The Beginning of the End of Coverture: A Reappraisal of the Married Woman's Separate Estate

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ABSTRACT: Before statutory enactments in the nineteenth century granted married women a limited set of property rights, the separate estate trust was, by and large, the sole form of married women's property. Although the separate estate allowed married women to circumvent the law of coverture, historians have generally viewed the separate estate as an ineffective vehicle for extending property rights to married women. In this Article, I reappraise the separate estate's utility and argue that Chancery's separate estate jurisprudence during the eighteenth century was a critical first step in the establishment of married women as property-holders. Separate estates guaranteed critical financial provisioning for wives seeking to escape unhappy marriages, allowed wives to recover debts from their husbands, and enabled wives to alienate property, thereby controlling transfers of wealth. Moreover, Chancery's jurisprudence inscribed a married woman's property rights into legal precedent, and, ultimately, ascribed individual identity to the married woman. Accordingly, Chancery's support for the married woman's separate estate can be seen as the beginning of the end of coverture.

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INTRODUCTION

> Oh, my sweetest Lizzy! . . . What pin-money, what jewels, what carriages you will have! . . . I am so pleased—so happy. Such a charming man! So handsome! So tall! Oh, my dear Lizzy! Pray apologise for my having disliked him so much before.[1]
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> – Mrs. Bennett, *Pride and Prejudice*

Perhaps the most widely known reference to a married woman's separate estate is Mrs. Bennett's exclamation of joy at the end of *Pride and Prejudice*, when she learns of Elizabeth's betrothal to Mr. Darcy. As Mrs. Bennett rhapsodizes about Lizzy's marriage—and all the benefits it will bring—readers infer from Mrs. Bennett's excitement that pin money was spending money allotted to the fortunate wives of wealthy men. Pin money was one form of personal allowance. Pin money was also an early-modern form of married women's property known as a separate estate.

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1. JANE AUSTEN, PRIDE AND PREJUDICE 318 (Alfred Knopf 1991) (1813).

Although little-known in modern legal circles, the separate estate was, by and large, the sole form of married women's property before statutory enactments granted married women property rights in the nineteenth century. In its most basic form, a separate estate was any assets put in trust for a woman, such that it was for her "sole and separate use" and not available to her husband or his creditors. Fathers and other family members, women themselves, and even the Court of Chancery could establish separate estate trusts at any point in a woman's life, but since these trusts were primarily intended to protect the property rights of a woman subject to the disability of coverture, most separate estates were created as part of a marriage settlement.

Sir William Blackstone, in a famous passage from the first volume of his 1765 *Commentaries*, described the doctrine of coverture as such:

> By marriage, the husband and wife are one person in law: that is, the very being or legal existence of the woman is suspended during the marriage, or at least is incorporated and consolidated into that of the husband: under whose wing, protection, and cover, she performs every thing; and is therefore called in our law-French a feme-covert. . . .[2]

A wife was not a full juridical being in the eyes of the common law, and she possessed only a limited set of legal rights.[3] A married woman could not sue or be sued; she could not form contracts or buy and sell property apart from her husband.[4] Moreover, once a woman was married, any property that the woman brought to the marriage came under the control of her husband.[5] The common law courts prioritized the rights of the husband as the head of the household over those of the woman who was "covered." The separate estate allowed the married woman a way around the rules of coverture because the wife did not legally own the property. Because the separate estate was a trust, the trustee held legal title while the wife held equitable title.

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2. 1 WILLIAM BLACKSTONE, COMMENTARIES *442. For an attempt at explaining coverture's origins, *see* Norma Basch, *The Legal Fiction of Marital Unity in Nineteenth-Century America*, 5 FEMINIST STUD. 346, 347 (1979) ("The concept of marital unity['s] . . . religious origins were in the one-flesh doctrine of Christianity, [and the doctrine's] empirical roots were in the customs of medieval Normandy.").

3. *See* J.H. BAKER, AN INTRODUCTION TO ENGLISH LEGAL HISTORY 550-57 (4th ed. 2005). Baker notes that, "[l]ike most legal fictions [coverture] was not universally applicable: for instance, the wife was not executed for her husband's crimes, or made answerable for his debts." *Id.* at 551. For a good overview of the complexity of coverture, see MARRIED WOMEN AND THE LAW: COVERTURE IN ENGLAND AND THE COMMON LAW WORLD (Tim Stretton & Krista Kesselring eds., 2013).

4. *See* 1 BLACKSTONE, *supra* note 2, at *442-45.

5. AMY LOUISE ERICKSON, WOMEN AND PROPERTY IN EARLY MODERN ENGLAND 24-25 (1993). All "moveables" or "chattels"—which included money, clothing, jewelry, furniture, and other personal goods—became the property of the husband, as did any leasehold land. A wife's dowry, or portion, also came under the control of her husband. A married woman retained title to her freehold, and in theory the husband could not dispose of it without her consent. However, a wife had no right to any income the property produced. *Id.*

I argue in this Article that the separate estate had real value—in practical, precedential, and theoretical terms—for married women. In practical terms, separate estates provided married women with the financial support to escape abusive marriages; allowed married women to act as creditors of their husbands and recover money borrowed or charged to their separate estates; and enabled married women to alienate both real and personal property without consent. In precedential terms, Chancery's jurisprudence built the foundation for an increase in married women's property rights by securing a legal foothold for married women in the realm of property and entrenching in legal precedent the idea that a woman could in certain respects act as a feme sole, or unmarried woman, even while under the disability of coverture.[6] Furthermore, the separate estate allowed a husband and wife to have separate economic interests. By conceding this notion, Chancery helped to rend a significant theoretical fracture in the law of coverture and re-create the wife as an individual in her own right—a nascent property owner and economic agent within the household.

Despite these benefits that flowed to married women from the separate estate, historians have viewed the separate estate as an ineffective means of extending property rights. Scholars stress that a wife's control over her separate estate was subject to control by trustees, and that the wife did not always control capital but rather benefitted only from the trust's income.[7] Furthermore, scholars argue that these trusts were designed to protect family wealth rather than financially empower wives, and that the pursuit of wealth accumulation disallowed for the generous provisioning of married women. Susan Staves points out that "the inventors of the new legal rules [concerning separate property] were motivated more by desires to facilitate the transmission of significant property from male to male and to ensure a basic level of protection for women and young children than they were . . . in increasing the autonomy of married women."[8] Highlighting the axiomatic nature of the principle of family wealth preservation, and stating it with characteristic wit, Samuel Johnson remarked: "It is mighty foolish to let a stranger have [your estate] because he marries your daughter."[9]

To better understand how separate estates provisioned and truly benefitted married women, I analyze the leading separate estate cases litigated in the

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6. *See* BAKER, *supra* note 3, at 551 ("In the law French . . . she was said to be *feme covert*, as opposed to *feme sole* (single woman), and her husband was her *baron* (lord).").

7. *See* Susan Moller Okin, *Patriarchy and Married Women's Property in England: Questions on Some Current Views*, 17 EIGHTEENTH CENTURY STUD. 121, 124-25 (1983).

8. SUSAN STAVES, MARRIED WOMEN'S SEPARATE PROPERTY IN ENGLAND, 1660-1833, at 221-22 (1990); *see also* EILEEN SPRING, LAW, LAND, AND FAMILY: ARISTOCRATIC INHERITANCE IN ENGLAND 1300 TO 1800, at 8-66 (1993).

9. JAMES BOSWELL, BOSWELL'S LIFE OF JOHNSON 225 (Charles Grosvenor Osgood ed., Charles Scribner's Sons 1917) (1791).

Court of Chancery during the eighteenth century.[10] Concentrating solely on litigated cases undoubtedly introduces a certain bias into the analysis, skewing discussion toward those parties who had sufficient resources to deem litigation worthwhile and could afford litigation.[11] Moreover, as Tim Stretton remarks, "for every marriage settlement, trust or use that went wrong . . . a larger and incalculable number went right."[12] Nonetheless, I believe that this set of cases has a very specific and distinctive value. First, these cases offer valuable insight into how the separate estate actually worked by providing us with a more detailed knowledge about the legal mechanics involved. In addition, although the separate estate agreements that were litigated in Chancery likely represent a small fraction of the separate estates agreements executed in total, the litigated agreements highlight what legal claims and questions were the most contentious and therefore posed the greatest obstacles to property ownership for married women.

This Article proceeds in three Parts. Part I examines the legal mechanics of the separate estate and provides context, describing the landscape of property ownership for married women at the time. This Part includes more detail about the broader story of the decline in women's property rights in the seventeenth and eighteenth centuries. Part II contains an analysis of the leading separate estate cases litigated in Chancery in the eighteenth century and a discussion of how the separate estate actually benefitted women. In Part III, I offer a reappraisal of the separate estate's worth. I demonstrate that Chancery's separate estate jurisprudence was a critical first step in the establishment of the married woman as a property-holder because it provided women with financial autonomy, inscribed married women's rights into legal precedent, and, ultimately, as-

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10. My source materials are the circumscribed but robust set of separate estate cases litigated in Chancery during the eighteenth century. For this paper, and my larger project, I comprehensively searched Chancery Rolls, as well as the English Reports more generally, from 1550-1800 for all cases dealing with the separate estate, separate property, separate maintenance, and pin money. While the English Reports have been digitized and are available on HeinOnline at http://heinonline.org/HOL/Index?collection=engrep, there is not an easy way to search for key terms within the decisions. Nonetheless, summaries provided by the editors of the various volumes index the cases from each term into categories, with Baron & Feme being the most relevant here. For my time period, I undertook a review of all the Baron & Feme cases available, as identified through summaries, indexes, and case referencing. The cases I discuss in this Article result from that search, and I focus, in particular, on reported decisions with extensive analysis. The Court of Requests, in the seventeenth century, had equity jurisdiction, and the Court of the Exchequer also had limited equity jurisdiction in both the seventeenth and eighteenth centuries. Because separate estate cases were overwhelmingly litigated in Chancery, I have chosen to focus on cases from that court.

11. ERICKSON, *supra* note 5, at 103-13 According to Erickson, "historians agree that the separate estate was employed only by the wealthiest segments of society, those who had substantial property to protect, who would pay to draw up the necessary documents and who could afford to enforce the terms of the trust in the Court of Chancery if necessary." *Id.* at 103.

12. TIM STRETTON, WOMEN WAGING LAW IN ELIZABETHAN ENGLAND 151 (1998); *see also* ERICKSON, *supra* note 5, at 124 ("Litigation records, while they are abundant and in some respects conveniently quantifiable, cannot indicate how often people established separate estates.").

cribed individual identity to the married woman. Accordingly, Chancery's support for a married woman's separate estate can be seen as the beginning of the end of coverture.

I. THE TRADITIONAL STORY OF THE SEPARATE ESTATE

The precise origin of the separate estate remains unknown, but Chancery was ruling on cases concerning a married woman's separate property as early as the end of the sixteenth century, during the final years of the reign of Queen Elizabeth.[13] During the two and a half centuries that followed, cases turning on questions of separate property appeared with increasing regularity before Chancery, evidencing the utility and popularity of that particular trust. As Mary Prior remarks, cases turning on questions of separate property appeared with increasing frequency due to "[f]avorable pronouncements in Chancery cases in the 1630s . . . [that] opened the way to a more confident use of trusts."[14] In the first section of this Part, I explain the legal mechanics of the separate estate, detailing how these trusts were created and administered. In the second section, I place the separate estate in the larger context of women's property and provide a fuller explanation of why the separate estate has been undervalued on account of a perceived general decline in women's property rights during the same time period.

A. The Legal Mechanics of the Separate Estate

A woman's father, family, husband, or even the woman herself could create a separate estate at any time—before, during, or after marriage. The only restriction was that a woman could not create a separate estate for herself once she had entered into marriage because she was, at that point, restricted by the

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13. There are conflicting accounts about the first separate estate case. Maria Cioni notes that *Walgrave v. Goldinge* is the "case that is unanimously considered to be the foundation stone upon which evolved the concept of a married woman's separate estate. . . ." MARIA L. CIONI, WOMEN AND LAW IN ELIZABETHAN ENGLAND, WITH PARTICULAR REFERENCE TO THE COURT OF CHANCERY 171 (1985). Marylynn Salmon, on the other hand, dates the origin of the separate estate to 1581 with the case *Avenant v. Kitchin*. *See* MARYLYNN SALMON, WOMEN AND THE LAW OF PROPERTY IN EARLY AMERICA 84 (1989).

14. Mary Prior, *Wives and Wills 1558-1700*, *in* ENGLISH RURAL SOCIETY 1500-1800, at 201, 220 (John Chartres & David Hey eds., 1990). The increase in the seventeenth and eighteenth centuries in marriage settlements generally, and strict settlements in particular, likely produced an increase in the number of separate estates as well. However, it is difficult to know the precise numbers. There are some important and valuable studies, particularly of strict settlements, that provide data. *See, e.g.*, LLOYD BONFIELD, MARRIAGE SETTLEMENTS, 1601-1740 (1983); *see also* LAWRENCE STONE & JEANNE C. FAWTIER STONE, AN OPEN ELITE? ENGLAND 1540-1880 (1984). Bonfield points out that a "majority [of settlement documents] have been lost," and that any attempt to undertake a comprehensive analysis of separate estate and marriage settlement agreements is plagued by source-based difficulties. *See* BONFIELD, at xv.

rules of coverture. Because of the restrictions that governed a married woman under coverture, separate estates were most commonly created in anticipation of marriage.[15]

When the separate estate was created as part of a marriage settlement, any property that the bride's family wished to settle for her use was put in trust and the income (and sometimes the capital as well) was subsequently hers to direct as she chose. Strict settlements, in which a daughter's portion and jointure were settled when the father settled his estate on the oldest son, were also common.[16] These agreements typically involved a groom's father settling a "life estate in the groom followed by a jointure provision with the entail secured in the eldest son to be produced by the union."[17] Nonetheless, separate estates were still possible in conjunction with strict settlements because not all parts of an estate were necessarily included in these strict settlements. A daughter's separate estate could consist of land that had not been settled by the entail, which included, for example, "new property" or "outlying parts of the larger estates."[18] Either way, the separate estate provisioned the wife during marriage and added to her jointure in the event of her husband's death.

Separate estates were also commonly created in anticipation of second marriages. In these cases women tended to create separate estates for themselves using their jointure from the first marriage or any other assets that a widow possessed. As Amy Erickson remarks, "a second-time bride was older, perhaps wealthier, and wiser at least in the ways of legal coverture than she had been the first time around."[19] Accordingly, these women knew the creation of a separate estate was the best way to protect the dower or jointure that they had received from their first husbands.[20] During marriage, married women frequently became the beneficiaries of separate estate trusts through bequests made by family members—including female family members, such as wid-

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15. *See* ERICKSON, *supra* note 5, at 103; STAVES, *supra* note 8, at 133.

16. *See* discussion *infra* pages 10-13. A bride's portion was her dowry, and jointure was a private settlement meant to provision a wife after the death of her spouse.

17. BONFIELD, *supra* note 14, at 46-47. Land not settled in entail was also used to provision younger sons and provide portions for other daughters. *Id.* at 104-05. The degree to which younger children and daughters were in fact provisioned in this way remains debated. *See* SPRING, *supra* note 8 (arguing that strict settlements decreased provisioning for daughters and younger children). Entails will be familiar to readers of *Pride and Prejudice*, in which Mr. Collins benefitted from an entail on the Bennett estate. *See* AUSTEN, *supra* note 1, at 111-12. An entail was "an estate that would pass forever in accordance with a prescribed succession so that the holder of the possessory interest could neither alienate his interest nor alter the subsequent line of succession." Steven J. Horowitz & Robert H. Sitkoff, *Unconstitutional Perpetual Trusts*, 67 VAND. L. REV. 1769, 1775 (2014).

18. Christopher Clay, *Marriage, Inheritance, and the Rise of Large Estates in England, 1660-1815*, 21 ECON. HIST. REV. 503, 508, 510 (1968).

