly in the distribution of property at divorce and death.

2. See Chused, *Married Women's Property Law: 1800-1850*, 71 GEO. L.J. 1359 (1983). [Hereinafter cited as Chused, *Married Women's Acts*].

lence arose not only because of concern over the changing social roles of mid-nineteenth-century women, but also because of the alterations made in the operation of the family economy by the new statutes. Although scholarship in this area suggests that macroeconomic events, such as panics, were important to the adoption of some married women's acts,³ close attention has not yet been given to the cumulative impact on married women's law of decades of disputes between husbands, wives, and family creditors. Throughout the period in which married women's property law was under revision, courts and legislatures were confronted with a variety of disputes raising issues about the appropriate definition of a married woman's separate estate. The vague language in many of the statutes left considerable room for argument and litigation. Disputes arose about the sort of property that could be owned by married women, the form of the documents necessary to establish a separate estate, the ability of women to invest in their own property or to dedicate their property to the payment of personal obligations, and the legitimacy of contracts dealing with separately held assets. While a number of influences in addition to family debtor-creditor issues were at work during the development of married women's property law, study of materials on legal issues in the family economy provides a useful window through which to analyze married women's property reform.

In this paper,⁴ I trace the impact of family debtor-creditor problems on the development of married women's law in Oregon. The major provisions of Oregon's married women's law were adopted between 1850, when Congress adopted the Oregon Donation Act, and 1880, when the state legislature enacted a sweeping statute removing most differences in the treatment of property owned by men

3. It is now generally agreed that the first wave of married women's acts were adopted in part because of the dislocations caused by the Panic of 1837. Chused, *Married Women's Acts*, *supra* note 2, at 1400-04; N. BASCH, *IN THE EYES OF THE LAW: WOMEN, MARRIAGE AND PROPERTY IN NINETEENTH CENTURY NEW YORK*, 39-40, 122-25 (1982); E. Warbasse, *The Changing Legal Rights of Married Women: 1800-1861*, at 146-59, 202-05 (Feb. 1960) (unpublished thesis). However, the continuing relationship between married women's property law and commercial law has not been thoroughly analyzed. The best paper on the subject that has come to my attention was written by a law student studying New Hampshire, Breed, *Conflicts of Interest: The Evolution of Married Women's Property Rights in Nineteenth Century New Hampshire* (1982) (unpublished paper, copy on file with author).

4. This is the second of two papers on the development of married women's law in Oregon. The first, Chused, *The Oregon Donation Act of 1850 and Nineteenth Century Federal Married Women's Property Law*, 2 L. & HIST. REV. 44 (1984) [Hereinafter cited as Chused, *Federal Women's Law*], dealt with the treatment of women by the federal land grant system, the adoption of the Oregon Donation Act of 1850, and the role of Oregon's territorial delegate, Samuel R. Thurston, in gaining the passage of the donation bill.

and women. The Oregon Donation Act was the only federal land grant act permitting married women to obtain title to federal lands in their own right. During the thirty-year period following the adoption of the Donation Act, a confusing system of land regulations emerged as the fledgling territorial government passed and repealed land statutes, the General Land Office struggled to open offices in Oregon, and state and federal judges with dramatically different visions of the world battled over the meaning of the Donation Act and related provisions in the Oregon territorial and state codes. Through all the confusion a steady stream of disputes arose over the relationship between married women, husbands, and family creditors. From the territorial legislature's adoption in 1852 of an act exempting women's donation claims from the claims of husbands' creditors through the enactment of the last married women's acts in 1878 and 1880, debates over the rights of creditors played an important part in the development of married women's law.

One of the most interesting aspects of the developments in Oregon during the second half of the nineteenth century was the gradual development of a well understood asset holding device for married women. The taking of a fee simple by a man had long carried with it certain automatic appendages—rights of transfer, devise, and management. The need to increase creditor's security over the meaning of the new statutory married woman's separate estate meant that common understandings also had to be developed for women's property. Whether women were to be treated the same as men was not always as important to creditors as knowing precisely the status of married women's property. It is this process of developing common understandings on the meaning of the separate estate which ensued in Oregon after the Donation Act went into effect. As things turned out, married women slowly gained the transfer, management, and devising rights held by men for generations. The gradual entry of women into the workforce and the rising tide of women acting as the arbiters of family consumption habits guaranteed that the common understandings on the meaning of a married woman's separate estate would make it look very much like the male fee simple. Of necessity, these developments eventually led to a slow *loss* of special status for property owned by married women. The early Oregon legislation exempting married women's separately held property from the debts of husbands gave way to laws providing family creditors with equal access to the property of married men and women. Throughout this period, legislative and judicial resolution of disputes between married couples and their creditors displayed many contradictory and ambiguous strains of thought on married women. Telling this story sheds significant light on the development of married women's property law in the second half of the nineteenth century.

I. THE OREGON DONATION ACT OF 1850

The Oregon Donation Act provided that persons settling in Oregon by December 1, 1850, could claim "... the quantity of one half section, or three hundred and twenty acres, if a single man, and if a married man, or if he shall become married within one year from the first day of December, eighteen hundred and fifty, the quantity of one section, or six hundred and forty acres, one half to himself and the other half to his wife, to be held by her in her own right. . . ."⁵ Although the act did not emerge from Congress with a provision exempting married women's donation lands from the claims of husbands' creditors, the issue was much debated.⁶ Before finally adopting the Senate version of the bill,⁷ the House had adopted an amendment proposed by Mr. Sackett providing that "no interest in the part so held by the wife in her own right, shall be liable for, or subject to sale upon the debts of the husband."⁸ In addition, the original House committee version of the bill contained language which, if adopted, would have been a married women's act quite advanced for its time.⁹

It was certainly not surprising that the debtor-creditor status of married women's property would be of concern to those drafting the Donation Act. By 1850, most states had adopted acts exempting married women's property from attachment by husbands' creditors, a number had also passed homestead bills exempting residences and

5. An Act to Create the Office of Surveyor-General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to Settlers of the Said Public Lands, ch. 76, §§ 4-5, 9 Stat. 496, 497, 498 (1850).

6. The story of these debates may be found in Chused, *Federal Women's Law*, *supra* note 4 at 61-68.

7. The Act was adopted near the end of the Congressional session. If Samuel Thurston, Oregon's territorial delegate to Congress, had tried to alter the bill approved by the Senate he would certainly have run out of time to get the bill adopted. He, therefore, took what he could get. See his Letter to the Electors and People of the Territory of Oregon 7, (Nov. 15, 1850) (Thurston Papers, MSS 379, Oregon Historical Society).

8. CONG. GLOBE, 31st Cong., 1st Sess. 1094 (1850).

9. H.R. 250, 31st Cong., 1st Sess. (1850) (Record Group 233, United States Archives). The original bill contained the following crossed out language:

and all lands herein provided for to be donated to females shall forever be the property of such females in their own right; to be by them held, used, aliened, and devised at their own will and pleasure, and not subject to the control of their husbands or be liable for their debts without the consent of such females first had in writing in such manner as may be provided for hereafter by the Legislative Assembly of Oregon Territory.

This language was replaced by the terminology "to be held by her in her own right", found in the adopted version of the bill. The crossed out language was never discussed on the floor of Congress. The reasons for its exclusion are not clear. See; Chused, *Federal Women's Law*, *supra* note 4, at 61-64.

surrounding land from seizure; and the free land, or homestead, movement urging the debt-exempt distribution of federal lands was becoming a powerful political force.¹⁰ All of these issues were of concern to Samuel R. Thurston, the Oregon Territory's non-voting delegate to Congress from 1849 to 1851. Near the end of his term, Thurston wrote his constituents a lengthy reelection campaign letter.¹¹ His sentiments on the exemption of married women's assets from husbands' debts were clear:

This land of the wife will serve as homestead exemption to the family, and it was with this view also, that I contended for this feature [the Sackett amendment] of the bill. While the wife has a home, the husband and children are sure to have one. If, then, the husband fails, or if misfortune overtakes him, he may return to the *sanctuary* of that guardian angel, his wife, who is ever watchful of his interest, and solicitous for his comfort, where he can rest from his troubles and be happy. I deem it highly important, and I care not how widely my doctrine is known, that Oregon should adopt the policy of legislating favorably for the masses at the earliest possible moment, and that she should throw around every one of her citizens a protection by way of *homestead exemption*, by which, with his ordinary industry, he can secure an honest and easy livelihood, and be protected against the hands of unfeeling oppression, and saved from the jaws of pinching want. In this way every man will be placed on an eminence, where *he can be a man, and his own man*; where he can be an independent suffragen, beyond the compelling grasp of the rich lord or politician, and where viewing all measures for himself, he can think, and speak, and vote as a well directed and untrammelled judgment shall direct. Hence, I favored the provision of the bill which passed the House, declaring this land of the wife not liable to the husband's debts or the grasp of his creditors, or subject to their control. That was stricken out in the Senate, to satisfy the scruples of some, that it was meddling too far with the domestic legislation of the Territory. It was said our assembly can pass such a law, which I hope they will do at their next session; and whenever we form a State, that this and the homestead exemption feature will find a place in our constitution.

The stage was thus set for three decades of judicial and legislative consideration of the relationship between wives, husbands, and family creditors. When, in 1852, the Oregon Territorial Legislature followed Thurston's advice and adopted an act exempting married

10. Chused, *Federal Women's Law*, *supra* note 4, at 55-56.

11. Thurston, Letter to the Electors and People of the Territory of Oregon, *supra* note 7.

women's donation claims from husbands' debts, a strong incentive was created to repose property in wives to protect it from creditors. To the degree that there was insecurity over which assets were protected by the exemption, it was also possible for married couples to use wives' property as enticement for deals, only to plead the debtor exemption provisions if trouble arose later. It was almost inevitable that these sorts of problems would require further deliberation, whether in courts, legislatures, or constitutional conventions.

II. THE OREGON DONATION ACT FROM 1850 TO 1857

Although Thurston died before the Oregon Donation Act was implemented,¹² the suggestion in his 1850 letter to his constituents that the new Oregon Territorial Legislature should protect wives' donation claims from husbands' creditors was taken up very shortly after Thurston's death. Perhaps his untimely death gave added impetus to the movement. In any case, on December 4, 1851, Matthew P. Deady, a member of the Council, one of the two houses in the territorial legislature, announced his intention to introduce exemption legislation.¹³ The fact that Deady introduced the measure confirmed its uncontroversial content. By this time, of course, almost every state had adopted at least one married women's property act. In addition, Deady, who became an important lawyer and judge in Oregon, was a proslavery Democrat steeped in common law traditions. His later opinions in married women's cases displayed traditional, and unchanging, attitudes on coverture.¹⁴ Six weeks after Deady's announcement appeared, an act was approved providing that a wife's donation claim was "secured to the sole and separate use and control of the wife" and that all legal and equitable interests

12. He died in 1851 on a boat off the shore of Mexico as he was returning to Oregon following his term in Congress.

13. Oregon Spectator, Dec. 9, 1851. This issue contained a summary of the activities of the Council. The entry for Thursday, December 4, contained this item:

Mr. Deady gave notice that on Monday or some subsequent day of the session he would introduce a bill to exempt the wife's portion of the claim donated by the act of Congress approved Sept. 27, 1850, from the debts or liabilities of the husband.

