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Women and the Law of Property in Early America

David H. Bromfield
University of Michigan Law School

WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA. By *Marylynn Salmon*. Chapel Hill: The University of North Carolina Press. 1986. Pp. xvii, 267. $24.

Prior to the passage of the first married women's property acts in the mid-nineteenth century,[1] single women enjoyed much the same property rights as men,[2] but "wives exercised only a truncated propri-

1. The first state to pass such an act was Mississippi in 1839. *See* Comment, *Husband and Wife: Memorandum on the Mississippi Woman's Law of 1839,* 42 MICH. L. REV. 1110 (1944).

2. Notable exceptions included women's inability to enjoy the franchise associated with property ownership in early America, to inherit equally with their brothers due to the law of primogeniture (observed in New York until 1774, in Virginia until 1785, in Maryland until 1786, and

etary capacity" (p. xv). Once married, women were no longer individuals with respect to the law. They could not institute legal actions, enter into binding contracts, act as executors or administrators of estates or as legal guardians, or convey property without their husbands' participation.[3] The common law sanctioned these activities only when wives acted with their husbands. Conversely, men did not require their wives' consent or participation for most transactions. Thus, in many respects the legal relationship between husband and wife resembled that between guardian and incompetent.[4]

The married women's property acts removed many of these common law disabilities of married women. The acts generally provided that married women shall have the same rights as single women to sue and be sued, make contracts, and own and transfer property.[5] By thus equalizing the property rights of married and single women, the acts displaced the ancient legal fiction of unity of person, whereby a husband and wife were viewed as a special partnership in which the wife's role was submissive (pp. 14-15). Those states that passed such acts at last cleaved the married couple into individuals and recognized the possibility of separate interests within a marriage.

Traditionally, historians have characterized the married women's property acts as revolutionary, the products of profound economic changes accompanying industrialization.[6] In *Women and the Law of Property in Early America,* however, Marylynn Salmon[7] moves beyond this perspective and shows that the passage of these acts was evolutionary, not revolutionary. She also asserts that, while economic forces may have dictated the need for legal reforms, ideological and social forces — not economic ones — determined whether those reforms would spell increased autonomy for women or perpetuate their dependence (p. 190).

From 1750 to 1830 an agonizingly slow and by no means uniform expansion in married women's property rights is evident. Because this expansion effectively foreshadows the more dramatic and substantive gains embodied in the married women's property acts, Salmon chooses to assess the legal status of married women during this period, explain

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in South Carolina until 1791 (p. 142)), and, of course, to expand their property rights upon marriage.

3. Under common law, a husband was even held liable for his wife's torts. This rule was based on the presumption that a wife acts under her husband's direction. *See* J. DUKEMINIER & J. KRIER, PROPERTY 531 n.13 (1981).

4. *Id.* at 531.

5. C. DONAHUE, T. KAUPER & P. MARTIN, CASES AND MATERIALS ON PROPERTY 559, 644-47 (2d ed. 1983).

6. For a listing and brief discussion of studies representing the debate on the development of women's property rights in colonial and early American society, see pp. xii-xvii nn.4-6.

7. Salmon is Assistant Professor of History at the University of Maryland, Baltimore County. The book is based on her Ph.D. thesis.

regional variations in this status, and show that the ideological and social forces which later resulted in passage of the married women's property acts were rooted in late colonial and early national society.

Women and the Law of Property in Early America succeeds admirably in these aims. In part, this success is due to Salmon's methodology. By choosing seven colonies (later states) to represent a range of social and economic characteristics of the period and by examining the legal status of married women in each with respect to conveyances, contracts, divorce and separation, separate estates, and provisions for widows, Salmon claims to avoid the flaws of past studies. Past studies, she asserts, have "suffered from a failure to cast the net widely enough" and have resorted to "easy generalizations" (p. 185). By failing to look at a number of different colonies and states, these studies give the mistaken impression that early America treated married women uniformly and that the married women's property acts materialized suddenly from a nationwide consensus. Furthermore, by failing to examine several types of property transactions, such studies may also lead one to the erroneous conclusion that a given colony or state can be easily characterized as either liberal or repressive in its treatment of women. With the appearance of Salmon's careful, extensively footnoted analysis of statutes, case law, and writings of the period, however, such misimpressions must now be put aside.

Salmon first discusses the vast regional variations in married women's legal status. In Connecticut, Massachusetts, and Pennsylvania — the colonies Salmon chooses to exemplify the reform tradition — Puritan and Quaker legislators, having fled religious persecution in England, were not enamored of English norms and distrusted the flexible modes of adjudication employed in English chancery courts. Thus, they were not at all reluctant to break with England to create social and legal systems that exemplified their ideals. One such ideal, deeply rooted in both the Puritan and Quaker ethoses, was that of family unity, which required the wife's submission to her husband's will in all aspects of economic life. To strengthen the family unit, therefore, lawmakers reduced the autonomy of married women. In doing so, they were unconstrained by more liberal decisions emanating from English chancery courts or by any consideration of whether the end of family unity justified the means of enforcing women's submission.