19. ERICKSON, *supra* note 5, at 123.

20. *See* CIONI, *supra* note 13, at 165 ("By the late sixteenth century, it was becoming popular for a widow to have an estate in trust to her separate use especially when circumstances indicated that the next spouse might be grasping or a spendthrift.").

owed aunts, seeking to provision their female kin. Moreover, as we will see in Part II, Chancery also had the power to create a separate estate for a wife during marriage. In these situations, Chancery would intervene when there was marital discord and allow the wife to live apart from her husband, giving her financial means by identifying her pre-marital property and placing it into a judicially created separate estate trust for her benefit.[21]

Examples of how to convey property upon marriage to a daughter through the formation of a separate estate could easily be found in conveyancing manuals. One of the most popular manuals was Sir Orlando Bridgman's, originally published in 1699. Bridgman's manual offers a template for "A Demise to Trustees for years, in Consideration and in Performance of a Promise and Agreement before Marriage on the Behalf and for the Separate Maintenance of the Wife."[22] The following language details what the clause within the settlement might look like: "In a Conveyance to Trustees before Marriage . . . That the Trustees shall execute such Estates, as the Woman, as well whilst Covert as Sole shall appoint . . . And til such Appointment shall permit her to receive the Profits to her separate Use excluding her Husband."[23]

It was common, as critics of the separate estate have observed, for fathers to create a separate estate for a daughter with income-producing land, such that the wife would enjoy a steady stream of income—and income alone—throughout her marriage. Gilbert Horsman, in his *Precedents in Conveyancing*, gives an example of what this type of settlement might have looked like:

> [The trustees shall], by and out of the Rents, Issues and Profits of the said Capital Messuage, Lands, Hereditaments and Premises, pay or cause to be paid for and during the natural Life of [the daughter] one Annuity, yearly Rent or Sum of 40£ of like Money, by four equal quarterly payments. . . .[24]

In some cases, however, the woman possessed fuller control of the capital placed in trust for her benefit and was able to enjoy the income and bequeath the property as she pleased. This was certainly the case when women created trusts for themselves in anticipation of a second marriage. Elizabeth Dibben, a wife and landowner in her own right, created the following settlement upon marriage, described by the Chancellor in the case *Churchill v. Dibben*:

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21. Because "there was a strong convention that the wife's portion should be used to purchase *land*," this may have simplified the court's task. In all cases, the wife's portion was easily identifiable. H.J. Habakkuk, *Marriage Settlements in the Eighteenth Century*, 32 TRANSACTIONS OF THE ROYAL HIST. SOC'Y 15, 22 (1950).

22. 1 SIR ORLANDO BRIDGMAN'S CONVEYANCES 122 (London, Nutt, Nutt & Gosling 1725).

23. *Id.* at 132-33.

24. 1 GILBERT HORSMAN, PRECEDENTS IN CONVEYANCING 35 (London, Lintot 1744).

> [O]n the marriage of Thomas Dibben, Esq. and Elizabeth his wife, the said Elizabeth conveys several lands and tenements to the use of herself for life, and so on, in strict settlement, to the issue of the marriage; and, in default of such issue, as to part, to the use of the husband, as to other part . . . to the trustees, and their heirs . . . for the benefit, and behoof, of such person or persons, and for such estates, as she should, notwithstanding her coverture, by deed, or will, or any writing purporting to be so signed and sealed by her in the presence of two witnesses, appoint.[25]

Elizabeth Dibben created a separate estate trust that allowed her to benefit from substantial income and assets during her life. Moreover, reserving to herself the power of appointment, she was able to devise the separate estate property at her death.

A critical inclusion in the creation of these trusts was particular language stating that the trust was for the "sole and separate use" of the bride-to-be or wife. This crucial phrase signaled that the trust was indeed a separate estate meant to benefit the wife and not available to the husband or anyone else seeking to reach the assets. Bridgman's conveyancing manual gives this example of how a parent could have created a separate estate through a bequest, highlighting the degree to which the husband was barred from using the trust income and assets as well as the importance of the "sole and separate use" language:

> I do further will and appoint that my Daughter D. shall have one Annuity or yearly Rent of 20*l.* of lawful Money of *England,* to be paid unto her own proper Hands, and not unto the Hands of her Husband, or to the Hands of any other Husband, with whom she may hereafter marry, nor to the Hands of any other Person or Persons that may claim the same by virtue of any Assignment or otherwise, but only to her own Hands for her sole and separate Use.[26]

In the first separate estate cases, in the early seventeenth century, Chancery required the precise formulation to be present in the wording of the legal document. By the eighteenth century, however, the court took a more flexible approach and inferred intent from any number of similar expressions.[27] By the end of the eighteenth century, the separate estate trust had become such a common practice that Henry Ballow stated confidently, "[I]t is certain, that a wife may have a separate estate from her husband, as by agreement, before or

25. Churchill v. Dibben, (1754) 96 Eng. Rep. 1310 (Ch.) 1311; 3 Keny. 68, 68-69.
26. 2 SIR ORLANDO BRIDGMAN'S CONVEYANCES 151 (London, Nutt, Nutt & Gosling 1725).
27. 1 BRIDGMAN, *supra* note 22, at 158-59.

after marriage; or by decree, for ill usage or alimony; or otherwise secured in trustees' hands for her."[28]

B. The Story of Women's Property Rights in Decline

A major reason that some historians often undervalue the separate estate as a vehicle for extending property rights to married women is that the broader story of women's property rights in the seventeenth and eighteenth centuries is not a wholly positive one. Apart from the separate estate, women's property rights were, some historians suggest, in decline. The two primary pieces of evidence in support of this argument are the replacement of dower by jointure and the rise of the strict settlement. These claims are highly contested, and my aim here is not to resolve the actual impact of these changes in property rights for women. My goal, rather, is to illustrate how the story of the separate estate has been swept into the greater story of decline without sufficient analysis of its merits. Accordingly, a short overview of the prevailing narrative of decline is useful.

The first claim about the decline of married women's property rights concerns the gradual elimination of dower and substitution of jointure in its place. What a bride acquired in exchange for her lost property rights upon marriage was a right to dower or, by the sixteenth century, jointure. Dower was a one-third life estate in the husband's freehold estate, which arose on his death.[29] Dower was intended to sustain a widow after the death of her husband,[30] and escaped the strictures of coverture because a wife would come into possession of her dower only upon the death of her husband, when she would once again be a feme sole.[31]

The common law enforced dower by means of a writ that the widow could use if she needed legal help recovering her dower property.[32] By the early sixteenth century, however, dower rights had been destabilized by the use (an early form of the trust) and the common law rule that there was no dower of a

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28. HENRY BALLOW, A TREATISE OF EQUITY, WITH THE ADDITION OF MARGINAL REFERENCES AND NOTES BY JOHN FONBLANQUE, ESQ. 93-95 (photo. reprint 1979) (1793).

29. SPRING, *supra* note 8, at 40. A husband's freehold estate was comprised of land and property that the husband owned outright. Property subject to dower claims included lands and houses, shares in public companies and mines, and more idiosyncratic items such as "the profits of stallage, of a fair, of the office of Marshalsea, of keeping a park, of a piscary." *See* OWEN DAVIES TUDOR, A SELECTION OF LEADING CASES ON REAL PROPERTY, CONVEYANCING, AND THE CONSTRUCTION OF WILLS AND DEEDS 42 (London, Butterworths 1856).

30. STAVES, *supra* note 8, at 45. Commentators also described the widow as possessing a "moral right" to dower. *Id.*

31. 2 WILLIAM BLACKSTONE, COMMENTARIES *129-39.

32. CIONI, *supra* note 13, at 176. A woman could use either the writ of right of dower or the writ of dower *unde nihil habet* in attempting recovery. *See* Alison Reppy, *The Development of the Common-Law Forms of Action: Part II*, 23 BROOK. L. REV. 38, 54-55 (1956-1957).

trust. Consequently, a husband could place his lands in a use or trust to gain taxation benefits and thereafter the land was no longer subject to dower.[33] The enactment of the Statute of Uses in 1536 ended this practice,[34] but jointure was already being used as a practical replacement for a widow's dower by that time.

Jointure, unlike dower, was not statutorily created. Rather, it was a private contract made between the parties to marriage before entering into marriage, often as part of the marriage settlement.[35] Jointure could take two forms, one being the creation of joint life estates to the bride and groom with survivor rights to the widow for life.[36] In this form, a woman's father or relatives created a jointure by including in the marriage settlement "some particular lands of the intended husband to his and his wife's *use*, in joint tenancy for their lives, as a provision for her in the event of her surviving him."[37] The second form, which originally involved land conveyed to trustees for the use of a married woman,[38] became after the Statute of Uses nothing more than a "guaranteed annual revenue from land payable to a wife should she survive her husband."[39]This second form of jointure was originally meant to offer the husband a means of providing for a widow while still holding land in trust, but even after the Statute of Uses ended that concern, the jointure was a popular alternative to dower.

The advantage of the jointure was that the wife "had an estate as soon as jointure was made," endowing her with a present as well as a future interest, whereas dower only vested the wife with a future interest.[40] Unlike dower, however, there was no writ at common law to provide remedy for a jointure claim if conflict arose.[41] In the absence of a writ that would give the common law court authority over the claim, and because jointure assets were often held in trust, disputes about jointure came to Chancery.[42]

As Susan Staves and Eileen Spring both remark, the liberal story concerning the replacement of dower by jointure is one of progress with respect to the alienability of land. Because a widow's dower constituted an interest in a hus-

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33. In the preamble to the Statute of Uses, concern for defrauded women barred from dower by the rule concerning uses is mentioned as one reason for enacting the statute. 27 Hen. 8, c. 10., § 1

34. SPRING, *supra* note 8, at 47. The preamble of the Statute of Uses states that a goal of the statute is to halt the defrauding of widows. *Id.*

35. STAVES, *supra* note 8, at 29-30; *see also* SPRING, *supra* note 8, at 58 ("With the transfer of dower into jointure, an invariable right in law had become a matter of private contract.").

36. 6 JOHN BAKER, THE OXFORD HISTORY OF THE LAW OF ENGLAND 689 (2003); *see also* SPRING, *supra* note 8, at 43.

37. 1 R.S. DONNISON ROPER, A TREATISE OF THE LAW OF PROPERTY ARISING FROM THE RELATION BETWEEN HUSBAND AND WIFE 461 (Philadelphia, John S. Littell 1841).

38. 6 BAKER *supra* note 36, at 685.

39. STAVES, *supra* note 8, at 29.

40. CIONI, *supra* note 13, at 198.

41. *Id.*

42. Amy Louise Erickson, *Common Law Versus Common Practice: The Use of Marriage Settlements in Early Modern England*, 43 ECON. HIST. REV. 21, 24 (1990).

band's freehold land, dower was thought to be a "great clog to alienations."[43] Jointure did not present the same problem. However, jointure also allowed a husband to settle considerably less than a third of his estate on his wife, and freed husbands from any statutory obligation to provide for their widows.[44] A wife's jointure was related in most cases to her portion and, by the eighteenth century, jointure "usually operated on a proportional basis of ten percent of the amount which the wife had brought to the marriage."[45] Furthermore, because lawmakers and landholders were concerned about the possibility that a widow could benefit from both her dower and jointure, the Statute of Uses decreed that any wife who had a jointure settled upon her at marriage was barred from recovering dower.[46]

The second claim that some historians make concerns the detrimental effect of the strict settlement on women. Foundational work by H.J. Habakkuk and others posited early in the debate that the strict settlement—in which the father settled the majority of his estate on his eldest son for life upon marriage with a trustee-preserved contingent remainder going to the first son of the marriage—in fact benefitted daughters and future brides, because their portions were firmly established through the settlement.[47] Blackstone suggested as much in his *Commentaries*, stating that the strict settlement helped to "secure in family settlements a provision for the future children of an intended marriage, who before were usually left at the mercy of the particular tenant for life."[48]

Other historians, however, have strongly contested this proposition. Eileen Spring, in particular, has taken issue with the idea that strict settlements benefitted women. Spring argues that "the character of [the strict settlement] is summed up in three words: patrilineal, primogenetive, and patriarchal. . . . We should not be impressed by the fact that settlements provided for all members of the family. Families have always been provided for by some means or an-

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43. SPRING, *supra* note 8, at 48 (citing 2 BLACKSTONE, *supra* note 31, at *137); *see also* STAVES, *supra* note 8, at 32.

44. *See generally* SPRING, *supra* note 8, at 39-66 (describing how the increased use of jointure as opposed to dower resulted in decreased financial security for widows); *see also* STAVES, *supra* note 8, at 25-55.

45. CIONI, *supra* note 13, at 196. Erickson charts the decline of the portion/jointure ratio, noting that in the early seventeenth century the ratio was closer to five to one. ERICKSON, *supra* note 5, at 119; *see also* SPRING, *supra* note 8, at 50 ("The ratio then steadily fell in the century after the Statute of Uses, clearly indicating a significant decline in the bargaining power of wives.").

46. SPRING, *supra* note 8, at 47-8.

47. *See* Habakkuk, *supra* note 21, at 20-30. Habakkuk's primary thesis was that there was a strong connection between the development of the strict settlement and the rise of "great estates"; *see also* BONFIELD, *supra* note 14, at 93-122; STONE & STONE, *supra* note 14. Tim Stretton has succinctly summarized the debate-at-large, stating: "Most agree that patriarchs saw the entails allowed in settlements as a useful means of shoring up family estates, preventing leaks of property to other families through the conduit of daughters, or wastage at the hands of spendthrift sons. They disagree about their application and effectiveness." STRETTON, *supra* note 12, at 119.

48. BONFIELD, *supra* note 14, at 102 (citing 2 BLACKSTONE, *supra* note 31, at *172).

other."[49] Strict settlements, according to Spring, likely decreased the amounts given to daughters because they limited fathers' discretionary ability to provide for them.[50] Moreover, as Susan Staves has pointed out, this form of historiography characterizes women as "bearers or sources of assets . . . or dependents whose needs take assets away from the heroic job of accumulation."[51]

Consequently, feminist versions of the history of women's property holding during this period have disputed the conventional view that the eighteenth century was witness to both an increase in women's education, agency, and wealth as well as a rise in "domesticity"[52] and "companionate marriages."[53] Instead, feminist historians argue that the eighteenth century was a period that sentimentalized women in order to demonstrate that they lacked the "rationality required for the active management of property."[54] From this perspective, the eighteenth century was one of "increasing legal restrictions" on women's management and ownership of property, masked by circulating theories of equality and rationality.[55]

Placed in this context, it is not surprising that the story of the separate estate has been subsumed into a larger story of decline and inequality. Nonetheless, as Amy Erickson has remarked, this historiographical focus on the effects of the strict settlement and related theories of the family has obscured analysis of other forms of settlement, trust forms, and property ownership for women.[56] In fact, Erickson proposes, "[t]here is clear evidence that women had an economic importance within the family which we continue to overlook."[57] This Article seeks to recover this overlooked history and positive impact of the separate estate, as viewed through the lens of litigation in Chancery.

II. UNHAPPY MARRIAGES AND UNPAID CREDITORS

The separate estate cases litigated in Chancery fell into three distinct categories. One category of cases was constituted by claims related to marital separation. Because of the limited options for divorce during the period, both legal and informal separations were popular options for unhappy couples. In these

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49. SPRING, *supra* note 8, at 144.

50. *Id.* at 17-19.

51. STAVES, *supra* note 8, at 203.

52. RANDOLPH TRUMBACH, THE RISE OF THE EGALITARIAN FAMILY: ARISTOCRATIC KINSHIP AND DOMESTIC RELATIONS IN EIGHTEENTH CENTURY ENGLAND 69-163 (1978).

53. *Id.; see also* Lawrence Stone, *The Rise of the Nuclear Family in Early Modern England*, *in* THE FAMILY IN HISTORY 13, 13-57 (C.E. Rosenberg ed., 1975).

54. STAVES, *supra* note 8, at 226.

55. ERICKSON, *supra* note 5, at 233; *see also* Susan Moller Okin, *Women and the Making of the Sentimental Family*, 11 PHIL. & PUB. AFF. 72, 73-75 (1984).