14. Deady drafted many of the territorial and state statutes and codes and sat as a judge from 1853 until 1893, first on the Territorial Supreme Court, and then as a federal judge. For biographical material on Deady, see Platt, *Matthew P. Deady*, in *GREAT AMERICAN LAWYERS* 355-92 (W. Lewis ed. 1909); 2 H.H. BANCROFT, *CHRONICLES OF THE BUILDERS OF THE COMMONWEALTH* 465-515 (1892); Teiser, *A Pioneer Judge of Oregon: Matthew P. Deady*, 44 OR. HIST. Q. 61 (1943); McBride, *The Oregon Constitutional Convention, 1857*, in *PROCEEDINGS OF THE OREGON HISTORICAL SOCIETY INCLUDING THE QUARTERLY MEETINGS OF THE BOARD OF DIRECTORS AND THE FOURTH ANNUAL MEETINGS OF THE MEMBERS OF THE SOCIETY*, Dec. 20, 1902, at 20, 23 (1906). Discussion of some of Deady's Donation Act decisions may be found *infra* in part IV of this paper.

in such claims "shall in no wise be made subject to or liable for the debts or liabilities of her husband, whether contracted before or after the passage of this act."¹⁵ This act provided the sort of homestead exemption which Thurston wrote of in his letters to the members of the House and to his constituents, and which the Senate deleted during the debates on the Oregon Donation Act.

Like most of the married women's property laws adopted during the 1840's,¹⁶ Deady's act was very narrow in its coverage. The common law rule that men gained title to their wives' personal property upon marriage was left untouched. Real estate other than donation land was not covered. Even the "sole and separate use and control" language of the statute did not guarantee that husbands lost their ability to manage wives' donation claims and control the profits. The language was probably borrowed from the equity tradition, where such words had to be used in trusts to guarantee the creation of a wife's separate estate. But even if the language in the trust succeeded in creating beneficial title to property in a married woman, control by her of the use, sale, or disposition at death did not necessarily follow. In many jurisdictions, the husband retained management authority unless the trust specifically guaranteed his wife the power to manage, sell, or will her real property.¹⁷ Deady certainly knew about these cases, as his later decisions made clear.

In Oregon the most liberal meaning of the "sole and separate use" language was not accepted. At the time Deady's Exemption Act was adopted married women could not write wills except as provided by an antenuptial agreement.¹⁸ Only after the Exemption

15. The act, found in *General Laws Passed by the Legislative Assembly of the Territory of Oregon*, 3d Sess., at Salem beginning Dec. 1, 1851, at 64 (1852), reads as follows:

AN ACT to exempt the wife's portion of lands donated in Oregon Territory by act of Congress, approved September 27th, 1850, from the debts and liabilities of her husband.

SECTION 1. Be it enacted by the Legislative Assembly of the Territory of Oregon, That all right and interest of the wife, both legal and equitable, in and to the land donated to settlers in Oregon Territory by an act of Congress, approved September 27th, 1850, both now and hereafter, be and hereby is secured to the sole and separate use and control of the wife, and such interests in said lands, both legal and equitable of the wife, and the rents and profits thereof, shall in no wise be made subject to or liable for the debts or liabilities of her husband, whether contracted before or after the passage of this act.

SEC. 2. This act to take effect and be in force from and after its passage.

Passed the Council, January 16th, 1852.

Passed the House of Representatives, January 20th, 1852.

16. See Chused, *Married Women's Acts*, *supra* note 2, at 1398-1400, 1410-12.

17. *Id.* at 1365-72.

18. An Act Respecting Wills §3 (Sept. 26, 1849), in *Statutes of a General Nature Passed by the Legislative Assembly of the Territory of Oregon*, 2d Sess., Dec. 2, 1850, Oregon City, at 274 (1851).

Act was passed did the territorial legislature move to permit a married woman to write a will, but only for "real estate held in her own right, subject to any rights which her husband may have as tenant by the curtesy."¹⁹ And tenancy by the curtesy, of course, provided the husband with management and control rights.²⁰ Oregon curtesy legislation went even further than usual by providing husbands with life estates in their wives' real estate regardless of whether children had been born of the marriage. More confusion was created when, in 1854, the territorial legislature adopted an act repealing all but a few statutes adopted before the fifth session of the territorial legislature.²¹ This act, which arose because the chaotic politics of the territory produced arguments over where the legislature should sit and disputes over what laws were operative, had the effect of repealing the Exemption Act, but not the curtesy provisions.²² Unless the language of the Donation Act itself was read to provide married women with the right to manage their claims, the exemption legislation, like the early married women's acts, acted only as a debtor protection measure.

But it was highly unlikely that the Donation Act provisions giving land to married women were intended to give them management authority over their assets. As already mentioned, Congress declined to insert either primitive or advanced married women's property provisions in the Donation Act. In addition, language in the act appeared to require depriving some married women of their claims if their husbands died before the family had occupied their land for the required four-year period. This was hardly the sort of

19. An Act Relating to Wills §3 (Dec. 15, 1853), in *Statutes of Oregon*, 5th Sess., Dec. 5, 1853, at 354 (1854).

20. An Act Relating to Estates in Dower, by Curtesy and General Provisions, Concerning Real Estates §30 (Jan. 16, 1854), in *Statutes of Oregon*, 5th Sess., Dec. 5, 1853, at 373 (1854).

21. An Act to Repeal All Acts Heretofore Passed, With Certain Exceptions (Jan. 30, 1854), in *Statutes of Oregon*, 5th Sess., Dec. 5, 1853, at 505 (1854).

22. See Kelly, *History of the Preparation of the First Code of Oregon*, 4 OR. HIST. SOC'Y Q. 185 (1903). At the first session of the territorial legislature acts were adopted which designated the location of a capital and transplanted the Iowa Code to Oregon. The validity of both of these acts was challenged on the ground that they contained material on more than one subject in violation of the federal act creating the Oregon Territory. Even the judges who were supposed to settle the matter fell into arguing over where to sit. Much of the dispute is described in Message From the President of the United States Inviting the Attention of Congress to the Condition of Things in the Territory of Oregon, H.R. EXEC. DOC. NO. 94, 32nd Cong., 1st Sess. (1852). After Congress intervened to declare the capital to be Salem, A Joint Resolution Approving and Confirming an Act of the Legislative Assembly of the Territory of Oregon, entitled "An Act to Provide for the Selection of Places for Location and Erection of the Public Buildings of the Territory of Oregon," and for Other Purposes, CON. RES. 8, 10 STAT. 146 (1852), the mess was straightened out at the territorial level by a general repealer and adoption of a new code of laws.

provision one would expect if married women could manage their own estates. The Donation Act, which required the filing of a land claim by a "settler," appeared to permit the settler's wife to obtain her land only upon the successful completion of the claim process by her husband, the "settler."²³ Since one of the obstacles to perfecting a claim was four years of occupancy, there was a significant risk that death or marital discord would prevent some married women from obtaining land if their claims were derivative to their husbands' rights.

The problem was discussed in a Report of the Surveyor General of Oregon transmitted to Congress on the last day of 1852 by the Secretary of the Interior.²⁴ Among other things, the report discussed difficulties arising because widows and orphans of emigrants dying enroute to Oregon could not make claims under the Donation Act.²⁵ Very early in the administration of the Donation Act, the Oregon Surveyor General let it be known that women who had settled on land with their husbands before December 1, 1850, but whose husbands had died before four years of occupancy was complete, could file claims for the amount they would have been entitled to in their own right had their husbands survived.²⁶ But those portions of the act granting land to future emigrants provided for claims by single

23. Section 4 of the Oregon Donation Act provided that a grant of land would be made to a "settler or occupant" completing four years of residence and cultivation on the claim, and that "if a married man", his wife would get half of the claim in her own right. 9 Stat. 497. Section 5, though worded somewhat differently, also called for grants of land to "citizens" settling in Oregon, with the wife obtaining half of the citizen's claim. 9 Stat. 498. While the act certainly could have been read to make the claims of husbands and wives independent, the language of the statute, to say nothing of the tenor of the times, made it likely that married women's claims would be deemed to arise only after their husbands, as settlers, perfected their donation claims.

24. Reports of Surveyors General of California and Oregon, H.R. EXEC. DOC. NO. 14, 32nd Cong., 2nd Sess. 12-30 (1853). The report, dated Oct. 23, 1852, did not reach Washington until late in the year. It was ordered to be printed on Jan. 14, 1853.

25. The Surveyor General wrote:

I would earnestly suggest that the act of 27th September, 1850, be modified, or amended, to allow *widows* and *orphans*, made such by the death of the husband or mother on the route to Oregon, to hold a quarter section of land, the same as is now allowed to *white male* settlers under the fifth section.

26. In the May 8, 1851, issue of the Oregon Spectator, the following item appeared:

We are authorized to state, by the Surveyor General of Oregon, that he has instructions to so construe the law making donations of land to the citizens of Oregon, as to include the widows of men immigrating to Oregon, whose husbands died upon the way or who shall have become such subsequent to their arrival in the Territory, that they will be entitled to all the benefits of the several provisions granted to white male citizens, or in such quantities as they would be entitled to, in their own right, provided their husbands were living; or in other words, as respects grants of land, they will be placed upon the same footing as male citizens: Provided that such widows were in this country before Dec. 1st., 1850, and are of American birth.

persons only if they were male, and widows newly arrived in Oregon lacked the joint occupancy with their husbands used by the Surveyor General to justify grants to widows of old settlers.²⁷ The territorial legislature followed with a resolution urging that the Donation Act be amended to confirm the Oregon Surveyor General's practices with respect to old settlers and to amend the act for new arrivals.²⁸

The Oregon Surveyor General's Report was transmitted to Congress sometime after legislation amending the Donation Act had been introduced in Congress. H.R. 224, introduced on March 10, 1852,²⁹ provided that those settlers desiring to pay immediately for their donation claims or falling outside the terms of the Donation Act, could purchase their claim under the land sale system governing federal land disposition in other areas of the country. The bill passed the House on June 22, 1852³⁰ and was reported out of the Senate Public Lands Committee with amendments about two months later.³¹ Very shortly after the Oregon Surveyor General's report appeared, Senator Felch asked the Senate to recommit the bill to committee for further work.³² When the bill reappeared a short time later it contained new amendments to extend the Donation Act's operation until 1855 and to provide for women arriving in

This notice followed the general instructions sent by the General Land Office to those administering the Act in Oregon. These instructions were sent on Mar. 10, 1851. Letter to Surveyor General of Oregon from J. Butterfield, Commissioner of the General Land Office, in 1 Letters Sent to the Surveyor General of Oregon 6, 23 (Record Group No. 49, Division "E," National Archives) (Mar. 10, 1851). The instructions are in the same volume at 52-96, with the widow instructions at 92-93. For those who survived for the full four year period required by §4, but died before receiving a patent, rights under the Donation Act passed by will, or, in the absence of a will, to the surviving spouse and children in equal shares. §4, 9 Stat. 497, 498. Section 5 lacked a similar provision. See *Davenport v. Lamb*, 80 U.S. (13 Wall.) 418 (1871); *Chambers v. Chambers*, 4 Or. 153 (1871).