To Salmon, Maryland, Virginia, and South Carolina represent slave economies. Settled by adventurers and entrepreneurs rather than by social experimenters and reformers, these colonies imitated English social and legal norms in an attempt to preserve the self-esteem of colonists who viewed the culture of the mother country as superior. These colonies therefore lacked the ideological commitment to change that characterized their Puritan and Quaker neighbors to the north.

As a result, chancery jurisprudence was embraced and English precedents were followed, adapted only to the exigencies of the new world.

Finally, Salmon chooses to analyze New York, a colony that is harder to classify. Founded by entrepreneurs and adventurers akin to those who settled the South (p. 12), New York, like the southern colonies, had many laws which attempted to duplicate the common law and equity systems of England. New York's economy, however, was more like that of the New England colonies. Thus, despite the common English origin, New York law came to be distinct from the law of the southern colonies due to its application and adaptation to a different economic reality.

Having first distinguished the social reformers in New England and Pennsylvania from the England-gazing Southerners and New Yorkers, Salmon then traces the development of laws on conveyancing. Under common law, upon marriage a husband acquired an estate known as *jure uxoris,* which gave him the right to possession (including all rents and profits) of lands of which his wife was seised either before or during the marriage. While the wife retained legal title to this property, the rights embodied in the estate *jure uxoris* were alienable by the husband and subject to the reach of his creditors.

Massachusetts, Connecticut, and Pennsylvania all created conveyancing laws based on the assumption that family stability required the wife to be submissive and that a husband's judgment would always be exercised in the best interests of the family. Thus, the Puritans and Quakers rejected such legal conventions as the bargain and sale deed with a private examination as a method of conveying married women's property. Under this mechanism, the wife was examined in private by a judge to insure that her signature on a deed conveying her own lands was knowingly given and free from coercion (pp. 17-18). This procedure, implying as it did the wife's autonomous decision regarding the disposition of property, represented a threat to the Puritans' and Quakers' concept of family harmony. The "reformers" thus invoked the concept of unity of person to reduce this threat, but as Salmon astutely notes, "Unity of person was based on the perfect marriage, and therefore it inevitably created hardships in marriages that were less than ideal" (p. 15). Thus, the reality of self-serving, coercive husbands was not recognized, and the damage they wreaked on their wives' fortunes was left unchecked.

New York, Maryland, Virginia, and South Carolina, on the other hand, accepted the concept of separate interests within marriage and admitted the strong possibility that a husband would coerce his wife to assent to transactions involving her property. They thus tended to enforce private examinations. Salmon formulates two theories for this difference (pp. 39-40). The Puritans and Quakers may have been progressive because they left it to women to protect their own interests,

while the southern states were paternal because of their concern for female helplessness. The alternate theory is that New York and the southern states, by admitting the possibility of coercion and enforcing private examinations, were the more enlightened by being less willing to view women's submission within marriage as per se in the best interests of the family.

How women fared in reality cannot be assessed by focusing on only a single sphere of transactions. Thus, in addition to conveyancing, Salmon focuses on divorce and separation provisions. Surprisingly, the Puritan colonies had the more liberal divorce laws. The Puritans viewed marriage not as a sacrament but as a civil contract and believed that "absolute divorces benefited society by dissolving dysfunctional unions" (p. 61). Absolute divorce was felt to be better for society than a marriage wherein opposing interests were permitted to clash. Thus, only in the New England colonies did lawmakers break from the traditional English reluctance to grant absolute divorce, and Puritan women, at least, were not legally trapped in cruel, abusive, or tyrannical marriages. While divorce was not as easily obtained in the southern colonies and New York, the chancery courts in these jurisdictions administered legal separations. This resource was not available to the reform colonies.

Once married, women resorted to divorce and separation only infrequently, but "[the] legal subjugation of the wife was intolerable to many prospective wives and their fathers."[8] Thus, where equity jurisdiction existed, the lawyer's office was a frequent stop on the way to the altar. Here, women sought to create property rights as yet unrecognized in common law and which could be enforced only in chancery courts. The mechanisms they created and sought to enforce included: premarital contracts which gave exclusive control of certain property to the wife during the marriage; "separate estate[s] in equity" (trusts, set up by the wife's family, of which she was the sole beneficiary); and mandatory contractual agreements between husband and wife whereby part of his estate *jure uxoris* was pledged to the support of the wife and could not be conveyed by him.[9]

Over time, the flexibility of the chancery courts and their use of English precedent allowed states with separate equity jurisdiction to enforce separate estates and antenuptial contracts for women and thereby protect wives' property from their husbands' creditors. The law in those states, according to Salmon, evolved to protect married women "as the financial prospects of their husbands became increasingly unstable" (p. 83).