56. Erickson, *supra* note 42, at 22. Erickson argues that "the primary purpose of a marriage settlement in early modern England was to preserve the wife's property rights." *Id.*

57. *Id.*

situations, claims frequently arose concerning maintenance and alimony for wives living apart from their husbands because of desertion, cruelty, or other conflict. A second category of cases was comprised of creditors' claims and turned on questions of estate accounting. These cases implicated the ability of the wife's separate estate to act as a creditor with respect to the husband as well as the right of a third-party creditor to recover money for a husband's debts from a wife's separate estate. The third category was constituted by claims concerning a wife's right to devise her separate estate; these estate battles raised similar questions concerning the extent of a married woman's power over her separate estate

A. Marital Breakdown and a Wife's Separate Estate

The first separate estate cases, which appeared before Chancery in the late sixteenth century, were cases involving marital discord and separation. George Spence wrote that the "first direct recognition of the wife being capable of separate rights during coverture, distinct from her husband, appears in the instance of the wife living apart under a deed of separation."[58] Spence was referring to *Sankey v. Golding* from 1579, a separate maintenance case involving the claim of a married woman to support when she and her husband decided to live apart because of "discord growing between them."[59] The court concluded that proceeds from the sale of real estate belonging to the wife would go to form her separate estate, and consequently placed the proceeds in the hands of a trustee under the decree that the money was to be used for Eliza Sankey's "maintenance."[60]

In similar cases that followed, Chancery repeatedly stepped in to resolve questions relating to support for an estranged wife and decree, as appropriate, the establishment of a judicially created separate estate. Specifically, Chancery identified a wife's pre-marital property and placed it in trust in order to establish a source of income for her during the marital separation. These separate estate trusts generally only provided women with an income stream. However, these judicially created separate estates provided material benefit to wives who had been treated with cruelty or otherwise come into conflict with their husbands, allowing them to escape abusive marriages.

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58. 1 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 595 (London, William Stevens 1846).

59. Sankey v. Golding, (1579) 21 Eng. Rep. 46 (Ch.) 46; 22 Elz. Cary. 124, 124.

60. *Id.* Even in marriage, a wife retained title to freehold land (land owned outright), even though it came under the control of the husband. For a discussion concerning a married woman's property rights, see *supra* note 5.

1. Provisioning Abandoned and Abused Wives

When a husband abandoned his wife, he was in dereliction of his marital duty. Both at common law and in Chancery, the husband owed a legal duty of support to his wife.[61] Blackstone remarked that the husband was "bound to provide his wife with necessaries by law, as much as himself; and if she contracts debts for them, he is obliged to pay them."[62] In the common law courts, providing "necessaries" generally meant keeping the wife according to the standard of living dictated by the couple's social class, not at subsistence level.[63] When the husband was derelict in this duty, legal remedy was available to the injured wife. The remedies were different, however, at common law and in Chancery.

The common law allowed a wife to charge necessaries at the shop of a merchant, who subsequently had the legal right to recover the money from the husband.[64] The common law premise was that the husband "authorised [the wife] generally to contract as his representative for such things as being within her domestic province may be supposed to be entrusted to her management."[65] Accordingly, in *Dent v. Scott*, a court held that "the wife may charge the husband for necessaries, as apparel, diet and lodging, in case that the husband does not provide them for her."[66] The main problem with this remedy, from the wife's perspective, was the difficulty finding a sympathetic merchant who was willing to go to the trouble of bringing a lawsuit in order to recover his profit.[67] Moreover, a husband could give notice to a merchant that the wife was not enti-

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61. *See* BARON AND FEME: A TREATISE OF THE COMMON LAW CONCERNING HUSBANDS AND WIVES 9 (Garland Publishing 1979) (1700) ("Though our Law makes the Woman subject to the Husband . . . [s]o he may not starve her, but must provide Maintenance for her.").

62. *See* 1 BLACKSTONE, *supra* note 2, at *442.

63. Nonetheless, defining "necessaries" was a source of contention between couples disputing debt in court and the court either turned the question over to the jury or designated a master to investigate and assess. *See* STAVES, *supra* note 8, at 131, 193; Colmer v. Colmer, (1729) 25 Eng. Rep. 304 (Ch.) 306; Mos. 113, 121.

64. *See generally* BAKER, *supra* note 36, at 861-62, for an example of a merchant seeking to recover who used a writ of *indebitatus assumpsit,* via the claim that the husband had undertaken a debt and not satisfied it.

65. Bolton v. Prentice, (1745) 93 Eng. Rep. 1136 (Ch.) 1137; 2 Str. 1212, 1214. The spelling of certain words in the report has been modernized. Hereinafter, all spelling in reports cited will conform to modern standards.

66. Dent v. Scott, (1681) 82 Eng. Rep. 916 (Ch.) 916; Aleyn 61, 61. If, however, the husband provided an allowance to the wife, in the form of pin money or a separate maintenance, the wife was not allowed to charge necessaries on her husband's credit. *Id.* Moreover, as the court in *Bolton* noted, a great deal "depends upon the manner in which the separation between the parties has taken place." 93 Eng. Rep. at 1137; 2 Str. at 1214.

67. STAVES, *supra* note 8, at 131-33, 145.

tled to credit, effectively blocking the wife from obtaining goods when she in fact had a legal right to them.[68]

For these reasons, wives often preferred to bring their claims in Chancery, where the usual remedy was a decree of separate maintenance instead of charging privileges. The amount of maintenance Chancery awarded had the potential to be greater than any amount of charging privileges. In addition, separate maintenance freed the wife from seeking out sympathetic merchants and circumventing the husband's influence on the merchants. A decree for separate maintenance from Chancery was therefore a more reliable option and an attractive alternative to common law remedy.[69]

In cases of abandonment, Chancery's goal was to provide for the wife and find support mechanisms other than the public fisc.[70] To this end, Chancery took judicial notice of separate property when possible, looking back to the wife's portion and translating that amount into a judicially created separate estate for her maintenance.[71] The 1729 case *Colmer v. Colmer* was exemplary in demonstrating the travails of an abandoned wife and Chancery's remedy.[72] The plaintiff wife in that case, a widow who was in possession of a third of her first husband's estate, had a generous separate estate that had been established upon her second marriage.

Specifically, £4,000 from her share in her first husband's estate, was "lodged in the hands of her trustees in trust, to pay the interest thereof to the plaintiff for life, for her sole and separate use, and if she died before her intended husband, then to pay the principal to such uses, and to such persons, as she, by deed or will, should direct and appoint; and for want of such appointment, to the husband; but if the husband died first, to pay the principal to her."[73] After establishing this separate estate, Mrs. Colmer gave her second husband a life interest in the residue of her assets derived from her first marriage, amounting to £8,000 that he was to have "the sole management thereof in trade."[74] The remainder was to go upon his death either directly to their children as well as her children from the first marriage or to her in trust and then to the children.

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68. For the rules on publicity and the importance of what pieces of information the tradesmen had, *see* 1 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 344 n.48 (E. Duyckinck 1827) (1765).

69. *See* STAVES, *supra* note 8, at 131, 145.

70. *See* LAWRENCE STONE, ROAD TO DIVORCE: ENGLAND 1530-1987, 142 (1990) (describing the financial consequences women faced when deserted by their husbands and noting the large proportion of deserted wives on relief rolls). John Fraser MacQueen, in his 1848 treatise about marital obligation, stated: "The only legal reason why a husband should support his wife is, that she may not become a burden on the parish. So long as that calamity is averted, the wife has no claim on her husband." JOHN FRASER MACQUEEN, THE RIGHTS AND LIABILITIES OF HUSBAND AND WIFE 42 (London, S. Sweet 1848).

71. The exception was when a husband left his wife in the line of work. *See* Bullock v. Menzies, (1799) 31 Eng. Rep. 413 (Ch.); 4 Ves. Jun. 797.

72. Colmer v. Colmer, (1729) 25 Eng. Rep. 301 (Ch.); Mos. 113.

73. *Id.* at 301; Mos. at 113-14.

74. *Id.* at 301; Mos. at 114.

Moreover, the second husband covenanted to settle "£4,000 out of his own estate in trust, in case the wife survived him, to pay the interest to her for life, and after her decease to pay the principal, as she should appoint, and for want of such appointment, to their children."[75]

Despite all this intricate financial planning, not long after the marriage had been solemnized, the husband, in debt and "desirous to get into his hands [the portions]"[76] that his wife had settled on her children from the previous marriage, began to treat his wife poorly. He denied his wife access to her children, turned her friends away, "gave the management of his family to a footman, [and] encouraged the servants to insult her."[77] When her husband disappeared without notice, Mrs. Colmer discovered his whereabouts in Portsmouth and went there in an attempt to reunite with him. Finding that her husband was on board a ship, she hired a boat but her husband spotted her rowing toward him and "persuaded the captain to cut his cables, and set sail, so that she could not come up to him."[78] Thwarted in her efforts to reconcile, Mrs. Colmer returned to London, where she found herself locked out of her house, and forced to stay with friends. Dealing a final blow, Mr. Colmer put all personal and family assets, including Mrs. Colmer's clothes and jewelry, "under colour of a deed of trust."[79]

Because the husband had placed his assets in a trust with a "design to bar [his wife] of all maintenance," the Chancellor concluded that Mrs. Colmer had "no remedy but in this court."[80] The Chancellor held that Mrs. Colmer was entitled not only to the income from her separate estate but to the allowance promised her by her husband. The Chancellor referred the case to a master to determine the proper amount of "maintenance according to the circumstances of the husband," taking into account the portion she brought to the marriage as well as her husband's social position.[81] That amount would be put into trust for the wife and its income would provide her maintenance, augmenting what she

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75. *Id.* at 302; Mos. at 114.

76. *Id.*

77. *Id.*

78. *Id.* at 302; Mos. at 115.

79. *Id.*

80. Colmer v. Colmer, (1729) 25 Eng. Rep. 304 (Ch.) 306; Mos. 118, 122. Before ruling on the case, the Chancellor explained: "This is a case proper not only for the spiritual Court, but also for a court of common law." *Id.* at 305; Mos. at 120. The case was potentially proper for the spiritual court inasmuch as there existed a question about fault in the breakdown of the marriage. However, Mrs. Colmer's claim did not include a suit for separation or divorce and this fact ultimately rendered the claim beyond the scope of the spiritual court. Mrs. Colmer might also have had a claim at common law, the Chancellor observed, because "it is a breach of the peace in the husband not to maintain his wife." *Id.* The breach of peace was a common law offence. *See* JOHN H. LANGBEIN, RENEE LETTOW LERNER & BRUCE P. SMITH, HISTORY OF THE COMMON LAW: THE DEVELOPMENT OF ANGLO-AMERICAN LEGAL INSTITUTIONS 31-32 (2010).

81. *Colmer*, 25 Eng. Rep. at 306. Factors worthy of particular attention were "the portion she brought, and . . . the present circumstances of the husband." *Id.*

already had from her separate estate income. Both of these separate estates provided Mrs. Colmer with a financial safety net. The separate estate she established for herself with the assets from her first marriage gave her guaranteed income and the right to appoint the assets through her will. The judicially created trust did not give her the same robust property right—Mrs. Colmer had no right to appoint the property—however, it guaranteed her standard of living in the absence of her husband and checked the husband's attempts to shield assets from her reach.

In 1740, eleven years after *Colmer*, Chancery ruled on a similar case of desertion in *Watkyns v. Watkyns*. *Watkyns* was likewise a case in which the wife had a "considerable fortune" from her first marriage, and upon entering into her second marriage with Watkyns she "trusted him to draw up a bond . . . to secure seventeen hundred pounds for the wife, in case she should survive him."[82] After the marriage, the relationship soured with mutual accusations of cruelty and infidelity, and the wife brought a bill in Chancery was "to have a maintenance out of her fortune, upon a suggestion of very cruel usage."[83] Unwilling to look into the question of fault, the Chancellor stated: "I can do no more in this case than Lord Chancellor *King* did in the case of *Colemore* and *Colemore*."[84]

Accordingly, the court ruled that the wife's pre-marital assets should be "secured to her to be paid out of her own fortune."[85] The Chancellor appointed a special master to assess these pre-marital assets and place what remained "in specie of capital and principal money arising out of such estate and effects" in the hands of a trustee.[86] The Chancellor further decreed that the wife was entitled to the interest arising on that trust until her husband found it "proper to return and maintain her as he ought."[87] Moreover, the wife was to recover the sum of £1,700, the principal from the bond, from the husband's estate. The wife had failed to protect her assets from her first marriage by putting them in trust; nonetheless, the court stepped in and identified those assets which constituted her separate property and created a separate estate for her to use while living apart from her husband.

In cases of physical abuse, Chancery also tended to grant requested relief and support a wife's right to separate property. The court defined cruelty as "extreme and repeated" physical abuse.[88] The leading case in this context was

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82. Watkyns v. Watkyns, (1740) 26 Eng. Rep. 460 (Ch.) 460; 2 Atk. 96, 96.
83. *Id.*
84. *Id.* at 461; 2 Atk. at 98.
85. *Id.*
86. *Id.*
87. *Id.*
88. STONE, *supra* note 70, at 198. Stone mentions that "[i]n canon law before the late eighteenth century, only physical cruelty was taken into account, and that had to be unjustified, extreme and repeated." *Id.*; *see also* R.H. HELMHOLZ, MARRIAGE LITIGATION IN MEDIEVAL ENGLAND 106 (1974) (stating that under canon law "[o]ne had to prove cruelty by concrete acts").

Oxenden v. Oxenden, in which the wife brought a portion of £12,000 to the marriage.[89] The articles of marriage allotted £6,000 to the husband upon marriage, with a £1,000 yearly annuity for jointure, and another £6,000 to be invested in lands to the husband for life, then to the wife in trust to increase her jointure, and the remainder to any children.[90] The marriage was an unhappy one and the wife was forced to separate from her husband on account of "his cruel usage."[91] Because the wife's family never transferred the second £6,000 to the husband, the wife filed a bill for specific performance of the marriage articles and to obtain separate maintenance from that second sum. The husband filed a cross bill to have the second £6,000 "invested in a purchase, and until a purchase found, to be placed at interest, on security, or on some of the public funds."[92] The court concluded that "[t]he ill treatment of the lady being fully proved,"[93] the second £6,000 was to be placed in trust and the wife was to receive the income as her separate maintenance. This arrangement was to remain in force "until there should be a cohabitation."[94] The court created a separate estate by identifying pre-marital property belonging to the wife and her family and using this sum to create a trust that benefitted the wife, recovering her pre-marital assets and allowing her to be self-sustaining.

Six years later in *Nicholls v. Danvers*, a wife who had sustained cruelty at the hands of her husband obtained a similar result.[95] It was proved that the husband "acted with severity and cruelty towards his wife," and the court devised a remedy in the form of the separate estate.[96] After the marriage, the wife had inherited £3,000 from her mother's estate. At the time she inherited this money, the marriage was already suffering due to the husband's cruelty. The wife's bill in Chancery was a request to keep this inheritance "for her own use for her maintenance."[97] Her husband filed a cross bill claiming his right to the money. Because of the husband's cruelty, the court dismissed his bill and decreed that the £3,000 was to be placed in a trust to pay out interest for the wife's separate maintenance.

Citing both *Oxenden* and *Nicholls, Williams v. Callow* was another case in which the "husband proved drunken, rude, and abusive to his wife, and wasting his stock."[98] The husband brought a bill to set aside the release of his wife's portion, which had been placed in the hands of a trustee, and the wife brought a

89. Oxenden v. Oxenden, (1705) 23 Eng. Rep. 916 (Ch.) 916; 2 Vern. 493, 493.
90. *Id.*
91. *Id.* at 916; 2 Vern. at 494.
92. *Id.*
93. *Id.*
94. *Id.*
95. Nicholls v. Danvers, (1711) 23 Eng. Rep. 1037 (Ch.); 2 Vern. 671.
96. *Id.* at 1037; 2 Vern. at 671.
97. *Id.*
98. Williams v. Callow, (1717) 23 Eng. Rep. 1091 (Ch.) 1091; 2 Vern. 752, 752.

cross bill to have the interest of her portion turned into her separate estate and maintenance. The court, finding that the husband "has wasted all, and has no fixed habitation, but goes from alehouse to alehouse," decreed separate maintenance for the wife and dismissed the husband's bill.[99] While the wife's property—her portion—had not been placed in trust specifically for *her* use upon marriage, the court did not hesitate to identify this sum as being the wife's separate property nor did the court hesitate to direct income from this property to support the wife.

In all these cases, restrictions on the judicially created separate estate meant that the trusts provided income for married women who had been abandoned or abused but generally did not grant the power of appointment. The women, therefore, did not necessarily have the ability to invade or direct principal. Nonetheless, these judicially created separate estates still provided great benefit to a married woman by recovering her pre-marital property and allowing her to maintain a certain standard of living. Ultimately, wives who had been subject to abusive treatment by their husbands were able to live apart from their husbands thanks to separate estate income.

2. Tolerance for Spouses Living Apart

Even when wives were not abandoned or severely abused, marital separation was increasingly common in the seventeenth and eighteenth centuries due to shifts in marriage regulation. Full divorce or total separation with permission to remarry was only available through an Act of Parliament.[100] The private Act was available to a husband provided he could prove his wife's adultery, but this option was an expensive and time-consuming process,[101] neither accessible to the general populace nor suitable for a spouse who had no title and few assets to protect.[102] The most common method for obtaining a legal separation, there-

99. *Id.* at 1092; 2 Vern. at 753.