27. Section 8 of the Donation Act also provided that an actual settler's death before four years of occupancy meant that the deceased party's rights passed to the widow and children in equal shares. 9 Stat. 499. This suggests that a widow's claim under §4 should also have survived the husband's death, but the issue was certainly not clear. See *supra* notes 22-25 and accompanying text.

28. Joint Resolution (Dec. 18, 1851) (Item 4211, Provisional and Territorial Papers, MSS 1226, Oregon Historical Society).

29. CONG. GLOBE, 32nd Cong., 1st Sess. 710 (1852). The terms of the bill were described by Representative Hall during the brief floor discussion of the bill on May 22, 1852. *Id.* at 1447-48.

30. *Id.* at 1595.

31. Senator Felch reported for the Public Lands Committee on Aug. 18. *Id.* at 2238.

32. The Surveyor General's Report was ordered to be printed in the House on Jan. 14, 1853. CONG. GLOBE, 32nd Cong., 2nd Sess. (1853). H.R. 224 was recommitted to the Senate Public Lands Committee on Jan. 25. *Id.* at 390.

the territory as widows.³³ On February 1, 1853, the Senate passed the bill and the House concurred in the Senate amendments only a week later.³⁴

As the act emerged from Congress it provided that settlers could purchase their claims after two years of occupancy, that emigrants could file claims through 1855; that the traditional land sale system would take over after 1855 as to all lands not claimed under the Donation Act; that all widows of settlers and emigrants could file claims for land they would have been entitled to but for the deaths of their husbands; and that the rights of wives dying before four years of occupancy passed to their heirs.³⁵ It was fortunate for Oregon's widows that this act was adopted, for the following year the Territorial Supreme Court decided that a wife's donation land claim was indeed derivative to that of her husband as the true "settler." In *Vandolf v. Otis*,³⁶ the wife's half of a Donation Act claim made by a white man was challenged because the wife was an Indian.³⁷ The court responded that the terms of the Donation Act limiting claims to white settlers or occupants applied only to the male family head, and that there was no racial limitation on the remaining members of the family. If this theory was correct, then widows of deceased claimants might also lose their claims,³⁸ since their title would depend upon their husband's continued settlement and occupancy.³⁹

33. *Id.* at 413-14, 499.

34. *Id.* at 499, 538-40.

35. An Act to Amend an Act Entitled "An Act to Create the Office of Surveyor General of the Public Lands in Oregon, and to Provide for the Survey, and to Make Donations to the Settlers of the Said Public Lands," Approved September Twenty-seventh, Eighteen Hundred and Fifty, ch. 69, 10 Stat. 158 (1853). *See also* Notice to Settlers in Oregon Claiming the Benefits of the Donations Law of 27th September, 1850, in 1 Letters Sent to Surveyor General of Oregon 135-36 (copy of a public notice inserted between these pages while remaining unnumbered itself) (Record Group 49, Division "E," National Archives) (Apr. 30, 1853).

36. 1 Or. 153 (1854).

37. The court noted that a number of the early male settlers married Indian women. *Id.* at 157.

38. Section 8 of the original Donation Act permitted wives to inherit the settler's claim but was silent as to the continued validity of their own claim. 9 Stat. 499.

39. This later turned out to be true. *See* *Fields v. Squires*, 9 F. Cas. 29 (C.C.D. Or. 1868) (No. 4776); *Vance v. Burbank*, 101 U.S. 514 (1879); *McSorley v. Hill*, 2 Wash. 638, 27 P. 552 (1891). Although the Supreme Court eventually held that single women would be treated like single men for purposes of the Donation Act, *Silver v. Ladd*, 74 U.S. (7 Wall.) 219, 226 (1868), that only meant that widows had to start their claims over if their rights during marriage were derivative from their husbands. That may have led to loss of claims either to intervening contestants, or under the time limits of the Donation Act. Administrative materials confirm the problem. *See* Claim of Daniel F. Bradford, 10 Op. Att'y Gen. 380 (1862); Claim of David S. Maynard, Copp, Public Land Laws 751 (1873); Claims of Meek & Luelling, 2 Copp's Land Owner 21 (1874).

Of some interest is the possibility that the early administrative practice may have been more lenient than the later judicial decrees. Early administrative materials

The same year *Vandolf* was decided, Congress completed its review of the Surveyor General's recommendations for Oregon by extending the preemption system over Oregon and providing for grants to orphans of persons who would have been entitled to donations.⁴⁰ Perhaps more than any other event during the early 1850's, the passage of this act displayed the fleeting interest of Congress in the fate of female western land claimants. On April 4, 1854, the House Committee on Public Lands simultaneously reported three bills, one to establish a surveyor general and grant land donations in New Mexico, another to do the same in Utah, and a third to amend the Oregon Donation Act.⁴¹ On May 2, the New Mexico bill was the first of the three to come up for debate in the House.⁴² It had been drafted jointly by the two Public Lands Committees and the Land Commissioner and called for donations of 320 acres to single white males and 640 acres to married males.⁴³ During the floor debate, which was much more concerned with racial issues than gender roles, the House amended the bill to conform to homestead ideas then in vogue by restricting claims to 160 acres by white males.⁴⁴ Mr. Lane, Samuel Thurston's successor delegate from Oregon, noted his pleasure that discrimination between married and unmarried men

suggest that some effort was made to protect widows and divorced women. *E.g.*, in a Feb. 17, 1855 letter to Jos. A. Ebert, Esq. in Oregon City from John Wilson, Commissioner of the General Land Office, in 21 Letters Sent Relating to Private Land Claims 120-21 (Record Group No. 49, Division "D," National Archives) (Feb. 14, 1855), a divorced woman was permitted to protect her claims as if her husband was "in law" dead to her. This was said to be in accordance with a policy established the prior year. The Commissioner also tried to protect the entire 640 acre claim when a wife died before the enactment of the Donation Act by giving the wife's share to her heirs. Letter to Hon. Jos. A. Lane from Jos. S. Wilson, Acting Commissioner of the General Land Office, in 22 Letters Sent Relating to Private Land Claims 383 (Record Group No. 49, Division "D," National Archives) (Aug. 11, 1856). This practice was later reversed. *See* *White v. Allen*, 3 Or. 103 (1869).

40. An Act to Amend the Act Approved September Twenty-seven, Eighteen Hundred and Fifty, to Create the Office of Surveyor-General of the Public Lands in Oregon, etc., and the Act Amendatory Thereof, Approved February Nineteen [sic] Eighteen Hundred and Fifty-Three, ch. 84, 10 Stat. 305 (1854). One other fairly minor amendatory act extending time for filing notices of claims was passed in 1864. An Act to Amend the Act of Congress Making Donations to the Settlers on the Public Lands in Oregon, Approved September Twenty-Seven, Eighteen Hundred and Fifty, and the Acts Amendatory Thereto, ch. 154, 13 Stat. 184.

41. CONG. GLOBE, 33rd Cong., 1st Sess. 848 (1854).

42. *Id.* at 1054. This bill had already been passed with virtually no debate in the Senate. *Id.* at 956.

43. *Id.* at 956. The text of § 2 of the bill as adopted by the Senate and proposed by the House Public Lands Committee provided for grants to "every white male American citizen of the United States" in the territory before 1853 of "one half section, or three hundred and twenty acres of land, if single, but if married, one section, or six hundred and forty acres"

44. *Id.* at 1074.

had been eliminated from the bill.⁴⁵ After the House passed the New Mexico legislation, it took up the bill amending the Oregon Donation Act. During this debate, Lane remarked, somewhat tongue in cheek, that he didn't want married men to get more land than unmarried men, but that the grant in Oregon of half of a married couple's land to the wife was fair. "My wife is the better half," Lane said to his laughing colleagues. "She will not sell her claim, and I would be likely to give mine to any good man who will come and be my neighbor. Such a man will always be welcome to it. She would be, probably, more tenacious of hers."⁴⁶

Thus, at the end of the Oregon Territory's first decade, its married women were in something of an anomalous position. Although the Donation Act had been amended to provide protections for widows of deceased male settlers and emigrants, and married women were coming to own substantial amounts of real estate,⁴⁷ the Donation Act had little immediate impact on the structure of coverture law in Oregon. The narrowly drawn married women's act exempting land from husbands' creditors was probably generated by the Donation Act debates, but it was lost in the repealer statute of 1854. Traditional curtesy rights of husbands continued to exist. Al-

45. *Id.*

46. *Id.* at 1076. This occurred during the debate on proposals to permit sales of land held under titles perfected but not patented because of surveying or other bureaucratic delays. The Utah bill met a fate similar to New Mexico's. It came from committee with larger grants for married men, but the provision was changed on the House floor. *Id.* at 1091-92. The Utah bill eventually failed to pass because of debates over polygamy. These debates are fascinating but a bit outside my topic. *See id.* at 1092-1102, 1109-14.

47. It is not clear if the Oregon Donation Act had an impact on the relative wealth of men and women in the state. What happened to all the land owned by women in Oregon as the nineteenth century progressed is not known. Until land title chains are studied in some detail, we are left with a hypothesis that some lasting cultural impact may have occurred as a result of the Donation Act. There is some indication that even this hypothesis may be false. Davenport, *An Object Lesson in Paternalism*, 4 OR. HIST. SOC'Y Q. 33 (1903). Davenport surveyed 100 square miles on the east side of the Willamette Valley in Marion County and found that:

[S]ixty-six per cent of donation claims have passed out of the possession of the donees and their descendants, another fifteen per cent are mortgaged for all they are worth, and for practical purposes may be considered as lost to them. Not more than fifteen per cent of the whole have been ordinarily successful in holding and improving a part of their possessions and are now free from debt. Only five of all of them have increased their holdings and are thrifty.