On the other hand, neither Massachusetts nor Connecticut enforced separate estates, and the single most important reason for this

8. J. DUKEMINIER & J. KRIER, *supra* note 3, at 531.

9. *Id.*

failure was the absence of chancery courts in these jurisdictions (p. 120). The Puritans' aversion to equity courts caused them to create a "truncated equity jurisdiction" (p. 121) which incorporated, piece by piece, certain claims and causes of action into their common law courts. Salmon documents how this piecemeal approach, combined with an ideology which viewed a woman's autonomy as threatening to the family, shaped the law regarding separate trust estates.

Finally, Salmon deals at length with economic provisions for widows. Because of the pervasive system of enforced dependency documented elsewhere in the book, this was a pressing concern for women. Once a woman's source of support had vanished, it was crucial that the law provide her enough of her husband's property to maintain a decent lifestyle. Salmon shows just how inadequately the law met this need.

The traditional provision of dower, a life interest in one-third of the real property owned by the husband during any time in the marriage, was both an absolute right and a floor below which any alternate provisions for the widow — including testamentary provisions — could not fall. So inviolate was the right to dower that it prompted one jurist in 1810 to declare: "the common by-word in the law [is] that the law favors three things, life, liberty, and dower" (p. 145). As a life interest only, however, dower did not give the widow the right to alienate the property she received, but only to enjoy its rent and profits for her lifetime. On her death, it descended automatically to her husband's children. Thus, dower reflected an ideal in colonial thought: it provided immediate support to the widow but did not allow for her independence (p. 143).

Perhaps more than any other area of the law, the rules of inheritance were subject to regional variations. Social, demographic, and economic conditions of the earliest colonial settlements laid the foundation for these differences. The early plantation societies suffered from high mortality rates, and men often died young, leaving behind young widows with children. Unless slaves and personal property were included in dower, these widows would be unable to manage the plantation, and their share of their husbands' real property would be meaningless, as no profits could flow from its use. In New England, however, the presence of slaves was not a factor in the development of inheritance provisions. New England widows, older and more likely to have grown children than those in the plantation societies, were expected to rely on their children for support. The Puritan ideal of family unity and interdependence reinforced this expectation. Thus, their dower consisted of only real property. Once again, however, reality conflicted with ideals to the detriment of women in less than ideal family situations, and the reality of this forced dependence was shocking:

> Far too often impoverished widows without family connections simply could not get along. They needed public assistance. In many communities, widows and single women living alone constituted the largest segment of recipients of poor relief. They turned up in almshouses as well. [p. 184]

The enforced dependency of widows (p. 183) on the charity of their children, families, and community was inevitable because the law denied widows the property and the control over it they needed to maintain their standard of living once their husbands died.

Salmon ends her analysis of statutes, case law, and writings by noting that women's dissatisfaction with the scheme of property rights men had provided them began to express itself in a variety of ways by the end of the period from 1750 to 1830. Demonstrations of their discontent ranged from refusals to marry to insistence on premarital contracts to resort to equitable mechanisms to create and enforce separate estates. By the middle of the nineteenth century, significant numbers of women were pressing for passage of the married women's property acts and for inheritance reforms that would increase their financial independence. Finally, Salmon foreshadows women's monumental drive for that most fundamental "compliance with the ideals of the Revolution" (p. 193), the vote.

Thus, the complexity of married women's property rights during the late colonial and early national periods becomes clear: legal devices available to women in some colonies and states were not available to their sisters in others. Colonial ideology created a diverse, often paradoxical scheme of statutes and case law, at once liberal and conservative, progressive and regressive, egalitarian and patriarchal.

It is a tribute to Marylynn Salmon's research and analysis that this book is often frustrating and infuriating to read. On one level this is because the development of the law was so painfully slow. Old legal concepts such as unity of person died hard — impeding expansions in women's autonomy that were otherwise consistent with the changing American economy, changing attitudes toward women, and the maturing of republican ideals by the mid-nineteenth century. On another level, the book is frustrating because the values Salmon documents are so objectionable to present-day notions of women's role in society, and it is easy to lose patience with ideas so rooted in ignorance and chauvinism and with theories that deny people the basic dignity of being treated as individuals.

This book will likely prove an important contribution to the fields of social and legal history and women's studies as a whole. It will also be interesting to see how more judgmental historians will use the injus-

tices Salmon documents to judge our colonial forefathers and religious patriarchs.

— *David H. Bromfield*