100. BAKER, *supra* note 3, at 565 (noting that there was "no escape from [the contract of matrimony] if it proved unsatisfactory"). A divorce via an act of Parliament was a divorce *a vinculo*, from the bond, as opposed to ecclesiastical divorce *a mensa et thoro,* from bed and board. *Id.*; *see also* Sybil Wolfram, *Divorce in England 1700-1857*, 5 OXFORD J. LEGAL STUD. 155, 155 (1985).

101. BAKER, *supra* note 3, at 565. When a divorce petition reached Parliament, the "main burden of the investigation" fell on a committee of law lords that included the Lord Chancellor. STONE, *supra* note 70, at 323. The reading of the bill before the law lords took on "the form of a full trial," with witnesses, questioning, and cross-examination. *Id.* The bill received a vote in the Committee of Lords and, if it survived, it went to the House of Commons, where it was read before the nine-member "Select Committee on Divorce Bills" and put to another vote. *Id.*

102. BAKER, *supra* note 3, at 564-65; *see also* Wolfram, *supra* note 100, at 158-66. Between 1700 and 1749, only fourteen divorces were granted through the Parliamentary Act, a number that underscores the exclusivity of this procedure. Wolfram, *supra* note 101, at 157. With respect to expenses, because the private Act allowed the husband to keep any money that had come to him through a marriage settlement or that he had allocated to his wife for household expenses during the time of marriage, Par-

fore, was the divorce *a mensa et thoro*. A husband or wife obtained this type of divorce by bringing suit in ecclesiastical court.[103] A decree allowed husband and wife to live apart, and awarded alimony based on factors including fault. Either spouse could apply to the spiritual court for this type of divorce on the grounds of "adultery, life-threatening cruelty, or a combination of both."[104]

Chancery, however, became deeply involved with marriage during the Interregnum, when the government closed the spiritual courts.[105] Because of the "failure of the Commonwealth or Protectorate to put anything in place [of the ecclesiastical court system]"[106] and because of Chancery's history of contract and trust regulation, Chancery took jurisdiction in many cases concerning marital matters. Furthermore, in the absence of the spiritual courts, private separation agreements "sprang up in the 1650s as a response to the administrative chaos during the Interregnum."[107] Because there were no real court costs or legal fees, deeds of separation were "popular as a very cheap way of terminating all marriages."[108] Judicial separation remained preferable in the case in which the husband could prove adultery, because he would escape alimony or annuity payments;[109] but for a wife, a private agreement guaranteed her an income without the burden of court proceedings and the need to prove adultery or cruelty in order to obtain a decree.[110] Chancery, again because of contract questions, was also the appropriate forum for claims concerning these private agreements.

In cases of marital separation without "good cause"—i.e. abandonment or extreme cruelty—the court was confronted with difficult legal questions that implicated marriage policy. Chancery sometimes chose to limit a couple's freedom to separate without cause by providing only narrow support for a wife's right to separate maintenance or payments from her separate estate. Additionally, Chancery promoted reconciliation by enforcing only the payment of arrears

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liament customarily ordered the husband to pay an annuity for life to the wife, regardless of her guilt. STONE, *supra* note 70, at 345.

103. For a general discussion of ecclesiastical jurisdiction and marriage regulations, *see* 1 R.H. HELMHOLZ, THE OXFORD HISTORY OF THE LAWS OF ENGLAND 521-64 (2004).

104. STONE, *supra* note 70, at 192. One advantage of bringing suit in the ecclesiastical court for the husband was that, if he could prove adultery, the court would not secure an annuity to the wife or grant alimony. If the wife eloped, "she even lost her common law right to dower." *Id.* at 193. The wife was, however, entitled to keep any property or assets held in a separate estate for her benefit. The wife also kept her jointure—even if she had been adulterous—because the marriage remained legally intact and therefore the settlement was still binding. *Id.*

105. *See* BAKER, *supra* note 3, at 152 ("In 1641 the Long Parliament abolished the High Commission and the criminal jurisdiction of other ecclesiastical courts; much of the civil jurisdiction also disappeared during the Interregnum.").

106. STONE, *supra* note 70, at 149.

107. *Id.*

108. *Id.* at 159.

109. *Id.*

110. *Id.* at 160.

when there was a breach of the separation agreement. Nonetheless, Chancery did enable wives to live apart from their husbands—and granted them financial support to do so—when conflict between the spouses was evident.

The 1737 case of *Moore v. Moore* is exemplary in this respect.[111] In that case, the wife had a separate estate that her husband settled on her upon marriage and that provided her with a yearly annuity of £100. Specifically, the husband had, in consideration of her £6,000 portion, "conveyed lands to trustees for 99 years, upon trust to pay out of the rents £100 a year, tax free, by half yearly payments."[112] The marriage nonetheless suffered from "continual quarrels between the plaintiff and the defendant about the pin-money."[113] The husband and wife accused each other of cruel behavior, and the husband treated his wife as "a cypher in his family,"[114] to the point of depriving her of "even the respect due to her from his servants."[115] Unable to tolerate living with her husband any longer, the wife fled to France and, through her trustees, brought a suit to recover the "great arrears of the annuity due."[116]

In response to the wife's motion, the husband filed a bill "complaining of his wife's withdrawing herself" and claimed that her right to the annuity was conditional on cohabitation.[117] He offered to pay the annuity if she returned home and he agreed to "receive her kindly, and forgive what is past."[118] Emphasizing his forgiveness, the husband requested that he "be relieved against the payment of the annuity"[119] and that he be awarded an injunction to stay the ejectment proceedings.[120]

The Chancellor was sympathetic to a wife who had been cruelly treated: "That a woman is justifiable in deserting her husband, where he uses her with cruelty, cannot be disputed."[121] The Chancellor also, however, showed concern about decreeing separate maintenance, stating that "separate maintenances are not to encourage a wife to leave her husband, whatever his behavior may be; for, was this the construction, it would destroy the very end of the marriage contract, and be a public detriment."[122] Expressing hesitation, the Chancellor observed: "I am afraid these separate provisions do often occasion the very

111. Moore v. Moore, (1737) 26 Eng. Rep. 174 (Ch.) 174; 1 Atk. 273, 273.
112. *Id.*
113. *Id.* at 176; 1 Atk. at 275.
114. *Id.*
115. *Id.*
116. *Id.* at 174; 1 Atk. at 273.
117. *Id.*
118. *Id.*
119. *Id.*
120. *Id.* In addition to his bill in Chancery, the husband also brought suit in the ecclesiastical court for restitution of conjugal duty. When his wife failed to appear, the court excommunicated her. *Id.* at 177; 1 Atk. at 277.
121. *Id.* at 176; 1 Atk. at 276.
122. *Id.*

evils they are intended to prevent."[123] In the wife's favor, however, the Chancellor was skeptical of both the timing of the husband's bill and his desire to reconcile, since he had made no application to his wife for her return. For these reasons, despite a stated desire to avoid the "public detriment"[124] of broken marriages, the court denied the husband's bill and ordered him to pay the annuity arrears due on the separate estate, thereby providing financial support for the wife to continue living in France by herself.

Chancery's support for marital separation did, however, have its limits. Three years later, in *Vane v. Vane*, the court addressed a situation in which there were allegations of cruelty but the couple had also privately contracted to create a separation agreement.[125] As in *Moore*, Lady Vane had a separate estate that had been created for her benefit upon marriage: "[I]n Consideration of a Fortune of £6000, Lord Vane made a Settlement upon her of a Rent-charge of £1500 per Ann. by way of Jointure, and of a Rent-charge of £400 per Ann. for her separate Use during the Coverture."[126] When the husband and wife decided to live separately, they drafted an agreement that gave Lady Vane £700 annually in rent over and above the amount to which she was entitled through the terms of the marriage settlement. In return, she agreed to relinquish property rights to their house in Grosvenor Square.[127]

The couple reconciled briefly after the execution of the separation agreement but the reconciliation ended abruptly when the husband became enraged with his wife and "took a hot Poker out of the Fire, ran it at her, and burnt her Clothes."[128] Worried, once they separated again, that his wife was going to bring a bill to recover money owed pursuant to their agreement, the husband sought an injunction from Chancery. Setting the stage, the Chancellor stated:

> This Court has given Countenance to Agreements for separate Maintenances. . . . However the Court has generally been cautious to prevent an improper Use from being made of them. And therefore where Agreements have been made for Pin-Money, or separate Maintenance, if the Wife refuses to live with her Husband without having a sufficient Reason for doing so, the Court always refuses to aid her in the Recovery of such Maintenance, and in some Cases has even stopp'd it . . . . nothing can be more mischievous to the Rights of Marriage than to

123. *Id.* at 177; 1 Atk. at 277.

124. *Id.* at 176; 1 Atk. at 276.

125. Vane v. Vane, (1740) 27 Eng. Rep. 585 (Ch.); Barn. C. 135.

126. *Id.*

127. *Id.* In addition, a clause in the agreement specified: "[N]o Action was to be brought on any Account whatsoever against the Person with whom [Lady Vane] should cohabit." *Id.* at 586; Barn. C. at 135. The Chancellor quickly concluded that this clause violated public policy, stating: "Should this Clause prevail, a Husband is to give up his whole Authority over his Wife," and that "this was a shameful Clause, and a manifest Imposition upon the Husband." *Id.*

128. *Id.*

> support these Sort of Provisions for Pin-Money or separate Maintenance, where a Wife will take Advantage of that, and live separately from her Husband without any Reason.[129]

The Chancellor noted that, in the case at hand, an attempt had been made on the wife's life and so there was a possible justification for the separation. Nonetheless, the court granted the husband's requested relief with respect to any income due on the private agreements and enjoined Lady Vane from attempting recovery. The court also indemnified the husband against any of the debts contracted by Lady Vane during their separation. Importantly, however, the court would not extend the injunction to the annuity deriving from Lady Vane's separate estate.[130] Consequently, Lady Vane would continue to receive the income from her separate estate. The court thereby demonstrated that the safest property for a wife was her separate estate, the proceeds from which the court would not disturb.

Similar limits emerged in *Head v. Head* (1745). While the husband professed he felt "a great affection"[131] for his wife, he claimed that she was mentally ill and therefore he did not want "to be a witness of her infirmities."[132] Consequently, the husband asked his father-in-law to take his daughter into her old family home and agreed to allow her £100 a quarter while she was living there.[133] When the husband did not pay as agreed, the wife presented a bill to Chancery "against her husband to establish her separate maintenance, pursuant to an agreement for that purpose."[134] She presented a second bill requesting payment of the £600—the amount that was due to her on account of her husband being a year and a half in arrears—in order to provide for her maintenance until the first bill came before the court.

The court directed that £400 be paid to the wife rather than the full £600 requested, subtracting arrears that came due during a period in which the husband professed to be "very desirous of cohabiting with [his wife]."[135] The Chancellor reminded the parties that "[t]here are instances where . . . upon the circumstance of the husband's consenting to cohabit with [his wife], and promising to use her kindly, the court have refused to continue the separate maintenance."[136] Conceding that there was spousal conflict, the Chancellor suggested that, although the wife was not necessarily "justified in living separate from her

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129. *Id.* at 587; Barn. C. at 139.

130. *Id.*

131. Head v. Head, (1745) 26 Eng. Rep. 972 (Ch.) 972; 3 Atk. 295, 295.

132. Head v. Head, (1745) 26 Eng. Rep. 1115 (Ch.) 1117; 3 Atk. 551, 558.

133. There was also evidence that the husband had attempted to forcibly institutionalize the wife by "carry[ing] her to a mad house." *Id.*

134. *Id.*

135. *Id.*

136. *Id.*

husband,"[137] it was reasonable to let them live apart "for some time, till their passions might be supposed to subside, and they had a prospect . . . to live happily together."[138]

When the bill to establish a separate maintenance ultimately came before Chancery two years after the grant of interim support, the court found the husband's proof of his desire to have the wife return home convincing. "Even supposing he had beat her," the court remarked, this was no bar to reconciliation, "for he may repent."[139] Accordingly, the court's tolerance for marital separation had boundaries and the prospect of reconciliation sometimes trumped mistreatment at the hands of the husband. The court's decision also underscored that a separate estate established at marriage was a more secure property right than a judicially created trust for separate maintenance, because a wife had almost guaranteed access to the income and the ability to enforce arrears.

Chancery's support for a wife's right to her separate property was, therefore, somewhat dependent on the level of abuse she could allege and the prospect of reconciliation. In this respect, Chancery's separate estate jurisprudence was conservative in its approach and hewed close to the established public policy of marriage promotion. On the other hand, Chancery's willingness to hear these separate estate cases, recognize the wife as a litigant apart from her husband, and support the separate estate as a trust form provided material benefit to wives seeking recourse from absent husbands and abusive marriages. Moreover, while judicially created separate estate trusts were often more restricted and less secure than separate estates created by family members, these judicially created separate estates still filled an important role by provisioning abused and unhappy wives, facilitating a certain standard of living, and financially enabling marital separation.

B. Creditor Claims and Divided Household Interests

A second major set of separate estate cases concerned the ability of the wife's separate estate to act as a creditor with respect to her husband as well as the rights of a creditor to recover from a wife's separate estate. These separate estate cases turned on questions about whether a husband owed money to his wife when he drew upon assets in her separate estate or charged purchases against the estate. Similarly, questions arose concerning the extent to which a wife could make her separate estate liable for her or her husband's expenses. These types of claims arose both during the marriage and also after the death of

137. Head v. Head, (1745) 26 Eng. Rep. 972 (Ch.) 973; 3 Atk. 295, 296.

138. *Id.*

139. Head v. Head, (1747) 27 Eng. Rep. 863 (Ch.) 864; 1 Ves. Sen. 18, 19. The court added that if "within a month she does not come home; . . . let the payment of the arrears be stopped." *Id.* at 864; 1 Ves. Sen. at 27.

the wife, in the context of will challenges and estate accounting. As with the marital separation cases, Chancery was sensitive to the policy questions embedded in these legal claims and promoted marriage protection as well as judicial paternalism. Nonetheless, despite Chancery's promotion of marriage in its jurisprudence, married women were still allowed to bring claims, act as litigants, and assert economic interests apart from their husbands. Accordingly, these cases underscore the separate estate's utility in allowing a wife to protect her and her family's assets from spendthrift husbands.

1. The Separate Estate as Creditor and Debtor

Even though the husband generally did not have rights or access to the wife's separate estate, he was still sometimes able to use it to his benefit by borrowing money from his wife or by using her separate estate as collateral and raising money against the assets in trust. Once the husband successfully charged debt to the wife's estate, the question before the court then became how to characterize the rights of the wife's separate estate as a creditor.

A leading case was the 1714 case, *Tate v. Austin*, in which the wife used £400 from her estate to "equip [her husband] as an officer in the army."[140] The court held that when the "wife subjects her estate to supply the wants of her husband, it must be taken to be a debt due from the husband, and to be paid out of his personal estate, if he be able; but all other debts shall be first paid."[141] The rule that developed subsequently from *Tate v. Austin* was that a wife's separate estate could act as a creditor and attempt recovery against a husband who had used the wife's separate property (albeit as the last creditor in line). The court in *Lewis v. Nangle* therefore stated: "That where the husband borrows a sum of money for his own use, and the wife joins in a mortgage of her jointure for repayment of it, that her estate shall be a creditor on the husband for that sum." [142]

In *Kinnoul v. Money*, the Chancellor reaffirmed this rule, stating in very strong terms that when a husband used his wife's estate as collateral to raise money, the Chancellor would consider "them as two persons, and . . . dissolve[] the marriage, *quoad (for the duration of)* the transaction."[143] Because each spouse would be held responsible for his or her own debts when creditors came

140. Tate v. Austin, (1714) 23 Eng. Rep. 1047 (Ch.) 1047; 2 Vern. 689, 689.

141. *Id.*

142. Lewis v. Nangle, (1752) 27 Eng. Rep. 97 (Ch.) 98; Amb. 150, 150. In that case, the property interest at stake was the wife's jointure, not a trust or separate estate. However, the principle remained the same so that the wife's jointure was not liable for a husband's debts.