Id. at 50-51. Davenport appears not to have studied how persons selling their land used the money received; nor did he focus on women's holdings. His study also reflects the late nineteenth-century biases against debt and fails to analyze the impact of the one third of the claims still held by the original donee families. But it is certainly possible that many of the claims obtained by women were transferred to men over the years.

though chancery actions were recognized in the territory,⁴⁸ and private bills in equity-like situations were adopted from time to time,⁴⁹ married women's separate estates were still subject to narrow rules of judicial construction. Furthermore, indications were strong that the language of the Donation Act was not intended to grant married women management of their donation lands. Not until the debates over the drafting of the state constitution did the Donation Act take on significance as a symbol, and perhaps even a contributing cause, to the development of a married women's law reform movement in Oregon.

III. OREGON STATE CONSTITUTION DEBATES

Oregon petitioned Congress for statehood as early as 1854.⁵⁰ A bill authorizing Oregon to frame a constitution passed the House of Representatives in 1856, but died in the Senate.⁵¹ Nonetheless, the people of Oregon voted in June, 1857, to convene a constitutional convention. The delegates met at Salem in August, 1857, and elected Matthew Deady as President. The draft constitution emerged with a married women's property act among its provisions.⁵² The debate on this provision took place on September 16, 1857. Complete reports

48. See *An Act to Regulate Proceedings in Suits in Equity* (Jan. 23, 1854) in *Statutes of Oregon*, 5th Sess., Dec. 5, 1853, at 173 (1854). See also *Pittman v. Pittman*, 4 Or. 298 (1872), where Emily Pittman was denied relief in a court of law for the use by her husband of a \$1000 separate estate trust fund. She was told to seek a remedy in an equity court. *Id.* at 300. Chancery was important to the development of married women's property law. See Chused, *Married Women's Acts*, *supra* note 2, at 1365-72.

49. See *An Act to Authorize Campbell E. Cristman and Lucinda Cristman to Make a Marriage Settlement of Their Property*, (Jan. 15, 1857) in *Special Laws of the Legislative Assembly of the Territory of Oregon*, 8th Sess., Dec. 1, 1856, at 13 (1857) (permitted a postnuptial marriage settlement). Divorces were also granted, some of which reinstated property rights, permitted resumed use of maiden names, granted child custody to women, and confirmed divorce settlement agreements. See *An Act to Divorce Dillard Martin and Miriam Martin* (Jan. 17, 1859) in *Laws of the Territory of Oregon*, 10th Sess., Dec. 6, 1858, at 100 (1859); *An Act to Divorce Nancy Judson and Lewis H. Judson* (Jan. 19, 1859) *Id.* at 99; *An Act to Divorce Susan Tary and William Tary* (Jan. 19, 1859) *Id.*; *An Act to Divorce Hessey Williams* (Jan. 19, 1859) *Id.* at 92; *An Act to Divorce Mary Culbertson From Her Husband, Wm. A. Culbertson* (Jan. 20, 1859) *Id.* at 97; *An Act to Divorce Sarah Torrence* (Jan. 22, 1859) *Id.*

50. Memorial of the Legislative Assembly of Oregon Territory Asking Admission as a State into the Union, H.R. Misc. Doc. No. 61, 33rd Cong., 1st Sess. (1854).

51. For general background on Oregon statehood, see 2 H.H. BANCROFT, *HISTORY OF OREGON* 413-41 (1888). Reference to the failed statehood bill is at 419.

52. Article XV, §5, of what eventually became the Oregon Constitution of 1859, read as follows:

The property and pecuniary rights of every married woman, at the time of marriage, or afterwards, acquired by gift, devise, or inheritance, shall not be subject to the debts or contracts of the husband; and laws shall be passed providing for the registration of the wife's separate property.

on the debates are not available, but extant newspaper accounts are quite revealing.⁵³ The debate was strikingly similar to the discussion preceding adoption of the New York married women's act almost ten years before.⁵⁴ Those opposing the Oregon constitutional provision argued that protection of married women's property would cause dissolution of families and lead to cheating of creditors. Others countered that love and affection, not money, were the roots of a good marriage, that families needed the economic protection afforded by married women's acts, and that contemporary women deserved the benefits of the proposed constitutional provision.

Among those arguing that the married women's provision should be removed from the proposed constitution was Matthew Deady, later to handle a number of Donation Act cases as a federal judge. Deady contended that married women's acts made "two persons of the husband and wife," causing "family alienation and jars."⁵⁵ Colleagues of Deady's argued that the provision would cause "much domestic trouble and many divorces."⁵⁶ Deady's fears of family discord implicitly assumed that the family was the core of American culture, that families needed a central male figure to survive, and that wives would vie for family leadership if they gained some economic independence from their husbands. These assumptions were made quite explicit by Mr. Kelsay, who argued that wives were amply provided for and expressed fear that a husband would become "simply a boarder at his wife's establishment," and by Mr. Williams who contended that the Donation Act's creation of distinct estates had caused "much domestic trouble."

Fear of marital discord was not the only focus of the opposition. Concern was also expressed that creditors would be cheated. Mr. Prim argued that the provision would become "a cloak for villiany [sic]," that debts would be contracted for the wife's benefit on the strength of what was thought to be a husband's property, and that "the honest creditor" would be cheated. As later experience in Oregon and elsewhere indicated, there was truth in Prim's argument

53. Reports on the proceedings in local newspapers have been pulled together in *THE OREGON CONSTITUTION AND PROCEEDINGS AND DEBATES OF THE CONSTITUTIONAL CONVENTION OF 1857* (C.H. Carey ed. 1926) [Hereinafter cited as *DEBATES*]. The Sept. 16, 1857 discussions were reported in the *Weekly Oregonian* of Oct. 10, 1857, and the *Oregon Statesman* of Sept. 22, 1857. Only the latter reports are useful. All the references to the debates in the text that follows are taken from the *Statesman* report, found at *DEBATES* 367-69.

54. See E. Warbasse, *supra* note 3, at 205-29, for a nice summary of the debates on the New York Married Woman's Act of 1848. See also N. BASCH, *supra* note 3.

55. The quoted language represents the reporter's statements from the Oregon *Statesman* summary of the debates, not the mouth of Deady. Unfortunately, that will be true for all reports on these debates. Further cites to the *Debates* are not made, other than to reveal the names of speakers not mentioned in the text.

56. Mr. Williams. Mr. Kelsay also complained about divorces.

that parties in economic distress might use married women's acts as a shield against honest creditors. Later legislation often corrected the imbalance in creditor access created by the early married women's acts.⁵⁷

The proponents of the constitutional provision turned conservative sentiments very similar to those of Deady and Prim to somewhat different use. Mr. Smith, a proponent of the provision who was also concerned about family solidarity, argued that separate property rules did not cause divorce. Rather "it was the want of affection—the want of marriage of the heart," that created discord. The influence of early nineteenth-century changes in the family must have influenced Mr. Smith. Romantic notions of mate selection, companionate marriage, and greater participation by women in family decision making and child rearing,⁵⁸ could certainly have led him to see married women's acts as "an advance step, and only up to the provisions of many of the states."

Others noted the desirability of protecting wives' property from husbands' creditors, either because it carried on the spirit of the Donation Act,⁵⁹ adopted the doctrine of the civil law,⁶⁰ or protected women and daughters from spendthrift husbands.⁶¹ These proponents focused on the misfortunes of honest women rather than the pitfalls for honest creditors. Mr. Logan cautiously observed that "If he [the husband] was prudent and thrifty she would give him control of her property. And if he was not, it was better that she should have the power to preserve her property to support herself and educate her children." And Mr. Waymire, said to be the prime supporter of the constitutional provision,⁶² argued that, "He didn't want a man to marry a daughter of his, with a large band of cattle, and then skin the cattle, and skin her, and leave her. If men married for money they ought not to have control of it. Every day they lived together they lived in adultery, for he married the money and not the girl."

The proponents of the provision added one new element to the debates—a mild dose of language from the women's movement—not too much mind you, but enough to see the impact of the demo-

57. See Chused, *Married Women's Acts*, *supra* note 2, at 1409-10; discussion *infra* in Part IV.

58. *Id.* at 1412-23.

59. Mr. Dryer.

60. Mr. Boise. Compare Deady's attitudes towards the civil law, *infra* notes 80-81 and accompanying text.

61. Mr. Logan, Mr. Waymire.

62. 2 H.H. BANCROFT, *HISTORY OF OREGON* 426, n.23 (1888). Waymire, supposedly called the "old apostle of democracy" by his friends, was said to be "an energetic, firm, strong, rough man, and an uncompromising partisan." *Id.* at 142, n.8.

cratic, women's, and utilitarian movements of the mid-nineteenth century. Mr. Smith was "for woman's rights, and was not afraid of her having too many. She has been too long denied her just rights." And Mr. Waymire noted that, "If we should legislate for any class it should be the women of this [Oregon] country. They worked harder than anybody else in it." But this was still "equality" with a paternal cast; it was men urging protection of the special qualities of their female family members with "modern" language. For Smith "would protect her property from dissipated or mercenary wretches," and Waymire thought any delegate with "girls old enough to marry" would take his side of the question. Like Thurston earlier in the decade, these men saw a need to surround women with protections befitting their special family roles, not their public obligations.

The provision remained in the draft constitution by only a 27-22 vote. The debates between Deady, Waymire, and the rest set the stage for a remarkable series of court cases over the following several decades. For Deady was named to the federal court bench shortly after Oregon became a state in 1859.⁶³ And Waymire, though never a judge, found his views expressed by others named to sit on the Oregon Supreme Court.

IV. JUDICIAL AND LEGISLATIVE RESPONSES TO THE OREGON DONATION ACT AND THE CONSTITUTION OF 1859

Important issues emerged in the judicial treatment of the Oregon Donation Act and related state statutes. Concerns expressed at the state constitutional convention about family harmony and the status of creditors were repeated in judicial opinions. Deady, as federal district judge, continued to note his disapproval of newer gender roles for women, while state court judges were more likely to take up Waymire's mantle. These differences in attitude certainly mirrored the currents of public debate then swirling around the courts. The *New Northwest*, a newspaper published by Oregon's leading suffragist, Abigail Scott Duniway, began publishing in May, 1871. Susan B. Anthony came to Oregon on a speaking tour shortly thereafter.⁶⁴ And as we shall see, family creditors, agitated over the difficulties caused them by early married women's legislation, obtained some legislative relief in both 1866 and 1872.

Different styles of judicial analysis also surfaced in the federal and state opinions. Deady paid lavish attention to English and American treatises and precedents, carefully analyzed old "legal

63. See An Act for the Admission of Oregon into the Union, ch. 33, 11 Stat. 383 (1859). For materials on Deady, see *supra* note 14.

64. A.S. DUNIWAY, *PATH BREAKING: AN AUTOBIOGRAPHICAL HISTORY OF THE EQUAL SUFFRAGE MOVEMENT IN PACIFIC COAST STATES* 43-47 (1914, reprint 1971).

chestnuts" and painstakingly worked his way to decisions. He was highly critical of civil law and enamored of British common law as "the source and panoply of all those features of our system which distinguish us from the subjects of absolute governments."⁶⁵ State court judges on both sides of married women's issues were much more likely to insist that recent constitutional or statutory developments created a new legal milieu, to support results by referring to the will of the general public, to ignore old precedents and treatises, and to issue broad opinions with sweeping language. The fact that Oregon's judges were elected gave them some basis for assuming that they had a popular mandate. To the extent that such differences in judicial technique mirrored splits in public opinion, it is not surprising that intervention by the legislature was necessary to resolve many of the problems created or left open by the Oregon Donation Act, the debt exemption statute of 1852, and the state constitution of 1859.

The fears expressed by Mr. Prim during the Oregon constitutional debates that honest creditors might come a cropper if they relied on actions of husbands alone⁶⁶ were vindicated in the most important of the early Oregon Supreme Court donation land cases, *Brummet v. Weaver*.⁶⁷ In accordance with the mandate of the constitution of 1859, the state legislature had adopted a registration act for married women's separate property at its first session.⁶⁸ Sarah Brummet registered three horses as her property in 1861. She had purchased these horses with money received from the sale of her Donation Act claim. Later she divorced Banner Brummet, and, in 1864, remarried him. Upon her remarriage, however, she did not reregister her horses as separate property.⁶⁹ After her husband disposed of the horses to James Weaver, Sarah Brummet sued to recover possession of the horses. The Supreme Court reversed the trial court's verdict for Weaver and remanded for a new trial.

Weaver contended on appeal that the constitution and the registration act limited separate property to assets received by gift, devise, or inheritance, that divorce operated as a revocation of Brummet's registration, that registration only protected property

65. H.H. BANCROFT, *supra* note 14, at 493.

66. See *supra* note 57 and accompanying text.

67. 2 Or. 168 (1866). One other case with import similar to *Brummet* was reported a few years earlier. *Carter v. Chapman*, 2 Or. 93 (1863). Significant cases did not arise earlier because of delays in setting up the new bureaucracy needed to implement the Donation Act.

68. An Act to Provide for the Registration of the Separate Property of Married Women, and to Declare the Effect Thereof (June 4, 1859), in *Laws of the State of Oregon*, 1st Extra Session of the Legislative Assembly, May 16, 1859, at 31 (1859).

69. By 1864, only two of the horses were the same as in 1861. The third had been exchanged for another animal.

described in the documents of record, and that he was, therefore, free to purchase the horses from Brummet's husband under the common law rule giving a married woman's personal property to her husband upon marriage. Brummet countered⁷⁰ that she had the right to dispose of registered assets, purchase new ones with the proceeds, and retain the new assets as separate property, and that registration was not the sole device by which persons could be put on notice of her claims.

The court, despite holding that divorce revoked registration, agreed that Sarah Brummet's claims had merit. The Constitution of 1859 effected a repeal of common law coverture rules, the court noted, adding:

Under that instrument [the Constitution of 1859] no woman loses any pecuniary rights by marriage. Whatever property a woman has at the time of marriage, or afterwards acquired by gift, devise, or inheritance, remains hers, until, she, by her own consent, express or implied, parts with it. Without that consent she cannot be divested of her title to it, whether registered or not. No one having notice of her claim can acquire any title to her property by any contract of her husband to which she does not expressly or by implication assent. If she has duly registered her property, the registry is notice to the world, as to all property described in it. If she has not registered it, we think actual or constructive notice, as recognized in case of deeds and mortgages of land, would be sufficient to bind the party attempting to deal with the husband concerning her property. It seems that the registry act . . . has made no provision concerning property owned by the wife at the time of the marriage; but her title to such property after marriage is not less indefeasible. Whether, however, a purchaser of such property from the husband, acquires any title, or whether the wife has a right to repudiate a sale by the husband and recover the property, will depend, in every such case, upon the conduct of the wife in regard to the management of the property. . . .⁷¹

Sarah Brummet got a new trial on the issue of the property's management and control, the court also holding that the constitution:

[M]ust be so construed as to allow a married woman not only to hold property as separate property, without the interference of a trustee, but also to exchange one species of her

70. Jurisdictions with low populations and few attorneys frequently provide surprises as to who shows up representing one or another party in a law suit. Sarah Brummet's counsel was Mr. Kelsay, who had argued against the adoption of Article XV, §5 of the state constitution. See *supra* note 56 and accompanying text.

71. 2 Or. at 173.

separate property for another, and to authorize her to sell any part of her separate property and retain the purchase money as her own; or with it buy other property to be held by her in the same manner and for the same purpose.⁷²

The *Brummet* court took a number of significant steps to enlarge the nature and importance of the married women's separate estate. Though Sarah Brummet, and all other married women in Oregon, risked loss of unregistered property if its separate character was not maintained, she could hold property without use of trustees, transfer her donation claim assets, and retain the proceeds of any transfer as separate property. These results were similar to legislation adopted by a number of state legislatures during the 1860's.⁷³ Despite the importance of the *Brummet* decision, the broad language of the opinion was hardly justified by the constitutional debates of 1857 or the narrow language of the 1859 constitution.

Indeed, the court may have moved too far, too fast, since changes in Oregon's separate property registration scheme were adopted almost immediately after *Brummet* was decided.⁷⁴ The old registration statute was repealed and replaced by a new statute providing only for the registration of personal property. After *Brummet* the regular recording system was available to provide notice of married women's title to real estate. The legislature, therefore, narrowed their focus to personal property and tried to create incentives, via a prima facie evidence of title system, for women to register their assets. Registration became prima facie proof of title for both spouses. A wife registering her personal property gained presumptive title, but failure to register became prima facie evidence that the property belonged to the husband.⁷⁵ The preamble to the statute, in an apparent reference to *Brummet*, pointedly noted that while the constitution protected the rights of married women, "better protection" was needed for "purchasers and creditors of their husbands." Although the act ameliorated the common law rule that all personal property of a married woman belonged to her husband, it is apparent that the motivation for its adoption had more to do with protecting

72. 2 Or. at 171.

73. See Chused, *Married Women's Acts*, *supra* note 2, at 1409-10. Massachusetts adopted an advanced married women's act in 1855, New York in 1860. Most other states lagged behind.

74. An Act to Provide for the Registration of the Personal Property of Married Women (Oct. 20, 1866), in Acts and Resolutions of the Legislative Assembly of the State of Oregon, 4th Sess., at 6 (1866). *Brummet* was decided in Sept., 1866.

75. The provision adding this language to the bill was added by an amendment offered by Mr. Olney on the floor of the House of Representatives on Oct. 20, 1866. J. OF THE PROCEEDINGS OF THE HOUSE OF THE LEGISLATIVE ASSEMBLY OF OREGON FOR THE FOURTH REGULAR SESSION 397 (1866). The motivations of Mr. Olney for offering this change are not clear.

the claims of husbands' creditors than enlarging the role of married women.

Brummet is a fine example of the problems that surfaced after the adoption of the early debtor protection married women's acts. If, as these early statutes provided, married women's separate estates were not available to creditors of husbands, certain disputes were preordained to arise. First, insecurity over which assets were to be denominated as separate and which as subject to the traditional control of husbands, was inevitable under the new regime. Since the acts were imprecise as to whether trustees were required to hold separate property, the language necessary to establish the estate, the ability of married women to manage or dispose of their separate property, and whether third parties dealing with a married couple would be deemed constructively aware of the existence of separate estates, creditors of the family unit were subject to a significant amount of insecurity about the value of contracts, deeds, or security agreements involving separately held property. Second, the exemption of only married women's property created a strange set of incentives. The acts created a strong impulse to "bury" property in a wife to protect it from risk and creditors. To the degree that insecurity over the meaning of the new separate estate existed, it was possible for unscrupulous, or even well intentioned,⁷⁶ married couples to use a wife's property as enticement for a deal, only to plead the debtor exemption provisions if the deal later soured. It was predictable that these sorts of problems would require further legislative intervention. A variety of responses were possible, depending upon the degree of legislative sympathy with creditors or debtors. But in all such responses, one would expect the legislature to increase certainty as to which assets were available to creditors of the family.

The legislative response to *Brummet* is, therefore, perfectly understandable. The 1866 legislation attacked the insecurity problem frontally by establishing both a recording system and simple, though perhaps hard to enforce, rules on the impact of the system's use. The separate estate began to take on the appearance of a traditional property device. The need to increase creditor's security over the meaning of a separate estate meant that general rules about the transfer and management of the estate had to be developed. That, of course, is exactly what married women's acts did in the second half of the century. Women gained transfer, management, and devising rights, slowly obtaining parity, at least in legal theory, with male

76. Even an honest couple would be sorely tempted to plead coverture if a deal made using his wife's property fell apart. Certainly most lawyers would suggest to their clients that their good intentions did not legitimate an otherwise unlawful transfer.

property owners. The special debt exempt status of married women's property gave way to a family oriented pattern of exemptions. Women's property became more easily available to creditors of the family, unless the general exemption statutes applicable only to men were significantly modified. The movement from special status to equal treatment that marked the general content of married women's acts in the second half of the nineteenth century significantly increased the ability of creditors to rely upon married women's assets as viable security.⁷⁷

Judge Deady, sitting on the federal bench, took a much more cautious approach than his state court brethren. Although Deady's decisions did not create direct conflicts with state law until the 1870's,⁷⁸ the overall tone of his early work was conservative. In a series of opinions, Deady confirmed the continued vitality of common law rules giving husbands management of wives' real estate and ownership of their personal property, and held that the state constitution did not retroactively alter these rules,⁷⁹ and that married women could not contract about their property.⁸⁰ Deady attached great importance to the study of the common law and the old treatises, criticized then prevalent trends to look to codes and civil

77. One of the more interesting phenomena in the history of women's private law status is the slow process by which regulation of women moved from special treatment towards equality. While there is still much debate about the extent to which this has occurred, particularly in areas related to childbirth and child rearing, *see, e.g.* Williams, *Firing the Woman to Protect the Fetus: The Reconciliation of Fetal Protection with Employment Opportunity Goals Under Title VII*, 69 GEO. L.J. 641, 653-65 (1981), there are a number of examples which suggest the validity of the notion. Protective labor legislation is a nice example, as is voting, ability to sue, access to damages for loss of consortium and a number of others. Some areas were equalized, at least in legal theory, before others. Women's property law happens to be one of the earliest to change, leaving women with access to the same sorts of property as men long before other aspects of society were prepared to let them fully use their economic rights. Perhaps this occurred because the debtor protection aspects of married women's property law created legislative coalitions that otherwise may not have existed.