143. Kinnoul v. Money, (1767) 36 Eng. Rep. 830 (Ch.) 836; 3 Swans 202, 217. In another case, however, Lord Thurlow remarked that "[a]s to Lord *Camden's* observation, that the marriage was dissolved *quoad* the transaction, that, perhaps, is merely figurative, as I know of no case to that extent." Clinton v. Hooper, (1791) 29 Eng. Rep. 490 (Ch.) 495; 3 Bro. C.C. 201, 213.

calling, the court expended both time and energy inquiring into the nature of the debt and disentangling the wife's debts from those of her husband. The wife possessed some lands that came to her from her mother and, before her marriage, she had settled those assets in a separate estate "to trustees for 99 years to secure £200 a year pin-money."[144] After the separate estate was created, but before her marriage, the wife used the separate estate to procure a loan to pay some family debts; after the marriage, the couple had further occasion to raise money on the separate estate in order to provide money to pay the husband's debts, such that £8000 (including interest) was ultimately owed to the estate by both the wife alone and the wife and husband acting as a couple.

In the wife's will, she devised part of her estate to her husband for life, stating that his inheritance was "subject to such encumbrances"[145] as existed. Having no children, the wife left other parts of her estate to family relations. When the wife died, her husband, the Earl of Kinnoul, brought a bill requesting the right to sell part of the estate as well as to procure contributions from the other heirs to his wife's estate in order to satisfy the debt raised on the estate. One dispositive question was whether the husband was solely responsible for the debt. If the husband were solely responsible, he would be obligated to pay it all out of his share of the estate. If, however, the court determined that some of the debt belonged to the wife alone, other heirs to her estate would then be liable for the money owed to the estate.

Defense counsel, trying to ascribe responsibility to the husband alone, argued that when money is borrowed by husband and wife on the wife's estate, that money is for the husband's use until proof is made to the contrary.[146] Plaintiff counsel argued that this rule applied only when the debt was not of "mixed nature,"[147] meaning that although the husband was liable for a portion of the debt, the wife alone was liable for the other portion, creating "mixed" liability. Consequently, the Chancellor recommended a master to "inquire into the application of the money" and discover details about who was liable for what part of the total debt.[148]

Upon receiving the Master's report, the Chancellor decreed that the wife had been the principal debtor with respect to approximately £2734 of the debt and the husband for the remaining sum of £5266.[149] The Chancellor discharged the husband from the wife's debt; held that the husband, as a tenant for life, was not within his right to sell the estate; and referred the rest of the matter back to the master to determine what was both due to and owed by the defend-

144. *Kinnoul*, 36 Eng. Rep at 836; 3 Swans at 203.
145. *Id.* at 830; 3 Swans at 202.
146. *Id.* at 833; 3 Swans at 202.
147. *Id.* at 834; 3 Swans at 203.
148. *Id.* at 836; 3 Swans at 218.
149. *Id.* at 837; 3 Swans at 220.

ants. Significantly, the court treated the husband and wife as separate individuals with respect to liability, rather than treating them as an inseparable unit. This type of reasoning—considering a marriage as a "mixed interest" proposition—struck at the heart of coverture.

As with any rule, however, there were exceptions. Consequently, even though the general rule, stated in cases like *Tate*, *Lewis*, and *Kinnoul*, was that a woman's separate estate could stand as creditor in respect to the husband, the circumstances of individual cases often made recovery difficult for the wife. Sometimes, it was unclear whether the sum of money given to the husband was a gift or a loan. In *Parteriche v. Powlet*, for example, the wife had a separate estate created by the terms of her marriage settlement.[150] Because her husband "had an encumbrance upon his estate, the wife advanced money to pay it off."[151] The question presented to Chancery was whether the money transferred from the wife's estate to satisfy the husband's debt was a loan or a gift.[152] Were the advance a loan, the wife, "having a separate estate, must be considered as a distinct person, and is equally entitled to stand in the place of the mortgagee as a stranger."[153] Had the transfer been meant as a gift, the outcome would have been the opposite. The case was referred back to the master to determine which it was.

Likewise an exception existed if it was apparent that the husband had used money from the wife's separate estate to pay for household expenses. In that case, the outcome was generally favorable for the husband. In *Squire v. Dean*, a husband "received the dividends" of his wife's separate estate and "applied them to the general purposes of the family."[154] When the husband died, the wife's trustees requested an accounting from the husband's estate to identify expenses that the wife's estate would have been able to charge to her husband's estate. The court refused, holding that when a husband used the funds toward household expenses, he did not owe a debt to the wife's estate.

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150. Parteriche v. Powlet, (1742) 26 Eng. Rep. 632 (Ch.); 2 Atk. 383, 384.

151. *Id.* at 633; 2 Atk. at 384.

152. At common law, gifts between husbands and wives were not possible. *See* 1 BLACKSTONE, *supra* note 68, at 343 n.45 ("[A] feme covert is incapable of taking any thing of the gift of her husband."). The court analyzed this issue in *Clinton v. Hooper*, where a wife mortgaged her estate to raise money for her husband and brought a bill "to have her estate exonerated by the estate of her husband." (1791) 214 Eng. Rep. 490 (Ch.) 490; 3 Bro. C.C. 201, 201. The husband claimed that the money from the wife's estate was "a voluntary gift . . . in order to enable him to complete the purchase, which had been made at her request." *Id.* at 490; 3 Bro. C.C. at 202. The wife's counsel argued that the money had not been a gift and that the case resembled *Tate* and *Lewis*, in which the rule was "where the wife's inheritance is mortgaged for the debt of the husband, she shall be a creditor upon the husband's assets to the amount." *Id.* Because there was only parol evidence brought forward to support the plaintiff's case, however, the Chancellor dismissed the bill without deciding whether the money had been a gift or a loan. *Id.* at 496; 3 Bro. C.C. at 214.

153. *Parteriche*, 26 Eng. Rep. at 633; 2 Atk. at 384.

154. Squire v. Dean, (1793) 29 Eng. Rep. 916 (Ch.) 916; 4 Bro. C.C. 326, 326.

A final exception was when a wife's separate income was characterized as pin money, the regular allowance or settled annuity that a husband provided his wife to buy clothing and accessories. If the court determined that the separate estate was pin money, then the normal rules of estate accounting did not apply and a wife usually could not recover money owed from her husband. Pin money was sometimes held in the form of a separate estate trust and sometimes not, which created confusion because different rules attached depending on whether the pin money was characterized as a "true" separate estate or as a general allowance that was not in trust form. Pin money, even when it was not held in trust form, was reserved for the wife's sole use as with a separate estate. However, regardless of how the assets were held, pin money differed from a traditional separate estate in that the wife was obligated to spend the money on "personal apparel, decoration, and ornament,"[155] attiring herself according to her husband's rank and taste.

Peacock v. Monk, from 1750, illustrates the problems that could arise when a wife's separate estate was considered to be pin money.[156] In *Peacock*, the wife had income allotted to her by agreement with her husband, an admiral who was often at sea and reliant on his wife to conduct household management. After the wife died, the husband sold some of her effects before he died. The wife's estate requested an accounting from the husband's estate in order to ensure that all the debts charged to the wife's estate were proper and to recover any arrears. Chancery held that, "in the case of pin-money, [the accounting may] never carry back beyond the year."[157] The aim of the court was to "prevent such accounts between husband and wife."[158] The court considered the daily give and take of domestic accounting inappropriate for retrospective calculation when the wife's income was merely "allowance" and did not want to encourage one spouse to keep a ledger of claims against the other.

Aside from these cases concerning the wife's right to act as a creditor, there were also cases concerning the right of the wife to make her own separate estate liable for debts with respect to third parties. These cases further defined the permissible actions a wife could take with respect to her property. The general rule with respect to third-party creditors was that, "having held that a wife might have separate estate, it was but just that the court should bind her to the extent of making that estate liable for her debts, and so it has accordingly been

155. Jodrell v. Jodrell, (1815) 50 Eng. Rep. 259 (Ch.) 259; 9 Beav 45, 45; *see also* 2 GEORGE SPENCE, THE EQUITABLE JURISDICTION OF THE COURT OF CHANCERY 500 (London, William Stevens 1846) (stating "it is her duty to apply it, as it is intended, for her own personal dress, decoration, and ornament; the husband as well as the wife has an interest in its being properly applied.").

156. Peacock v. Monk, (1750) 28 Eng. Rep. 123 (Ch.); 2 Ves. Sen. 190.

157. *Id.* at 123; 2 Ves. Sen. at 190.

158. *Id.*

settled."[159] Even though a married woman was unable to contract at common law,[160] Chancery would act "on the implied intent . . . [and] decree a satisfaction by the trustees out of her separate property including the rents of her separate real estate."[161]

Norton v. Turvill was one of the first cases in which the court affirmed that a wife's separate estate was liable for her debts.[162] A wife conveyed an estate to her separate use before her marriage and with the approval of her intended husband. After the marriage, she "borrowed £25 upon her bond," and when she died the bondholder brought a bill against the executors of her estate to recover the sum.[163] The husband and the executors argued that the wife's bond was void. Chancery, however, held that when a wife "having a separate estate, borrows money and gives a bond; the separate estate [is] liable."[164]

In *Clerk v. Miller*, a wife in possession of a separate estate commissioned workers to perform repairs and improvements to the couple's house "without [the husband's] directions"[165] and with "promises to pay [the workers]."[166] When the wife died, the creditors brought a bill in Chancery to recover money from the wife's separate estate. Similarly, in the 1792 case of *Master v. Fuller,* the wife entered into an agreement with her landlord to secretly pay him money from the proceeds of her separate estate in addition to what her husband paid for rent "in consideration of the house being differently fitted up."[167] After the wife's death, the husband discovered the arrangement and brought a bill to recover the money his wife had used from her separate property, claiming the agreement was fraudulent because it had been entered into without the consent of the husband. The court charged the separate estate.

These creditor cases demonstrate that women received benefit from their separate estates because the wife's separate estate could act as a creditor with respect to the husband. Judicial support for these claims prohibited the husband from treating his wife's separate estate as his personal property—as otherwise allowed by coverture—and taking financial advantage of his wife. Moreover, the separate estate was important because it allowed the court to construe the wife as an autonomous economic actor and hold her responsible for her own debts. This may not have been of immediate benefit to women, especially those trying to avoid creditors. Nonetheless, the recognition of women as purchasers

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159. 1 SPENCE, *supra* note 58, at 597.
160. *See* 1 BLACKSTONE, *supra* note 2, at *442-45.
161. 2 SPENCE, *supra* note 155, at 514.
162. Norton v. Turvill, (1723) 24 Eng. Rep. 674 (Ch.); 2 P. Wms. 144.
163. *Id.* at 674; 2 P. Wms. at 144.
164. *Id.*
165. Clerk v. Miller, (1742) 26 Eng. Rep. 629 (Ch.) 629; 2 Atk. 379, 379.
166. *Id.*
167. Master v. Fuller, (1792) 29 Eng. Rep. 757 (Ch.) 757; 4 Bro. C.C. 19, 19.

and debtors undermined the state of coverture by granting them legal agency with respect to their separate property.[168]

2. "Kicking or Kissing" a Wife's Separate Estate from Her

Another question that troubled Chancery was what resulted when a wife voluntarily chose to give assets from her separate estate to her husband. In some cases, the husband and wife had a happy and successful marriage, and the exchange was mutually beneficial. In assessing exchanges and transactions between spouses, however, Chancery recognized the danger of an imbalance in bargaining power between a wife and her husband. The fear was that a husband could "kiss or kick" a wife's separate property from her.[169] Despite these paternalist concerns and the fear of coercion, Chancery generally upheld a wife's right to direct income from her separate estate to benefit her husband. These affirmations of a women's right to direct her separate estate income and assets demonstrated support for a wife's economic agency.

For example, in a case where the trustees tried to stop a wife from giving separate estate assets to the husband, the court sided with the wife. In *Ellis v. Atkinson*, the plaintiff wife was possessed of a separate estate of £2000 that had been settled to her upon marriage.[170] The wife entered into an agreement to give over the income from her estate to her husband and brought a bill against the trustees when they would not execute the agreement. The trustees questioned whether the wife could so direct her property, especially because the trust was established to "protect her against the debts of her husband."[171] The Chancellor held it was "in the absolute power of the wife"[172] to direct income to her husband, and, because "it was evidently her pleasure to give it to her husband, he did not see how he could prevent her."[173]

Similarly, in *Pawlet v. Delaval*, the court characterized the wife's conversion of her separate estate into liquid assets to give her husband as a valid exercise of power.[174] In that case, the wife was possessed of a separate estate of £23,000 derived from an inheritance from her mother. The trust, intended for the wife's sole and separate use, did not contain any conditions on its use. The wife, acting with the approval of the trustees, decided to convert the separate estate into assets for her and her husband's joint use. Subsequently, the husband died and the assets became a part of his estate. The wife soon remarried, and

168. For a discussion of married women and creditors under coverture, *see* James Oldham, *Creditors and the Feme Covert*, *in* LAW AND LEGAL PROCESS 217 (M. Dyson and D. Ibbetson eds., 2013).

169. SPRING, *supra* note 8, at 115.

170. Ellis v. Atkinson, (1792) 21 Eng. Rep. 466 (Ch.); Dickens 759.

171. *Id.* at 466; Dickens at 760.

172. *Id.*

173. *Id.*

174. Pawlet v. Delaval, (1750) 28 Eng. Rep. 422 (Ch.); 2 Ves. Sen. 663.

she and her second husband brought a bill, requesting that Chancery set aside the deeds by which the wife had ended her separate estate.

The Chancellor began by stating that it was "the duty of this court to protect a *feme covert* from any inadvertent act of hers, and not to presume she intended to part with that property." [175] For this reason, the court was "careful to prevent her affection and obsequiousness, or her fears, from operating to her prejudice."[176] The Chancellor, however, found "no pretence of any compulsion, fraud or imposition . . . ."[177] Rather, the Chancellor remarked that the couple "lived in the best harmony,"[178] and stressed that the wife had presented no objections to divesting herself of her separate estate at any time—at the time of the agreement, during the subsequent twelve years of the first marriage, or after the death of her husband when she was acting as executrix. As executrix, she had settled her husband's account according to the will and never questioned that these assets that were once her separate estate formed part of her husband's estate. The consent of the trustees also militated in favor of the voluntariness of the wife's signing over her estate. The Chancellor consequently dismissed the bill.

Furthermore, although Chancery took an allegation of coercion seriously, such an allegation did not always result in a ruling against the husband. In *Pybus v. Smith*, Anna-Maria Vernon, a ward of the court, was married to Thomas Vernon.[179] Upon her marriage and "in pursuance of a decree of the Court of Chancery," wife and husband established a separate estate consisting of a house and its land, the rents from which were to go to the wife for her sole and separate use.[180] The husband was a trader and, finding himself "considerably in advance on his account,"[181] came to an agreement with his bankers that they would continue to advance him money and he would use his wife's separate estate as security. The wife signed an agreement directing her trustees to pay the income from her separate estate to her husband and also make available to her husband the real estate that she held in trust.[182] Relying on this agreement, the husband's bankers brought a bill to recover their losses from the wife's separate estate.

The wife argued that she had not understood the import and consequences of the agreement at the time she signed it, and defense counsel highlighted her innocence by reminding the court, "Mrs. *Vernon* was an infant, and a ward of

175. *Id.* at 424; 2 Ves. Sen. at 665.
176. *Id.*
177. *Id.* at 425; 2 Ves. Sen at 668.
178. *Id.* at 425; 2 Ves. Sen at 667.
179. Pybus v. Smith, (1791) 29 Eng. Rep. 570 (Ch.); 3 Bro. C.C. 340.
180. *Id.* at 570; 3 Bro. C.C. at 340.
181. *Id.* at 571; 3 Bro. C.C. at 341.
182. *Id.*

this Court, when *Vernon* carried her off to *Scotland.*"[183] Defense counsel also emphasized that the wife had not consulted with the trustees before signing the agreement relinquishing control of her separate estate to the husband. The plaintiff bankers, eager to be paid, "argued that a *feme covert* was, as to her separate property, exactly in the same state as a *feme sole.*"[184] The Chancellor, who had doubts as to the wife's understanding upon entering the agreement, ordered a master's inquiry into the circumstances of the signing. The Master, however, found that the wife executed the agreement "freely and readily, and that no arguments or persuasions were used, at the time of executing the said deeds, by any person, to induce them to execute the same."[185] Accordingly, although the Chancellor considered the wife's act "improvident,"[186] he held for the bankers, saying that if "a *feme covert* sees what she is about, the Court allows of her alienation of her separate property."[187]

In the 1750 case of *Grigby v. Cox*, the court likewise dismissed claims of coercion and ruled that a wife's actions with respect to her separate estate were legally valid.[188] In that case, an estate had been settled on the wife upon marriage and placed in the hands of trustees who would "receive the rents and profits for [the wife's] sole and separate use."[189] The wife sold part of her separate estate to the plaintiff, completing the sale without consulting the trustees. When the wife did not perform, the plaintiffs brought the bill in Chancery for specific performance of the bargain.[190] The wife argued that her husband was in collusion with the plaintiff, and that he had compelled her to sell the land. She claimed that she executed the deal "for fear of losing her life if she refused."[191]

The Chancellor, however, concluded that: "[W]here any thing is settled to the wife's separate use, she is considered as a feme sole; may appoint in what manner she pleases."[192] The Chancellor noted that an exception to the rule existed when "the joining of her trustees with her is made necessary," but found that there was no requirement of trustee approval in the case at hand.[193] The Chancellor observed that "if there is any proof that the husband had any im-

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183. *Id.* at 572; 3 Bro. C.C. at 344. After Lord Hardwicke's Marriage Act of 1753, it was much easier to get married in Scotland than in England. "As a border town, Gretna Green in Dumfries thrived on the business thrown to it by the strictures of the Marriage Act of 1753, and the term 'Gretna Green marriage' acquired a reputation similar to that of 'Las Vegas divorce'." SAMUEL P. MENEFEE, WIVES FOR SALE: AN ETHNOGRAPHIC STUDY OF BRITISH POPULAR DIVORCE 11 (1981).