78. *E.g.*, in *Fields v. Squires*, 9 F. Cas. 29 (C.C.D. Or. 1868) (No. 4776), Deady reaffirmed prior state court holdings that the widow of a person dying before the Donation Act was adopted took nothing under the act, *Id.* at 33, citing *Ford v. Kennedy*, 1 Or. 166 (1855), and that a husband could not contract to sell land without his wife's participation, 9 F. Cas. at 33, citing *Carter v. Chapman*, 2 Or. 93 (1863). But this opinion, like most others he wrote later, was highly detailed factually and analytically; his writing style was precise, technical, and hard to master.

79. *Starr v. Hamilton*, 22 F. Cas. 1107 (C.C.D. Or. 1867) (No. 13,314).

80. *Dick v. Hamilton*, 7 F. Cas. 660 (C.C.D. Or. 1867) (No. 3890). Deady had a tendency to rescue women at the last minute from the clutches of the common law. In addition to *Dick*, the tendency is evident in *Chapelle v. Olney*, 5 F. Cas. 503 (C.C.D. Or. 1870) (No. 2613), where he applied the old common law rule that a married woman's personal property belonged to the husband as soon as he reduced it to possession. *Id.* at 506. But he went on to find that the husband in *Chapelle* never reduced the property to possession. *Id.*

law as substitutes for common law, and revered common law's ability to provide every person with a right to sue, to limit the intervention of government, and to mold and shape morals, politics, and literature.

In a remarkable address, given in 1866 to the Portland Law Association, Deady described his attitudes toward the common law traditions. His linkage of Manifest Destiny, the inferiority of civil law tradition, and the superiority of a cautious precedent system was palpable:

Nowadays, it is the fashion in some quarters to sneer at the common law as a relic of feudalism and barbarism, and to point to the civil law as the proper source from whence to draw the jurisprudence of highly civilized and refined people. But I caution you to beware of the spirit, and be not persuaded by it. . . . The laws of a people react upon them, and mould their character and opinions. The common law people—the English race, wherever they go, establish limited governments, with parliaments and juries; but the people of civil law—the Latin race, always come under some modification of the empire—in which the will of the prince, emperor, or chieftain is the supreme law.

In so far then as we discard the fundamental principles of the common law, and adopt those of the civil, we are paving the way for the political and social condition of the Roman empire, in the age of the Caesars—both good and bad. Probably this is the innate tendency and inevitable result of our republic, with its diversified and agglomerated population and ever widening territory.

But be this as it may, the common law is the source and panoply of all those features of our system which distinguish us from the subjects of absolute governments, ancient or modern,—either by monarchs or majorities. It was made by freemen for freemen, and so long as you think these distinctions between it and the civil law worth preserving, you should cherish it in private and exalt it in public.⁸¹

Deady's careful attention to the details of the common law surfaced in a number of opinions. Though he appeared to strive for fair outcomes, statutory modifications of old traditions in coverture law were routinely construed narrowly. A good example of his style was *Starr v. Hamilton*.⁸² In this case, Christina Hamilton, prior to marrying Alexander in 1853, inherited land in Missouri from her mother.⁸³

81. See H.H. BANCROFT, *supra* note 14, at 491, 493.

82. 22 F. Cas. 1107 (C.C.D. Or. 1867) (No. 13,314).

83. *Id.* at 1107-08. The receipt of inheritances by women was apparently common in the nineteenth century. See Chused, *Married Women's Acts*, *supra* note 2, at 1376-78.

In 1857, two years before the Oregon Constitution went into effect, she sold this land for \$1200. The following year she used \$500 of this money to purchase a parcel of land in the Portland area. She received a deed granting title to Christina Hamilton and her heirs by the body of her husband Alexander. In 1864 and 1865 Christina Hamilton bought additional land, this time titled in Christina Hamilton to "her own separate use, benefit and behoof forever, free from all control of her said husband." All this property was registered, but not until 1866, several years after Alexander fell into economic difficulties. Starr, who was the auction purchaser of the property of Alexander Hamilton, sued to gain possession of the property claimed by Christina.

Deady held that the real property owned by Christina when she married in 1853 was subject to Alexander's management and control upon marriage, that under the common law rule giving a husband ownership of his wife's personalty the \$1200 received from the sale of Christina's property in 1857 became the property of the husband immediately upon his receipt of it, that the land purchased in 1858 was bought by Alexander as a gift for Christina, and that Alexander retained curtesy rights in the property. The creditor of Alexander was thus entitled to Alexander's curtesy, but not to Christina's title.⁸⁴ Deady then considered whether the constitution of 1859 altered these outcomes. He gave only a polite bow to *Brummet*, stating that if property was not subject to a husband's debts, then "he is thereby precluded from any control over it."⁸⁵ Deady went on to hold that vested curtesy rights of husbands predating the 1859 state constitution could not be altered by its provisions.⁸⁶ As to the rest of Christina Hamilton's property, Deady confessed he had doubts that land obtained by purchase could be included within the language of the 1859 state constitution, but saved Christina's assets by finding that they were purchased with money owned by Alexander, were gifts, and were, therefore, within the parameters of the state constitutional provisions.

The outcome of the case was somewhat Solomonic, with Alexander's creditors getting some of the property, and Christina the rest. But the clear implication of opinions like *Starr* was that Deady would strive to place the new fangled provisions of Oregon law into the old structure, rather than use the constitution as a device for largely ignoring the old law. The difficulties inherent in Deady's position were vividly revisited in *Dick v. Hamilton*.⁸⁷ This case in-

84. In Oregon, curtesy entitled Alexander to a life estate, even if the couple was childless. See *supra* note 20 and accompanying text.

85. 22 F. Cas. at 1108.

86. Deady cited New York cases which had held § 2 of the 1848 New York Married Women's Act invalid on similar grounds. *Id.* at 1110.

87. 7 F. Cas. 660 (C.C.D. Or. 1867) (No. 3890).

volved the same parcels as in the prior case. Dick, as another creditor of Alexander, was attempting to gain control of the remaining separate property of Christina—the postcurtesy rights in the 1857 parcel and the title to the other lands. He could not claim direct rights through Alexander since he had not purchased any rights at the sheriff's auction. But he could and did claim that any gifts or transfers between spouses were made in defraud of creditors.

Deady held fast to his prior decision on the 1857 parcel, noting again that Alexander made a gift to Christina and that the postcurtesy portion of this gift was unavailable to Dick since the transfer had been made before Alexander fell into economic difficulties and, therefore, had not been in defraud of creditors. As to the other land, however, Deady found himself in some difficulty. The transfers to Christina were made in 1864 and 1865 when Alexander was "notoriously insolvent."⁸⁸ If the property came to Christina by gift, as Deady held in *Starr*, then Dick could gain access to it. Rather than countenance this result, Deady confessed he erred in *Starr*, and held instead that the lands had been purchased by Christina as a settlement of dower rights in land of her husband claimed by creditors, and that if the settlement did not reduce the value of the assets available to Alexander's creditors, the sole and separate estate language in the deeds insulated Christina's property from Alexander's creditors. Some of this land was also encumbered by promissory notes and mortgages signed by Christina. As to these, Deady found the contractual promises in the notes void under common law coverage rules, and the mortgages valid as part of the operation of a married woman's equitable separate estate. When the dust settled, Christina retained the property left her after *Starr v. Hamilton*.⁸⁹ In the process, Deady was forced to recognize and accommodate himself to the inevitability that women holding property under deeds clearly creating married women's separate estates would bargain with others over its disposition.

Between 1866, when *Brummet* was decided, and 1871, four new members appeared on the five judge Oregon Supreme Court.⁹⁰

88. *Id.* at 664.

89. Another interesting case from this time period is *Lamb v. Starr*, 14 F. Cas. 1030 (C.C.D. Or. 1868) (No. 8022), in which Deady construed the succession upon death provision of § 4 of the Donation Act, holding that successors to deceased claimants took as donees of the United States, not as heirs. *Id.* at 1032. See also on the same issue, *Mizner v. Vaughn*, 17 F. Cas. 543 (C.C.D. Or. 1872) (No. 9678).

90. In 1866, the judges were Stratton, Boise, Prim, Wilson, and Shattuck, the author of *Brummet*. In 1871, only Prim remained from the earlier court. He sat with Thayer, Bonham, Upton, and McArthur. See the judge lists at 2 Or. 8 (1869); 3 Or. vii (1872). It is difficult to know how significant these shifts were. Prim was continually conservative. His remarks during the debates on the state constitution, see *supra* note 57 and accompanying text, were consistent with the prejudices and peculiarities of a southern gentleman, according to Boise, *Bench and Bar of Early Oregon*, in PROCEEDINGS OF THE OREGON HISTORICAL SOCIETY INCLUDING THE QUARTERLY

Whether because of Democratic victories in the 1868 state elections, the influence of Deady, or a slowing of interest in women's issues after the Civil War,⁹¹ the court began to issue much more conservative rulings. The most significant of these opinions was *Frarey v. Wheeler*.⁹² Judge Bonham's opinion for the Oregon Supreme Court discussed two questions—the ability of a married woman to contract, and the role of equity in the resolution of a dispute between a married woman and the putative purchaser of her donation claim. Ignoring the broad language of *Brummet* permitting dealings in donation lands, and citing Kent's *Commentaries*, a celebrated but conservative classic, the court strongly, almost bitterly, declared its unwillingness to validate Jemima Wheeler's contract to sell her donation claim.

Notwithstanding the doctrine which is so zealously promulgated by some (and which in some respects it is to be feared may be somewhat utopian in character), claiming an enlargement of the rights of women, yet it is the generally received opinion that the sphere of married women's duties, as they have been heretofore generally recognized and acquiesced in, precludes the means of acquiring by them that knowledge of law and commercial transactions necessary to enable them, as a rule, to safely and understandingly enter into covenants concerning real estate.⁹³

MEETINGS OF THE BOARD OF DIRECTORS AND THE SIXTH ANNUAL MEETINGS OF THE MEMBERS OF THE SOCIETY, Dec. 17, 1904, at 17, 23 (1906). Boise also writes about all the other judges in this article, but rarely with any political content to his comments.

91. In 1872, the United States Supreme Court decided that reform of women's law was not to be included within the protective umbrella of the recently enacted privileges and immunities clause of the fourteenth amendment. *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1872). Three years later, the Court held that the fourteenth amendment did not bestow the right of suffrage upon women. *Minor v. Happersett*, 88 U.S. (21 Wall.) 162 (1874).

92. 4 Or. 190 (1872). On Apr. 1, 1867, Jemima Wheeler and her husband Jacob agreed to sell Jemima's donation claim to D. W. Frarey. The contract provided that Frarey would pay \$20 in gold coin at the signing of the agreement, that possession would immediately be given to Frarey, and that title would be transferred one year later upon the payment of another \$380 in gold. *Id.* Frarey made improvements on the land, but had trouble raising the final payment. Not until Aug. 1, 1870, did he tender the money, along with accrued interest. The Wheelers declined the payment and refused to execute a deed. Frarey's suit for specific performance was dismissed by the trial court. *Id.* at 191.

93. *Id.* at 194-95. The court by way of analogy also noted that Oregon statutes voided married women's covenants in deeds, as opposed to contracts. *Id.* at 195. See An Act Relating to Alienation by Deed, and the Proof and Recording of Conveyances, and the Cancelling of Mortgages §2 (Jan. 13, 1854), in Statutes of Oregon, 5th Sess. Dec. 5, 1853, at 475 (1854). The court *could* have relied on this analogy and stopped. The gratuitous nature of the language quoted in the text is therefore all the more notable. It is much like the now famous concurring opinion of Justice Bradley in *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 139 (1872).

The court went on to construe narrowly the "in her own right" language in the Oregon Donation Act to refer only to the holding of property, not its disposition,⁹⁴ and to virtually overrule *Brummet*'s broad reading of the state constitution.

We do not think it was the intention of the framers of our Constitution and laws on this subject, to entirely segregate the proprietary interests of husband and wife and make them to all intents and purposes *two* instead of *one* in law. But on the other hand, might it not be fairly inferred from the language of the law and its contemporaneous history, that the prime object and controlling purpose was, to secure to the wife the right to *hold* such property as the means of the support of herself and family in the event that her legal protector and provider might fail, through misfortune, improvidence or death, to do so?⁹⁵

While Judge Bonham may have read the history of the state constitutional debates correctly, his studied ignoring of *Brummet*⁹⁶ led to some controversy. In 1872, the legislature appeared to respond to *Frarey* and the other creditor cases by confirming that a married woman's property was not subject to her husband's debts, and adding that property acquired "by her own labor" should "be subject to the same exemptions and liabilities as property owned at the time of her marriage or afterwards acquired by gift, devise or inheritance."⁹⁷ There probably was concern in the legislature over the redefinition of married women's property by the *Frarey* court and the resulting possibility that property assumed by creditors to be controlled by women would not be available in case of default. By 1872, in something of an ironic twist, the legislature had modified results of both a liberal and a conservative court in order to insure that those dealing with married persons could rely upon certain un-

94. 4 Or. at 195-96.

95. *Id.* at 196 (emphasis in the original).

96. Because of the narrow reading of the Donation Act and the state constitution, the court had to resolve a serious problem of fairness. Mr. Frarey had paid some money to the Wheelers and expended more on improvements. *Id.* at 191. Much as Deady had wrestled in *Starr v. Hamilton* and *Dick v. Hamilton* with the interplay between the rights of creditors and wives, see *supra* notes 87-89 and accompanying text, so Bonham had to resolve a dispute between wives and their partners in contract. "The law exempting a married woman from liability on her covenants to convey her real estate, was adopted for her better security and protection," the court noted. "[A]nd we do not think that it would be equitable, or in harmony with public policy and good morals, for courts of equity, in protecting the rights of persons, to encourage the perpetuation of actual fraud by them." *Id.* at 197. So Frarey got his accounting. Both the \$20 and the value of the improvements were treated as a charge on the land until paid. *Id.*

97. An Act Relating to the Rights of Married Women (Oct. 15, 1872), in Acts and Resolutions of the Legislative Assembly of the State of Oregon, 7th Sess., at 23 (1872). The act also created a process for women abandoned by their spouses to become free traders.

derstandings about the meaning of a married woman's separate estate. The act not only reversed the principal holdings of *Frarey*, but also slightly enlarged the potential extent of a married woman's estate by including property acquired by her own labors. This legislation marked the high-water mark for the exemption of married women's property from creditors of the husband.⁹⁸

The state legislature's attempts to resolve disputes over creditor access to married women's property did not halt the flow of cases into the courts. In fact, the disputes became more serious. Some cases appeared in which men attempted to use the special status of their wives to defraud creditors.⁹⁹ In addition, many of the disputes began to involve old transactions dating back to the years just after the adoption of the Donation Act. In one such case, *Wythe v. Smith*,¹⁰⁰ Deady's undoing of long-settled titles set the stage for serious conflict with the Oregon Supreme Court.¹⁰¹ In *Wythe*, Deady clearly, and for the first time, held that wives' donation claims were encumbered by the common law management rights of husbands as soon as the four year occupancy period required by the statute was complete, and that the 1852 territorial statute exempting wives' donation claims from husbands' debts was unconstitutional insofar as it voided vested marital rights of husbands.

The case apparently created something of a stir. By 1876 elections had again altered the makeup of the Oregon Supreme Court. Judges Boise and Shattuck, who both sat on the *Brummet* court,

98. Later legislation imposed the same status on the property of husbands and wives, making both liable for family debts and neither liable for the debts of the other spouse. See *infra* notes 116-18 and accompanying text. This development has a certain logic to it. To the extent that married women were entering the labor force in greater numbers towards the end of the nineteenth century, there is a significant likelihood that their property would eventually become important enough that it could no longer be ignored for purposes of insuring the ability of the family economy to use its assets as security for the purchase of property or the obtaining of general credit. It may well have been in the best interests of both women and creditors that married women's property lost its special status and became available for use in the purchase of family items, especially as the middle class grew in size and urbanization at the turn of the twentieth century.

99. E.g., *Elfelt v. Hinch*, 5 Or. 255 (1874). In this case, A. W. Hinch supposedly sold land to his wife and then used the same land to obtain large credits for the purchase of merchandise. *Id.* at 255-56. The court made short shrift of such shenanigans, noting that the transfer was in fraud of creditors. *Id.* at 259. But it also noted that the state constitution did not abrogate the common law rules of coverture, and that A. W. presumptively owned any money used by his wife to purchase the property. *Id.* at 257.

100. 30 F. Cas. 771 (C.C.D. Or. 1876) (No. 18,122).

101. *Wythe* involved a long chain of transfers of a tract of land in Salem. The tract was part of the donation claim of Chloe Willson, wife of William Willson. William initiated the series of transfers and each transfer was allegedly accomplished with Chloe's permission, though not her signature. *Id.* at 722.

were again on the bench, and one other judge was new.¹⁰² In *Linnville v. Smith*,¹⁰³ decided only a few months after *Wythe*, the court noted:

In the argument of this case considerable discussion was had by counsel relative to the rights of a wife in her portion of a donation claim as to the matter of it being her separate property and it was claimed by counsel for plaintiff that by the operation of the donation law the wife's half of a donation claim is separate property, and also that it is such by the constitution of the state. These questions are of great interest to the people of the state, as they affect a large portion of the real estate of the country, and many important interests rest on the determination of these questions. The general understanding of the people has been that the wife's portion of a donation claim is separate property, and it has been generally treated as such. But the matter has not as yet been adjudicated by this court, and we do not feel called upon to determine it in this case.¹⁰⁴

The court passed over Deady's holdings in *Wythe* because the donation claim in *Linnville* was transferred after rather than before 1852.¹⁰⁵ But, with Boise writing the opinion, it used equitable principles to designate the husband a constructive trustee for his wife of land purchased with proceeds from the sale of her donation claim and refused to permit the creditor of her husband to gain access to the newly purchased land.

The court quickly got another chance to review Deady's work. In *Rugh v. Ottenheimer*,¹⁰⁶ Judge Boise, again writing for the court, returned to the liberal sentiments of *Brummet*. While the court agreed with Deady that the marriage of William and Nancy Rugh during the territorial era gave rise to common law curtesy rights in William in the land of his wife, it went on to hold that the state

102. See judge lists at 2 Or. 8 (1869); 3 Or. vii (1872); 5 Or. iii (1876); 6 Or. iii (1878).

103. 6 Or. 202 (1876).

104. 6 Or. at 204-05.

105. William and Leah Linnville conveyed Leah's donation claim, and bought additional land on the understanding it would be titled in her name. Instead it was deeded to William and levied on by his creditors before the title could be corrected. *Id.* at 202-03.

106. 6 Or. 231 (1877). Nancy Rugh, in the year before her marriage to William Rugh, purchased a 160 acre farm with proceeds from the sale of her donation claim. *Id.* at 232-33. This was the claim of a single person, not that of a wife. Single women were apparently treated as single males within the meaning of the Donation Act. See *Silver v. Ladd*, 74 U.S. (7 Wall.) 219, 226 (1868). The deed was not delivered until after her marriage. Later she agreed to trade the land for some owned by Nelson Gardner, who promised to deed the new land to her. Instead he deeded it to William, who eventually abandoned Nancy and Oregon, and left behind disputes with his creditors.

constitution altered the old rules retroactively. All property owned by married women when the constitution went into effect was freed of common law rights of their husbands. Perhaps throwing a dagger Deady's way, Boise wrote:

The simple natural construction of the words used in this section, read by scholars unrestrained by legal technicalities or rules of construction of statutes, would include the property and pecuniary rights of married women who were then married and owning property which could be made subject to this provision.¹⁰⁷

The court argued that the "farmers" at the constitutional convention who had acquired donation claims enacted the married women's provision by a "large majority"¹⁰⁸ and hoped it would protect their wives' property from their debts and contracts. Despite the contrary cases decided in the prior decade, the court found that a broad view of the constitution had been the "almost uniform construction of this section by the people of the state."¹⁰⁹ If marriage rights of husbands could be retroactively terminated by divorce, the court held, then general provisions in the state constitution could perform the same task.¹¹⁰

Rugh was an unusual case. While some state courts retroactively applied married women's acts where a wife's personal property had not been reduced to possession¹¹¹ at the time a married women's act was adopted,¹¹² virtually none applied married wom-

107. 6 Or. at 234.

108. *Id.* at 235. A 27-22 majority can hardly be called large. See *supra* note 63 and accompanying text.