184. *Pybus,* 29 Eng. Rep. at 572; 3 Bro. C.C. at 344.

185. *Id.* at 572; 3 Bro. C.C. at 343.

186. *Id.* at 573; 3 Bro. C.C. at 347.

187. *Id.* at 573; 3 Bro. C.C. at 346.

188. Grigby v. Cox, (1750) 27 Eng. Rep. 1178 (Ch.); 1 Ves. Sen. 517.

189. *Id.* at 1178; 1 Ves. Sen. at 517.

190. *Id.*

191. *Id.*

192. *Id.* at 1178; 1 Ves. Sen. at 518

193. *Id.*

proper influence over the wife in it by ill, or even extraordinary good usage, to induce her to it, the court might set it aside: but not without that."[194]

Consequently, the clearest paths for wives to recover assets from her separate estate in the absence of extreme coercion by the husband, was a claim that the trustees breached their fiduciary duty. *Thayer v. Gould*, from 1739, was such a case. Humphrey Thayer was the trustee for the separate estate of Anne Thayer.[195] A marriage settlement had established a trust in the amount of £2000 for the use of the husband during his life, becoming the wife's jointure upon the husband's death.[196] Needing money, the wife and husband applied to the trustees to use £1000 of the trust's principal, and the trustees approved.[197] The couple then came to a new agreement that the remaining £1000 of the trust assets were to be "laid out in the purchase of an annuity, which should be for the sole and separate use of the wife during the coverture, and in fee in case of survivorship."[198] After the couple created the separate estate for Mrs. Thayer, her husband "found means to prevail upon *Humphrey Thayer* to pay him this £1000 likewise."[199] The husband died, without having repaid the sum to the separate estate, leaving the "plaintiff destitute, there being no assets."[200] The wife brought her bill against Humphrey Thayer's estate for breach of trust, and the court ordered that the wife receive a quarterly, tax-free annuity for life out of the husband's estate.

Similarly, in 1798, in *Whistler v. Newman*, the wife's separate estate had been established, just prior to her marriage, and two trustees were appointed.[201] One of the trustees was an uncle and creditor of the husband. When the husband needed money to pay his debts, the trustees transferred assets in the form of stock from the wife's separate estate to the husband. Nine years later, the husband had not repaid the money and died "insolvent[,] leaving his wife and six children by her surviving."[202] The trustees did replace the stock, approximately a year after the husband's death, but the widow brought a bill against the trustees to recover the dividends that she would have earned had the stock not been sold. Defense counsel contended that the stock was "sold out at her instance and request, and with her privity, consent, and direction."[203] The Chancellor, however, concluded that the trustees had taken "an active and most

194. *Id.*
195. Thayer v. Gould, (1739) 26 Eng. Rep. 386 (Ch.); 1 Atk. 615.
196. *Id.* at 386; 1 Atk. at 615.
197. *Id.*
198. *Id.*
199. *Id.* at 387; 1 Atk. at 616.
200. *Id.*
201. Whistler v. Newman, (1798) 31 Eng. Rep. 67 (Ch.); 4 Ves. Jun. 129.
202. *Id.* at 68; 4 Ves. Jun. 131.
203. *Id.*

mischievous part."[204] He remarked: "I do not recollect to a case, where the trustee has stood before me, aiding the husband ruin his family."[205] The Chancellor thereafter ordered trustees to make restitution by paying the wife lost stock dividends.

Even in cases when the court failed to protect the separate estate assets, then, Chancery did a service to married women by treating them as agentic beings possessed of the right to dispose of assets according to personal choice and not subjecting these choices to judicial revision. It is possible that Chancery extended judicial support in these cases because the husband ultimately benefitted. That is, outcomes that benefitted the husband many have been more palatable to the court because they aligned with both coverture rules and social norms regarding traditional marital property.[206] Accordingly, some form of interest convergence may have propelled the support for a married woman's control over her separate property. Nonetheless, the court did married women a service by avoiding the assumption that they had no control over their actions with respect to their separate property and supporting their right to direct the assets in their separate estates.

C. A Wife's Right to Devise Her Separate Estate

Similar questions concerning the extent of a wife's power with respect to her separate estate arose in the context of wills. The central question in these cases was whether a wife had the legal right to devise her separate estate. The general rule for a wife's devise, the Chancellor stated in *Grigby v. Cox*, was that "where any thing is settled to the wife's separate use, she is considered as a feme sole."[207] This proposition was affirmed and clarified in cases that followed. In another leading case, *Fettiplace v. Gorges*, the court clarified that a wife did not need her husband's consent to will her separate estate when it consisted specifically of various forms of personal property.[208] In that case, Sophia Fettiplace, the wife, had a separate estate, consisting of annuity income, established for her sole and separate use by her husband upon marriage, and another estate established by her aunt through a bequest, consisting of stock and furniture. When Sophia died, she left the entirety of the combined estate to her niece, instead of her husband, who was apparently improvident and had been

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204. *Id.* at 70; 4 Ves. Jun. 135.

205. *Id.*

206. This was also true with respect to women devising their property, i.e. Chancery was supportive, particularly to the extent that married women's devises aligned with the family interest in maintaining the family estate. *See* discussion *infra* pp. 40-42.

207. Grigby v. Cox, (1750) 27 Eng. Rep. 1178 (Ch.) 1178; 1 Ves. Sen 518, 518.

208. Fettiplace v. Gorges, (1789) 29 Eng. Rep. 374 (Ch.); 3 Bro. C.C. 8.

previously "embarrassed and obliged to go abroad."[209] The husband brought a bill in an attempt to recover the estate, claiming that his wife did not have the power to dispose of it without his consent.[210] The court dismissed the bill and affirmed that, if a wife's separate estate was solely comprised of personal property, the wife could dispose of the estate without her husband's permission or any other accompanying grant of authority.[211]

But while women could clearly devise personal property, real property was another question. In *Peacock v. Monk*, Chancery was faced with the question of how to treat a married woman who tried to devise a house bought with the proceeds from her separate estate. The Chancellor began by remarking that "it is common, that by agreement between husband and wife she has some separate estate left for her disposal . . . which she may not only use, but by the contract may dispose of what arises out of her [separate estate], as a *feme sole*."[212] He proceeded, however, to qualify the rule by stating, "It is very different as to real estate; for her real estate will descend to her heir at law."[213] The Chancellor asked rhetorically, "How can a will made during [the wife's] coverture prevent the descending to her heir at law? It is impossible."[214] Mrs. Lestock's devise of real property failed.

Questions of real property distribution arose once again in *Churchill v. Dibben*. In that case, the wife, Elizabeth Dibben, left various forms of property to her relations, including her husband, in her will. The court treated the various forms differently, according not only to type of property but also according to whether or not the property had been placed in trust before marriage. A portion of the lands she devised—"some farms, & some freehold, others leasehold"—were lands she had purchased during coverture.[215] The Chancellor therefore reiterated what *Peacock v. Monk* had earlier suggested:

> If part of that personal estate is laid out in the purchase of lands, though those lands are the fruit of, and do arise from, that separate estate, there is no authority to say, she may dispose of them, for there comes in another person, an heir at law, to be disinherited, and he cannot be bound by any agreement of the husband.[216]

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209. 2 R. S. DONNISON ROPER, A TREATISE ON THE LAW OF PROPERTY ARISING FROM THE RELATION BETWEEN HUSBAND AND WIFE, 184 (New York, Gould & Son 1824).

210. *Fettiplace*, 29 Eng. Rep. at 374; 3 Bro. C.C. at 8.

211. *Id.* at 375; 3 Bro. C.C. at 10.

212. Peacock v. Monk, (1750) 28 Eng. Rep. 123 (Ch.) 123; 2 Ves. Sen. 190, 190.

213. *Id.* at 124; 2 Ves. Sen. at 192.

214. *Id.*

215. Churchill v. Dibben, (1754) 96 Eng. Rep. 1310 (Ch.) 1311; 3 Keny. 67, 69.

216. *Id.* at 1316; 3 Keny. at 84.

The Chancellor concluded, "[w]here lands are purchased after [marriage], there is no trust, no use that can give force to an appointment of them."[217] The heir at law was therefore entitled to inherit the freehold land that Elizabeth Dibben had purchased with the proceeds from her separate estate while married.[218]

Apart from the lands Elizabeth Dibben had purchased during her marriage, she was also the owner of other, substantial freehold lands that she conveyed upon marriage to the use of herself for life and, in strict settlement, to the issue of her marriage or, in the absence of issue, part to her husband and part to the trustees and their heirs.[219] Dibben also bequeathed the remainder of her "goods, chattels, estates, and estate whatsoever undisposed of . . . unto [her] kinsman, Richard Churchill, the Younger, to him, his heirs, executors, and assigns, for ever."[220] She reserved for herself the power of appointment with respect to these estates.[221] When Elizabeth died childless, Richard Churchill, her heir at law, filed a bill to ascertain the rights of the various parties and obtain an accounting.[222]

Addressing the question of whether the devise of these other parcels of land was a good execution of the power, the Chancellor concluded that a married woman possessed full authority to devise any property, including freehold property, if she had properly conveyed the property to herself in trust prior to marriage and reserved the power of appointment to herself.[223] In *Peacock*, Lord Hardwicke had speculated that, given the proper conveyance, a married woman could direct her separate estate to the benefit of someone other than the heir at law.[224] In *Churchill*, that speculation became legal conclusion.

Because the wife had conveyed the property to herself in trust and given herself the power of appointment, the court could find no reason she did not have the power to devise it. The Chancellor stated:

> "This was originally the testatrix's own estate; she has settled it to herself for life, and after in strict settlement, with a power to dispose of it . . . [and] the reversion in fee was in herself, and, unless she disposed of

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217. *Id.* at 1317; 3 Keny. at 85.

218. *Id.* The court held the devise of the leasehold land purchased during coverture to be good, however, passing it as personal property to her brother.

219. *Id.* at 1311; 3 Keny. at 68.

220. *Id.* at 1311; 3 Keny. at 70.

221. *Id.* at 1311; 3 Keny. at 69.

222. *Id.* at 1311; 3 Keny. at 70.

223. *Id.* at 1311; 3 Keny. at 85.

224. Peacock v. Monk, (1750) 28 Eng. Rep. 123 (Ch.) 124; 2 Ves. Sen. 190, 191. ("Undoubtedly on her marriage a woman may take such a method, that she may dispose of that real estate from going to her heir at law; that is, she may do it without a fine; but I doubt whether it can be done but either by way of trust or of power over a use.").

> it, would remain in her and descend to her heirs."[225] Furthermore, the court asked "[w]hat, then, is the difference between her case and that of a person who has a general capacity by virtue of the Statute of H.8 [The Statute of Wills]?"[226]

The answer was that there was indeed no difference and the devise of these properties was consequently good. With respect to the remainder of the estate devised to Richard Churchill, the Chancellor employed a similar logic: "[H]ad this been the will of a person who had a general capacity to dispose of lands, . . . such lands would certainly have passed."[227] And so the remainder of the estate, including a grant of £1,000 reserved for the executor, went to Richard Churchill.[228]

Ten years later, *Wright v. Cadogan* came before Chancery. The court was again called upon to decide whether the will of a married woman, who by marriage articles had reserved to herself the power of disposing her separate estate (which included both real and personal property), was a valid execution of the power.[229] In that case, a wife created a separate estate for herself in anticipation of her second marriage. The wife had a jointure from her first marriage and "great expectations of a considerable accession of fortune from several relations" that formed her separate estate, the terms of which allowed her to devise all the property and assets in the trust.[230]

The wife devised her estate to trustees, with provisions for her husband and the children from her second marriage, and when she died, her son from the first marriage filed a bill requesting that half the estate be conveyed to him.[231] Lord Northington held that the wife had the right to devise property—both real and personal—in her separate estate and denied the bill.[232] Stating the rule and citing *Churchill*, the Chancellor remarked:

> "[A] woman may now antecedent to her marriage retain a power over a legal estate of which she is seised, so as to have during the coverture a power to dispose of it . . . in the same manner as she might have done if she had not put herself under coverture."[233]

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225. *Dibben*, 96 Eng. Rep. at 1316; 3 Keny. at 82.
226. *Id.*
227. *Id.* at 1315; 3 Keny. at 81.
228. *Id.* at 1317; 3 Keny. at 86-87.
229. Wright v. Cadogan, (1764) 28 Eng. Rep. 890 (Ch.) 890; 2 Eden 239, 239.
230. *Id.* at 891; 2 Eden at 242.
231. *Id.* at 892; 2 Eden at 244-45.
232. *Id.* at 897-98; 2 Eden at 260.
233. *Id.* at 895; 2 Eden at 252.

The Chancellor further added: "This has been the established doctrine espoused and adopted by the court, after having been controverted for a great length of time."[234]

Finally, in *Rippon v. Dawding*, Lord Camden ruled for the wife's right to direct property in the case of a widow who was seised of a freehold estate and entered into a bond with her second husband, previous to their marriage, allowing her to dispose of her freehold estate by deed or will notwithstanding her coverture. "As the Court decreed performance of the agreement in *Wright v. Lord Cadogan*, which was a trust interest, it will do so in this, which is the case of a legal interest."[235] In a subsequent note to the opinion, the Editor remarked: "The present case, and that of *Wright v. Englefield*, settled what had before been doubted [in *Peacock v. Monk*] . . . that the husband and wife may, by mere agreement [made in contemplation of marriage], enable the wife to dispose of her real estate during coverture, and, thereby defeat the right of the heir after her death."[236]

In a matter of fifteen years, due in large part to the decision in *Churchill v. Dibben*, a married woman's right to devise both real and personal property from her separate estate became entrenched. Chancery transformed the treatment of a married woman's real property by recognizing her right to devise it when it was placed in separate trust before the marriage and the wife possessed the power of appointment. This evolution, perhaps more than anything, demonstrates the great benefit that the separate estate provided to married women. That a wife could not only enjoy the income from her separate estate but could also dispose of the assets to her liking, as long as they were in trust, lends strong support to the characterization of the separate estate as trust form that was materially beneficial to married women.

III. A REVISED ASSESSMENT OF THE SEPARATE ESTATE

What remains is to assess the impact of these separate estate cases in order to understand what utility the separate estate had for married women. The prevailing view of the separate estate is that it was not a particularly effective vehicle for extending property rights to married women.[237] Susan Moller Okin has

234. *Id.* at 895; 2 Eden at 253.

235. Rippon v. Dawding, (1769) 27 Eng. Rep. 363 (Ch.) 364; Amb. 565, 566.

236. *Id.* at 365; Amb. at 566.