109. 6 Or. at 235. Although the court did not refer to it, there is some support in administrative materials for the proposition that the act had always operated to protect married women's claims from creditors. The General Land Office had a general practice of giving the more valuable half of the donation claims of married parties to wives, especially where there was an encumbrance on part of the property or a share had already been sold. Letters describing this practice during the period 1859-1865 are in Volumes 3 and 4, General Correspondence Including Surveyor General; Washington, Oregon and California, 436, 505-06 (Vol. 3); 147-48 (Vol. 4) (Record Group No. 49, Division "D," National Archives) (Apr. 18, Oct. 9, 1862). At times the Land Office went to some lengths to protect women's property from claims by creditors, inviting charges that couples chose to implement the General Land Office policies in a way that deprived creditors of valid claims.

110. 6 Or. at 236. As a result, Nancy Rugh's claim to the farm prevailed over her departed husband's creditors. Despite the presence of purchasers from her husband in the chain of title, Nancy was permitted to trace the proceeds from the sale of her original donation claim, and impose the equivalent of a constructive trust upon her husband to hold title for her to the exclusion of creditors or successors in interest.

111. The normal common law rule was that personal property of the wife belonged to the husband as soon as he reduced it to possession.

112. *Clarke v. McCreary*, 12 Miss. (1 S. & M.) 347 (1849); *Deck v. Smith*, 12 Neb. 389 (1882); *Percy v. Cockrill*, 53 F. 872 (8th Cir. 1893); *Executor of Henry v. Dilley*,

en's acts retroactively to alter rules governing real property held by women before the adoption of a married women's act.¹¹³ Not until after *Rugh* was decided did the winds of change begin to affect real property retroactivity decisions in other states.¹¹⁴ It is possible that Deady's consistently rigorous common law analysis of local law drove the state judges to render a more far-reaching judgment than otherwise might have occurred, or that the Oregon Donation Act heritage laid the groundwork for *Rugh*. In any case, Deady quickly let it be known that *Rugh* mattered little to him. In *Elliot v. Teal*,¹¹⁵ Deady held that common law disabilities made both a wife's power of attorney and her separate deed invalid, and that her husband's deed purporting to convey her donation claim actually transferred only his life estate by curtesy in the land.

Only a year after the decision in *Rugh* and less than two months after that in *Elliot v. Teal*, the state legislature adopted a new married women's act.¹¹⁶ While *Brummet* had been roughly received by the state legislature in 1866, *Teal* got the same treatment in 1878. The

25 N.J.L. 302 (1885). *Contra*, *Stearns v. Weathers*, 30 Ala. 712 (1857); *Sperry & Niles v. Haslam*, 57 Ga. 412 (1876); *Dunn v. Sargent*, 101 Mass. 336 (1869); *Leete v. State Bank*, 115 Mo. 184 (1893); *O'Conner v. Harris*, 81 N.C. 279 (1879); *Cunningham v. Gray*, 20 Mo. 170 (1854).

113. *Compare Rugh with Darden v. Gerson*, 91 Ala. 323 (1890); *White v. Hilton*, 13 D.C. (2 Mackey) 339 (1883); *Nat'l Metropolitan Bank v. Hitz*, 12 D.C. (1 Mackey) 111 (1881); *Junction R.R. v. Harris*, 9 Ind. 184 (1857); *Day v. Bishop*, 71 Me. 132 (1880); *McLellan v. Nelson*, 27 Me. 129 (1847); *Meyers v. Gale*, 45 Mo. 416 (1870); *Prall v. Smith*, 31 N.J.L. 244 (1865); *Burson's Appeal*, 22 Pa. 164 (1853). *See also* Nash, *The Constitutionality of Retrospective Statutes*, 2 W.L.J. 170, 197 (1845).

114. *See Kirkpatrick v. Holmes*, 108 N.C. 206 (1891); *Hershizer v. Florence*, 39 Ohio St. 516 (1883); *Moninger v. Ritner*, 104 Pa. 298 (1883). *See also*, *Baker's Executors v. Kilgore*, 145 U.S. 487 (1892).

115. 8 F. Cas. 545 (C.C.D. Or. 1878) (No. 4396). In this case, Violet and William Berry took a donation claim for which they received a patent in 1865, one year after their divorce. In 1854, Violet executed a power of attorney permitting William to sell the claim, which he did early in 1855 to Henry Fuller. Later, in an effort to insure Fuller's title, Violet also conveyed a deed to him. *Id.* at 545-46. After Deady's decision, rendered over 20 years after Fuller's purchase, *Teal*, who succeeded to Fuller's interest, was said to have purchased only a life estate for the life of William Berry (the curtesy interest), and Violet Elliot, nee *Teal*, who had remarried in the interim, owned the remainder. *Id.* at 546.

116. An Act Defining the Rights and Fixing the Liabilities of Married Women, and the Relation Between Husband and Wife (Oct. 21, 1878), in *Laws of Oregon*, 10th Sess., at 92 (1878). An omen of legislative sentiments appeared in the prior session when the civil procedure code was amended to permit married women to sue or be sued as to their separate property, wages, tort actions, or cases against their husbands. An Act to Amend § 30, in Title III; chapter 1 of Code of Civil Procedure, General Laws, as compiled by Matthew P. Deady and LaFayette Lane (Oct. 21, 1876), in *General Laws of the State of Oregon, Enacted by the Legislative Assembly*, 9th Sess., at 73 (1876). The 1878 act passed the Senate by only a 23-21 vote on Oct. 18, the final day of the Session. A very brief summary of the legislative debate on S.B. 23 may be found in the *Morning Oregonian*, Oct. 21, 1878, at 2.

new act legitimated transfers between spouses, permitted one spouse to designate the other spouse their attorney in fact, granted married women management, transfer, and will writing authority with respect to their property, designated a wife's wages as her property, and removed common law disabilities on the rights of married women to sue and be sued. In addition, the act stepped away from the extensive debtor exemption provisions protected by *Rugh*, providing instead that *neither* spouse was liable for the other's debts save for family and education expenses. And two years later a sweeping act was adopted providing that, "All laws which impose or recognize civil disabilities upon a wife which are not imposed or recognized as existing as to the husband, are hereby repealed." In addition, the act provided that the "rights and responsibilities of the parents, in the absence of misconduct, shall be equal" as to children's custody, earnings, and estate.¹¹⁷

These two statutes represent a watershed in the development of Oregon's married women's property law. For the first time, married women's property was to be treated the same as their husbands' assets. The dramatic difference in creditor access to husbands' and wives' property created by the 1852 exemption legislation and the early decisions under the 1859 state constitution was removed in favor of joint liability for family purchases and individual responsibility for other investments. Total exemption of married women's property from family creditors became untenable as more women entered the labor force, and women became the primary purchasers of family and consumer goods.¹¹⁸ By 1878, the routine presence of women in the consumer market place made passé both Judge Deady's conservative notions of women's role and the highly protected status of married women's property under the 1872 exemption legislation.

V. CONCLUSION

The need to resolve conflicts among creditors, land buyers, and married women was a constant part of Oregon's jurisprudence from

117. An Act to Establish and Protect the Rights of Married Women (Oct. 21, 1880), in *Laws of Oregon*, 11th Sess., at 6 (1880).

118. By 1890, 17% of the labor force was female and 14% of the female labor force was married. U.S. BUREAU OF THE CENSUS, *THE STATISTICAL HISTORY OF THE UNITED STATES FROM COLONIAL TIMES TO THE PRESENT* 129-34 (1976). It is certainly likely that the number of married women working at some time during their marriage was significantly higher than the static number given in the census reports. In addition, there may have been an additional impact in Oregon if donation claims made women wealthier than in other states. There is the further interesting phenomenon that women were becoming the major purchasers of family consumer goods by the turn of the twentieth century. See S. STRASSER, *NEVER DONE: A HISTORY OF AMERICAN HOUSEWORK* 242-62 (1982).

the 1850's through the adoption of the final married women's acts in 1878 and 1880. The need for rules providing reasonable certainty as to which assets were available in case of default and minimizing incentives to "hide" assets behind easily available special protective barriers led to temperizing actions by the state legislature whenever the courts drastically altered existing norms. The early married women's acts establishing a special status for married female debtors inevitably led to pressure to equalize the treatment of the spouses in order to simplify the rules and reduce incentives to hide assets in the secure grasp of married women. Although this pressure was certainly not the only reason for Oregon's adoption of the 1878 married women's act,¹¹⁹ it made it easier for more conservative legislators to see the need for some equalization in the status of husband and wife. Most importantly, the pattern of disputes found in Oregon appears to have occurred in a number of other states. Statutes equalizing the availability to creditors of married women's and men's property were adopted in a number of jurisdictions after the Civil War.¹²⁰ Though the focus of this paper is limited to Oregon, its conclusions may be applicable on a much larger scale.

119. Pressure from suffragists, particularly Abigail Scott Duniway, was quite strong by 1878. Duniway appeared before the Oregon House of Representatives on Sept. 27, 1878, on behalf of the Women's Suffrage Committee, to argue for suffrage and coverture law reform. The Senate declined to hear her. *Morning Oregonian*, Sep. 28, 1878, reporting on the Senate session of Sept. 26. Her talk was reported in the same paper on Sept. 30, 1878. The married women's act was adopted on Oct. 18, just before the legislative session ended. The bill passed the Senate 27-1 on Oct. 5. *Morning Oregonian*, Oct. 7, 1878. The House approved the bill 23-21 on Oct. 18, 1878. *Morning Oregonian*, Oct. 21, 1878.

120. Some examples may be found in Connecticut: Act of July 9, 1869, ch. CXXIV, 1869 Conn. Pub. Acts 340; Act of Aug. 1, 1872, ch. XCIV, 1872 Conn. Pub. Acts 96; Act of July 3, 1873, ch. LXV, 1873 Conn. Pub. Acts 159; Act of Mar. 16, 1877, ch. CXIV, 1877 Conn. Pub. Acts 211; Indiana: Act of Mar. 25, 1879, ch. LXVII, 1879 Ind. Acts 160; Minnesota: Act of Mar. 10, 1860, Ch. XLIX, 1860 Minn. Laws 217; New Hampshire: Act of July 14, 1871, ch. XXVII, 1871 N.H. Acts 530; New Jersey: Act of Mar. 27, 1874, N. J. Rev. Stat. 468, 471 (1874); Ohio: Act of Mar. 30, 1874, 1874 Ohio Laws 48; Act of Mar. 20, 1884, 1884 Ohio Laws 65; Tennessee: Act of Mar. 2, 1870, ch. XCIX, 1869 Tenn. Pub. Acts 113. *See also* Breed, *supra* note 3. The uncertainties present in legal circles after the Civil War on the debtor-creditor issues is reflected in the major treatise of the day. *See* J.P. BISHOP, 2 COMMENTARIES ON THE LAW OF MARRIED WOMEN 270-73, 363-86 (1875).