237. See the discussion *infra* in the Introduction and Part I.B. There are, nonetheless, historians who celebrate the separate estate and Chancery's equitable interventions into married women's property ownership. Maria Cioni has stated that "[p]roviding security for married women while their spouses were alive and permitting them to have an estate at their own disposal was a major innovation developed in the Elizabethan Chancery." CIONI, *supra* note 13, at 286. Moreover, she has argued that Chancery, in response to changing social conditions and because of legal claims from married women, developed particular forms of equitable relief. *Id.* at 280.

pointed out that a wife's right to own and control property, when held in separate trust, was necessarily subject to control by trustees, underscoring the wife's lack of full capacity.[238] In addition, because of restrictive trust terms established by the trust settlor, the wife sometimes received trust income, but was unable to touch the principal. Susan Staves therefore argues that "the very rules that conferred ownership on women gave them a kind of ownership different from that imagined in a liberal property regime—entitlement to profit from capital, but not control over capital itself or the power to alienate capital."[239] Moreover, Staves points out that cultural norms and expectations weighed against women "understanding their entitlements or controlling their assets."[240]

A related argument, put forth by Staves and others, is that in the case of women's property, "private law rules . . . express[ed] public ideologies"[241] and that the dominant ideology being expressed at the time was wealth preservation for the family. Like Eileen Spring,[242] Staves suggests that conventional concern for the maximization and preservation of great estates tended to result in the dispossession of women through the application of idiosyncratic property rules.[243] According to this argument, the fact that the rules governing married women's property were designed to accumulate and maintain great estates prevented the rules from simultaneously endowing daughters and wives with economic agency.

The conception of the separate estate as a conservative and patriarchal form of property holding has great merit. It is undoubtedly true that idiosyncratic property rules sometimes kept married women from enjoying full power over their separate property, and that the separate estate was a useful vehicle for preserving family wealth and great estates. Furthermore, families were certainly motivated to create these trusts as much to protect against a potentially irresponsible and spendthrift son-in-law as to provision the daughter, as is clear from the standard language used in creating a separate estate.

The separate estate was, however, only as conservative or paternalistic as the terms that created it. The terms of a trust—how it was written and what restrictions it contained—dictated the amount of control that a wife had over her separate estate. In some cases, fathers or other relatives wrote restrictions into the trust, safeguarding money by disallowing women to invade principal. However, in other cases, trust settlors created trusts that gave women full authority over both income and principal. Furthermore, when women created separate

238. *See* Okin, *supra* note 7, at 125.
239. STAVES, *supra* note 8, at 222.
240. *Id.*
241. *Id.* at 196.
242. SPRING, *supra* note 8, at 39-65.
243. STAVES, *supra* note 8, at 199-208.

estates for themselves before marriage, they generally gave themselves full authority over the assets placed in trust.

The separate estate was not created nor used as a tool for female empowerment. Nonetheless, I propose that the separate estate was a vehicle that furthered the rights and well-being of married women. In this Part, I discuss the importance of the separate estate for married women in practical, precedential, and theoretical terms. I discuss the material benefits that flowed to married women from their separate estates, endowing them with economic agency. I also discuss the importance of the separate estate in making women legal actors and setting legal precedent for increased rights-holding. Finally, I discuss the value of the separate estate as a tool for fracturing the unitary theory of marriage.

A. Married Women as Economic Actors

On a very basic economic level, a wife's separate estate was the source of many material benefits. Even in the absence of marital conflict, the financial subsidy that a wife received from her separate estate could only be helpful. The separate estate provided income to the wife that was guaranteed and not dependent on the largesse of her husband. Wives certainly had access to money in forms other than the separate estate—annuities established in marriage contracts or other non-trust forms of allowance.[244] Nonetheless, having a guaranteed source of income that was not reachable by a husband or his creditors added a layer of security and gave the wife some economic bargaining power within the marriage.

Moreover, as the marital separation cases illustrate, judicially created separate estates allowed wives to live apart from their husbands in cases of abuse, cruelty, and other marital conflict. Chancery was tolerant, to a certain degree, of marital separation—especially in the case of abuse—and willing to enforce the terms of a separate estate and also to create separate estates to provide married women with the means to support themselves. Because of these judicially created separate estates, mistreated wives were not forced to seek public assistance, live in penury, or beg for subsistence funds from their husbands. Instead they had a modicum of income and were able to be self-supporting and economically independent. By provisioning wives with the economic resources to live apart from their husbands in these situations, the court provided great benefit to women by allowing them to escape from unhappy and harmful marriages.

In addition, because a wife's separate estate could act as a creditor with respect to the husband and recover money borrowed from or charged to the es-

244. *See* STAVES, *supra* note 8, at 132; *see also* ERICKSON, *supra* note 5, at 103-04.

tate, these trusts were not a freely accessible source of income for the husband. Married women had judicial recourse when their husbands mortgaged their separate estates to raise funds, charged personal expenses against the separate estate, or similarly misappropriated assets. In this way, the separate estate provided the benefit of secure assets for married women that were not automatically under their husbands' control. All of these practical and economic benefits flowed from a married woman's separate estate, even assuming a restrictive trust that provided a wife with access to income alone.

Women did not just control income, however. As the cases concerning will challenges and estate accountings demonstrate, married women did in fact have the ability to alienate their separate estate property, and not just personal property but also real property, as long as it had been placed in trust before marriage. Wives were therefore able to choose how and to whom to transfer their wealth. In some of the separate estate cases, wives controlled great bodies of wealth and capital.

It is possible that Chancery supported a wife's right to dispose of property because the testation patterns of the married women in these cases aligned with the goal of family wealth preservation. When married women devised their separate estates, the results did not necessarily differ from those cases in which the wives possessed no power to devise the property. That is to say, married women's devises in the separate estate cases followed a specific pattern, namely giving assets and income back to their birth families and giving husbands a life interest in various parts of their estates, especially when there were no children.

In *Churchill v. Dibben*, Elizabeth Dibben, who died childless, left her husband a life estate in certain properties but upon his death these properties reverted to family ownership and the land passed to her brother. Moreover, in her will Dibben made generous gifts to her other brother, as well as a female relation from the Churchill side of the family.[245] Likewise, in *Kinnoul v. Money*, the husband was entitled to be a tenant by curtesy and had a life estate in certain of the wife's properties; however at his death the properties reverted back to her relations.[246] Furthermore, the wife had devised other properties to relations in her will, leaving the better part of her estate to family relations, not her husband. In *Fettiplace v. Gorges*, the wife left her estate to her niece instead of her husband, who was still alive when she died.[247]

These devises certainly support the idea that separate estate trusts were vehicles for consolidating family wealth. However, the devises also support the proposition that building family wealth and great estates did not necessarily

245. Churchill v. Dibben, (1754) 96 Eng. Rep. 1310 (Ch.) 1311; 3 Keny. 68, 69.
246. Kinnoul v. Money, (1767) 36 Eng. Rep. 830 (Ch.) 830; 3 Swans 202, 202.
247. Fettiplace v. Gorges, (1789) 29 Eng. Rep. 374 (Ch.) 374; 3 Bro. C.C. 8, 8.

come at the expense of married women. What these testation cases suggest is that married women, not just their fathers and male relations, had an interest in and desire for preserving the family estate. In fact, married women appointing their separate estates may have played an active rather than a passive part in keeping family wealth intact.[248] In this respect, the fact that women were directing and devising property through the use of the separate estate maps on to the proposition put forth by Lloyd Bonfield that "women were empowered by the 'culture of will-making' that obtained in early-modern England."[249] Additionally, this activity lends additional support to the findings of Tim Stretton, who has suggested that women "could, and many did, overcome the pressures of law, society, family and kin to claim interests for themselves inside courtrooms as well as out in the world."[250]

Speaking in practical terms, then, the separate estate cases underscore that women received economic benefit from their separate estate. Women were able to exit bad marriages, obtain purchasing power, and help consolidate family fortunes. Women became economic actors—some of them on acting on a prominent stage—thanks to the assets they held in separate estates.

B. Married Women as Litigants

Commentators on equity have often repeated the maxim that "equity follows the law."[251] In the case of a married woman's right to separate property, equity did not necessarily follow the law. While coverture was the rule at common law, "across the hall"[252] in the Court of Chancery, a materially different set of rules governed married women's property rights. Chancery was willing, as the cases demonstrate, to treat a wife as a person apart from her husband. Scholars have, consequently, made the connection between Chancery as a legal forum and the increase in women's rights. Maria Cioni has argued that "Chancery laid the foundations for married women's property rights, gave security to women who held real and personal estates [in trust] . . . and accorded a

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248. Married women may still have seen themselves as embedded in an ancestry that was not extinguished upon marriage. For example, Lady Anne Clifford construed her identity in terms of her inheritance and her obligations to her birth family. *See* Carla Spivack, *Law, Land, Identity: The Case of Lady Anne Clifford*, 87 CHI.-KENT L. REV. 393, 420 (2012).

249. LLOYD BONFIELD, DEVISING, DYING, AND DISPUTE: PROBATE LITIGATION IN EARLY MODERN ENGLAND 241 (2012). Women not only made wills, but also acted as executrices and administrators, and served as witnesses in probate courts. *Id.* Amy Erickson also has documented the great frequency with which wives acted as agents of absent husbands. ERICKSON, *supra* note 5, at 155-60.

250. STRETTON, *supra* note 12, at 154.

251. For a few representative discussions of this maxim, see 3 WILLIAM BLACKSTONE, COMMENTARIES *441 ("It is a maxim that equity follows the law."); JOSEPH STORY, COMMENTARIES ON EQUITY JURISPRUDENCE 40 (London, Stevens & Haynes 1884) ("In the first place it is a common maxim, that equity follows the law, *AEquitas sequitur legem.*"); and 1 SPENCE, *supra* note 58, at 421.

252. LANGBEIN ET AL., *supra* note 80, at 312.

right to separated or divorced women."[253] Tim Stretton has also emphasized that "[e]quity courts helped to protect the interests a woman wished to keep separate from her husband" by providing "flexibility" that the common law courts did not. [254] At a baseline level, Chancery benefitted married women by allowing them access to courts in the capacity of litigants and evaluating their claims on the basis of trust law—not according to coverture rules or canon law. In so doing, Chancery not only established married women as having their own economic interests, writing these women into legal record, but also established a precedent-setting jurisprudence with respect to a married woman's right to separate property.

1. Chancery as a Forum for Wives

The degree to which Chancery supported the separate economic identity of the wife by endowing her with property rights was tied to questions of marital reconciliation, moral behavior, household accounting, and property definition. In none of the cases, however, did Chancery refuse to consider the wife's claim because of coverture. Moreover, Chancery did not take up claims based on civil marital law, as practiced in the spiritual courts.[255] In fact, the Chancery court was very careful not to tread too heavily on ecclesiastical jurisdiction and maintained a policy of avoiding inquiry into the merits of marital disputes.[256]

Accordingly, unlike the spiritual and common law courts, Chancery was not overly constrained by legal rules and conventions about marital duties or the impairment of a woman's rights within marriage. Rather, the Chancellors defined their jurisdiction and their judicial approach to marriage against the other courts. The controlling factor in Chancery's taking jurisdiction in these cases was the presence of questions relating to the regulation of trusts.[257] Chancery had exclusive jurisdiction over the trust form because the common law, in

253. CIONI, *supra* note 13, at i.

254. STRETTON, *supra* note 12, at 27-29. Stretton also emphasizes that women were still dependent on access to resources and that, while equity courts were a wife's "allies," they were not her "legal saviour." *Id.* at 28.

255. Marital litigation could occur in various fora including but not limited to Chancery. For a discussion of the various fora in which women were litigants, see STRETTON, *supra* note 12, at 21-42. For an overview of the spiritual courts' jurisdiction and jurisprudence, see BAKER, *supra* note 36, at 233-43, and for an overview of the development of equitable jurisdiction and trust jurisprudence, see Michael Macnair, *The Conceptual Basis of Trusts in the 17th and 18th Centuries*, *in* ITINERA FIDUCIAE 211-12 (R. Helmholz & R. Zimmerman eds., 1998).

256. In *Legard v. Johnson*, the Chancellor stated plainly that the "Ecclesiastical Court according to the jurisdiction of this country has exclusive cognizance of the rights and duties arising from the state of marriage." (1797) 30 Eng. Rep. 1049 (Ch.) 1052; 3 Ves. 352, 359. This was especially true after the interregnum, once the church courts had been re-established and were adjudicating marital claims relating to divorce. *Id.*

257. LANGBEIN ET AL., *supra* note 80, at 311.

its "rigidity and strictness,"[258] did not recognize trusts.[259] Trust regulation defined Chancery's powers as well as its docket.[260] In *Legard*, consequently, the Chancellor stated that Chancery could rule on a separate maintenance case "where the property is only to be sued in this jurisdiction; where a trust is created; and there is no coming at it by the common law."[261]

The categories of claims married women brought to Chancery fell "broadly into two camps: proprietary . . . and contractual."[262] The husband filed a claim in *Kinnoul*, requesting an accounting from his wife's estate in the hope of relieving some of the debt inherited with her estate.[263] In *Churchill*, the heir at law filed for an accounting and clarification of whether the wife's appointment of her property was good.[264] In *Peacock*, the wife's trustee brought a bill demanding an accounting of expenditures from the husband's trustee after both spouses had died.[265] Claims concerning the ability of a wife to devise her separate estate also exemplified contested property interests held in trust. In *Fettiplace*, the husband filed a bill "insisting that his late wife had no power to make such will, he never having assented."[266] The plaintiff in *Wright* was a son from the wife's first marriage who did not receive the inheritance he wanted and therefore contested his mother's power of appointment over her property.[267]

Separate estate cases also fell into the camp of trust as a form of contract, and dealt specifically with contract enforcement.[268] Commentators have identified the trust as a type of agreement or contract,[269] and observed that the specific enforcement of agreements was "the core of equity."[270] Claims concerning an alimony order from the spiritual court or a private separation agreement implicated Chancery's jurisdiction over promissory arrangements and invoked

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258. William Searle Holdsworth, *The English Trust, Its Origin and Influence in English Law*, *in* 4 TIJDSCHRIFT VOOR RECHTSGESCHIEDENIS 367, 382 (1923).

259. R.H. Hemholz, *The Early Enforcement of Uses*, 79 COLUM. L. REV. 1503, 1503 (1979). ("[C]ommon law courts would neither enforce nor interpret the use . . . .").

260. "Trusts were clearly going to play a key role . . . because they were integral to a widely used conveyancing device, the strict settlement." Macnair, *supra* note 255, at 212-13.

261. *Legard*, 30 Eng. Rep. at 1053; 3 Ves. at 360. This was true as well in *Colmer v. Colmer*, when the husband placed all the family assets in trust and the Chancellor was forced to conclude that "the plaintiff has no remedy but in this Court." (1729) 25 Eng. Rep. 304 (Ch.) 306; Mos. 118, 121.

262. Macnair, *supra* note 255 at 235.

263. Kinnoul v. Money, (1767) 36 Eng. Rep. 830 (Ch.) 830; 3 Swans 202, 202.

264. Churchill v. Dibben, (1754) 96 Eng. Rep. 1310 (Ch.) 1311; 3 Keny. 68, 70.

265. Peacock v. Monk, (1750) 28 Eng. Rep. 123 (Ch.) 123; 2 Ves. Sen. 190, 190.

266. Fettiplace v. Gorges, (1789) 29 Eng. Rep. 374 (Ch.) 374; 3 Bro. C.C. 8, 9.

267. Wright v. Englefield, (1764) 27 Eng. Rep. 308 (Ch.) 309; Amb. 469, 470.

268. Commentators note that "the distinction between trusts and contracts has not always been easily drawn . . . " Neil G. Jones, *Aspects of Privity in England: Equity to 1680*, *in* IUS QUAESITUM TERTIO 162 (Eltjo J.H. Schrage, ed., 2008).

269. *See* FREDERIC W. MAITLAND, EQUITY: A COURSE OF LECTURES 29 (John Brunyate rev. ed., 2d ed. 1936) (1909); *see also* W.T. BARBOUR, THE HISTORY OF CONTRACT IN EARLY ENGLISH EQUITY 166 (1914).

270. Macnair, *supra* note 255, at 217.

Chancery's ability to enforce agreements.[271] For example, in *Fletcher v. Fletcher* the Chancellor affirmed that Chancery had the jurisdiction to "enforce performance of articles of separation," because the alimony award from the spiritual court had specified terms and created an obligation.[272] An alimony arrangement tied to a private separation agreement was regulable by Chancery alone because the common law would not recognize contracts between a husband and wife.[273]

In addition, many of the separate estate cases turned on the question of the liability of a wife's trust with respect to third party creditor claims. These cases, which turned on questions of privity, were "in one sense a question of the boundaries of trusts"[274] and also involved an analysis of the promisor's contractual duty.[275] Therefore, in *Legard*, the Chancellor remarked that Chancery had clear jurisdiction in separate estate cases "where a third party had intervened; and [the suit] was not only between the husband and wife."[276] In *Rutland*, a "bill was brought by a creditor of the husband's to subject [the wife's estate] to the payment of his debt," and Chancery evaluated the right of the creditor with respect to the wife's trust.[277] Creditors also filed bills for payment from a wife's separate estate in *Pybus*[278] and *Hulme v. Tenant*.[279] In *Clinton*, the wife brought the bill before Chancery, requesting that her estate be "exonerated . . . by the estate of her husband, from a mortgage made by the husband."[280] In these creditor cases, despite the fact that coverture was anachronistic in many commercial situations, the separate estate proved useful as a tool to protect the family against creditors.

Chancery dealt, therefore, with the separate estate cases because of legal questions relating to the trust form, and analyzed the legal claims of married women based primarily on principles of property and contract. Neither common law legal rules of coverture nor the canon law regulating marriage governed the legal analysis. Chancery was therefore able to view a wife's legal claims through a primarily economic rather than moral lens. Consequently

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271. Historically, because of their ecclesiastical backgrounds, "Chancellors carried with them into the court of Chancery the idea that faith should be kept; and enforced agreements . . . whenever they thought that in the interests of good faith and honest dealing, they ought to be enforced." 1 WILLIAM SEARLE HOLDSWORTH, A HISTORY OF ENGLISH LAW 456 (Little, Brown, and Company 1922) (1903).

272. Fletcher v. Fletcher, (1788) 30 Eng. Rep. 46 (Ch.) 47; 2 Cox. 99, 102.

273. Legard v. Johnson, (1797) 30 Eng. Rep. 1049 (Ch.) 1052; 3 Ves. 352, 358-59. ("The common law will not entertain a suit upon contract by a wife against her husband. Such a contract is incapable at law of producing any action.").

274. Jones, *supra* note 268, at 172.

275. *Id.* at 173.

276. *Legard*, 30 Eng. Rep. at 1053; 3 Ves. at 359.

277. Rutland v. Molineaux, (1688) 23 Eng. Rep. 651 (Ch.) 651; 2 Vern. 65, 65.

278. Pybus v. Smith, (1791) 29 Eng. Rep. 570 (Ch.); 3 Bro. C.C. 340.

279. Hulme v. Tenant, (1778) 28 Eng. Rep. 958 (Ch.); 1 Bro. C.C. 16. *Hulme* was a leading case affirming the wife's ability to charge her separate estate.

280. Clinton v. Hooper, (1791) 29 Eng. Rep. 490 (Ch.) 490; 3 Bro. C.C. 201, 201.

women were able to litigate their claims not just as wives but also as independent economic actors. Tim Stretton has remarked that "[w]omen, in this sense, were litigants like any others, and the [courts of equity that] heard their causes concentrated on the guilt or innocence of the parties before them, rather than on whether they were male or female."[281]

2. The Separate Estate as Legal Template

Chancery's separate estate jurisprudence not only allowed women to be legal actors in a public, judicial forum but also formed a body of law that created strong precedent for the subsequent increase in married women's property rights. Married women were, thanks to Chancery, put on the record as juridical beings who were "uncovered" for purposes pertaining to their separate estates. These judicial holdings were cited in subsequent case law in both England and America. The cases were also reproduced in legal treatises concerning marital property and trust administration. Ultimately, they constituted a template that future courts and legislatures would adopt with respect to the provision of married women's property rights.

Chancery, in the decades leading up to the Married Women's Property Acts, continued to provide settlements or maintenance to a wife if she was subject to cruelty or abandonment. The Chancellor in *Barrow v. Barrow* stated that, "where the cause of the separation is the fault of the husband, and that it is by reason of his misconduct that she is unable or refuses to live with him," a wife's "equity" or right to a settlement was clear.[282] The rule, stated narrowly, was that Chancery would interfere and provision the wife financially from her pre-marital property "where the husband has been guilty of cruelty, turned the wife out of doors, or quitted the kingdom without making any provision for her."[283]

In cases concerning creditors' rights—a fast increasing set of cases in the nineteenth century—Chancery continued to rule favorably for creditors, which meant affirming a wife's right to make liable her separate estate. For example, in *Murray v. Barlee*, a case concerning a married woman's liability for legal fees incurred when separated from her husband, the court followed the rule that married women were liable for their own debts. The Chancellor stated: "Her separate existence, both as regards her liabilities and her rights, is [in this court]

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281. STRETTON, *supra* note 12, at 153. Stretton analyzes women as litigants in the Court of Requests, a minor equity court. Stretton also notes, however, that husbands' "position as masters of their own families was never seriously put under threat." *Id.*

282. Barrow v. Barrow, (1854) 52 Eng. Rep. 208 (Ch.) 210-11; 18 Beav. 529, 536. *Barrow* holds that "[a] wife's equity to a settlement includes all unsettled property to which she is entitled, whether it be vested in her in interest before or after the marriage"). *Id.* at 208; 18 Beav. at 529.

283. Duncan v. Duncan, (1815) 35 Eng. Rep. 549 (Ch.) 550; G. Coop. 254, 256.

abundantly acknowledged."[284] Moreover, citing *Master v. Fuller*,[285] the Chancellor concluded that a married woman was liable for her debts because these cases set forth the "foundation of the doctrine" that "the wife has a separate estate subject to her own control, and exempt from all other interference or authority. . . . [T]he very object of the settlement which vests it in her exclusively is to enable her to deal with it as if she were discovert."[286]

Reinforcing the strength of these foundational holdings, English treatise writers repeated and circulated Chancery's decisions. One treatise writer observed: "When the Court first established the separate estate, it violated the laws of property between husband and wife; but it was thought beneficial, and it prevailed. It being once settled that a wife might enjoy separate estate as a feme sole, the laws of property attached to this new estate."[287] R.S. Donnison Roper, in his frequently-cited treatise, had an extensive chapter dedicated to detailing Chancery's case law concerning "The Wife's Power over Her Separate Property in Opposition to the Marital Rights of Her Husband."[288] Treatise writers discussed and debated the finer points of separate estate doctrine, in addition to relaying judicial opinion, and in so doing entrenched the separate estate in legal doctrine.[289]

The property rights provided by the separate estate also acted as a model and template for married women's property rights in the future statutory enactments—the Acts that would, in the minds of many, bring about an end to coverture.[290] In 1870, the United Kingdom passed its first Married Women's Property Act, and married women gained rights over any earnings that they obtained separate from their husbands.[291] Married women also gained control over personal property held in bank accounts, stocks, or shares, as well as the right to any amount under £200 left to them in wills, and the right to control the rent from any freehold and copyhold property bequeathed them.[292] In 1882,

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284. Murray v. Barlee, (1834) 40 Eng. Rep. 80 (Ch.) 84; 3 MY. & K. 220, 222.

285. Master v. Fuller, (1792) 29 Eng. Rep. 757 (Ch.); 4 Bro. C.C. 19.

286. *Murray*, 40 Eng. Rep. at 85; 3 MY. & K. at 223. While married women were held increasingly liable for debts, the right of alienation was highly contested in the nineteenth century. Chancellors during this period, in response to the expansive rights granted by their predecessors, used the "restraint on anticipation" to limit a wife's right to alienate or borrow money against her separate estate. *See* STAVES, *supra* note 8, at 153. The restraint on anticipation appeared around the turn of the century and was well established by the 1830s. *Id.*; *see also* SPRING, *supra* note 8, at 115.

287. 2 JOHN EDWARD BRIGHT, A TREATISE ON THE LAW OF HUSBAND AND WIFE, AS RESPECTS PROPERTY 287 (London, William Benning & Co. 1849).

288. ROPER, *supra* note 209, at 151.

289. *See, e.g.*, LEONARD SHELFORD, A PRACTICAL TREATISE ON THE LAW OF MARRIAGE AND DIVORCE 398 (London, S. Sweet 1841).

290. *See, e.g.*, MARY LYNDON SHANLEY, FEMINISM, MARRIAGE, AND THE LAW IN VICTORIAN ENGLAND, 1850-1895, at 103 (1993).

291. Married Women's Property Act, 1870, 33 & 34 Vict. 93 (U.K.).

292. Mary Beth Combs, *Wives and Household Wealth: The Impact of the 1870 British Married Women's Property Act on Wealth-Holding and Share of Household Resources*, 19 CONTINUITY & CHANGE 141, 145 (2004) ("[T]he Act provided women with the opportunity to change their investment

Parliament amended the Act, expanding the protections offered to married women and creating a more comprehensive set of rights. These additional rights and responsibilities of property-ownership came almost directly from separate estate rules.

The amended Act stated: "A married woman shall, in accordance with the provisions of this Act, be capable of acquiring, holding, and disposing by will or otherwise, of any real or personal property as her separate property, in the same manner as if she were a feme sole, without the intervention of any trustee."[293] Married women were also capable of rendering themselves liable for amounts pledged from their separate property, and the Act provided creditors with recourse against both husbands and wives trying to shield separate property. Moreover, a wife could act as a creditor, last in line as with the separate estate, when she loaned money to her husband from her separate property. The language from separate estate trust instruments and Chancery decisions served as a model for statutory language.

Furthermore, the influence of the separate estate travelled across the Atlantic. Early American treatise writers and commentators on equity voiced support for the separate estate and generally accepted the trust form as inherited from the English.[294] In *Law of Baron and Femme*, Tapping Reeve stated that the broad contours of the separate estate were "fully established."[295] According to Reeve: "A wife may have separate property, distinct from her husband, in which the husband has not any interest, both in personal and real estate."[296] Similarly, James Clancy, in his *A Treatise of the Rights, Duties and Liabilities of Husband and Wife*, agreed that "every species of property may be conveyed to trustees for the separate use of a married woman, and a court of equity will enforce the performance of the trust, and protect it against the legal rights of the husband."[297]

The separate estate also had some notable successes in American state courts, particularly in those states that had established chancery courts and sup-

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portfolios and shift wealth-holding from forms of real property to forms of personal property, such as stocks, that had the potential to earn higher real returns").

293. Married Women's Property Act, 1882, 45 & 46 Vict. 75, § 1 (U.K.).

294. Lawrence Friedman points out that Americans were the most "avid customers" when Blackstone's *Commentaries* were published, and a 1771 American edition sold 1,557 sets on a subscription basis making it one of the most "ubiquitous [texts] on the American legal scene." LAWRENCE M. FRIEDMAN, A HISTORY OF AMERICAN LAW 102 (1985). Friedman adds, "Lawbooks were more common in the 18th century. But a lawyer's library was not full of books about *American* law; the books were English law books." *Id.*

295. TAPPING REEVE, THE LAW OF BARON AND FEMME, OF PARENT AND CHILD, GUARDIAN AND WARD, MASTER AND SERVANT, AND OF THE POWERS OF THE COURTS OF CHANCERY, WITH AN ESSAY ON THE TERMS, HEIR, HEIRS, AND HEIRS OF THE BODY 181 (Burlington, VT, Lucius E. Chittenden 1846).

296. *Id.* at 162.

297. JAMES CLANCY, A TREATISE OF THE RIGHTS, DUTIES AND LIABILITIES OF HUSBAND AND WIFE 255 (1828). Clancy noted that a "term of years" was the exception and could not be made into a separate estate. *Id.* at 495.

ported equitable jurisdiction.[298] In a typical 1874 case from Virginia, *Burnett v. Hawpe's Executor*, the state Supreme Court cited *Grigby v. Cox*[299] (as well as several other cases from the *Grigby* period) in affirming a married woman's right to her separate property. The court stated:

> It is the established doctrine of this court, that a married woman, as to property settled to her separate use, is to be regarded as a feme sole, and has the right to dispose of all her separate personal estate, and the rents and profits of her separate real estate, in the same manner as if she were a feme sole, unless her power of alienation be restrained by the instrument creating the estate.[300]

The court concluded that, because the terms of the separate estate gave the wife full control over the assets in the trust, the wife had full power to create an obligation and charge the separate estate.

The separate estate furthermore provided a template not just for English statutory enactments but also American ones. New York's Married Women's Property Act, passed in 1848, was a model for the states that subsequently passed similar legislation. The Act has a familiar ring to readers of the original Chancery cases:

> It shall be lawful for any married female to receive, by gift, grant devise or bequest, from any person other than her husband, and hold to her sole and separate use, as if she were a single female, real and personal property, and the rents, issues and profits thereof, and the same shall not be subject to the disposal of her husband, nor be liable for his debts.[301]

New statutory rights were modeled on and traced over those that had been pioneered by the separate estate.[302] In this way, the separate estate had prodigious precedential value, in the case law that followed as well as in statutory enactments, and was a forerunner to more modern forms of married women's property.

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298. *See* SALMON, *supra* note 13, at 81-140; *see also* Erwin C. Surrency, *The Courts in the American Colonies*, 11 AM. J. LEGAL HIST., 253, 272 (1967) (describing the mixed success of equity courts in the American colonies).

299. Grigby v. Cox, (1750) 27 Eng. Rep. 1178 (Ch.); 1 Ves. Sen 518.

300. Burnett v. Hawpe's Ex'r, 25 Va. (1 Gratt.) 481, 486 (1874).

301. 1848 N.Y. Laws 307, ch. 200, §3.

302. *See* ERICKSON, *supra* note 5, at 103 ("[The separate estate] is also important as the basis of the late nineteenth-century reform of married women's property law in both England and America.").

CONCLUSION

The separate estate was an innovative trust form that allowed women to own property at a time when the rules of coverture otherwise prohibited it. With a separate estate, created in anticipation of marriage by either the bride's family or by the bride herself, a married woman could control property and spend income that could not, in theory, be reached or controlled by a husband or his creditors.

Analyzing the claims that were litigated in Chancery, we can see that the most contentious aspects of the separate estate were access to income during marital separations, the rights of creditors, and the ability of the wife to devise her property in trust. As the Chancellor's decisions made clear, a wife's rights with respect to her separate estate were variable and partly conditioned on factors such as the terms of the trust agreement or the type of property. For these reasons, historians have not usually depicted the separate estate as a robust vehicle for enhancing and extending the property rights of married women.

This view of the separate estate does a disservice to the innovative nature of this trust form. The separate estate gave married women control of income, and allowed wives suffering from cruel and abusive treatment to live apart from their husbands. The separate estate enabled wives to recover money from their husbands, by acting as creditors on his assets and estate. Moreover, separate estate trusts were sometimes written such that the wife had control over both income and principal. Thanks to the separate estate, married women were able to devise property and direct sometimes-significant amounts of capital.

In addition, because Chancery had jurisdiction over questions pertaining to trust law and allowed claims from married women, these women gained a legal forum in which they were able to pursue claims and recover property. The separate estate helped to transform women into litigants. As litigants, exercising their nascent property rights, the wives who brought their claims to Chancery helped to build a body of precedential cases that served as the template for future statutory enactments, both in England and America, that granted married women property rights.

Finally, through the separate estate cases in the eighteenth century, Chancery firmly established the notion that law could treat a married woman as single for certain purposes. Chancery's separate estate jurisprudence, by establishing the married woman as a feme sole with respect to her separate property, fractured coverture's unitary rule and helped to entrench in the legal imagination the idea that married women could act, invest, spend, and litigate as individuals separate from their husbands. The axiomatic legal conclusion Chancery promulgated was that "where any thing is settled to the wife's separate use, she

is considered as a feme sole."[303] Taking this even further, in *Kinnoul v. Money*, the Chancellor stated that, in evaluating a separate estate case, he would consider a husband and wife "as two persons, and . . . dissolved the marriage, *quoad (for the duration of)* the transaction."[304]

Taken seriously, these were radical statements that struck at the heart of coverture. Through the configuration of the wife as a separate entity, this jurisprudence created fissures in the brittle surface of coverture and introduced the idea of divided household sovereignty. From this perspective, the separate estate was a marker of destabilized gender roles, the fracturing of coverture, and the disruption of absolute sovereignty within the household.[305] The separate estate was not, therefore, an ineffective tool for married women but rather a robust trust form that moved forward married women's property rights and offered a template for future rights-holding. The separate estate was the beginning of the end of coverture.

303. Grigby v. Cox, (1750) 27 Eng. Rep. 1178 (Ch.) 1178; 1 Ves. Sen. 518, 518.

304. Kinnoul v. Money, (1767) 36 Eng. Rep. 830 (Ch.) 836; 3 Swans 202, 217.

305. That the separate estate contributed to a certain destabilization of gender roles may be seen from the vehement and derogatory response from a majority of writers and cultural commentators. "[P]in money was a subject of satire and a fact almost universally lamented by gentleman moralists." STAVES, *supra* note 8, at 158; *see also* ERICKSON, *supra* note 5, at 108.