Married Women's Property and Male Coercion:

United States' Courts and the Privy Examination, 1864–1887

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This article addresses an overlooked area of married women's property law: the separate or privy examination. Under state privy examination laws, a married woman who intended to sell or mortgage her own property was required to be interviewed by a public official in order to determine whether she understood the transaction and whether her husband had coerced her into it. This article traces the dramatic transformation in the ways in which courts interpreted these supposedly protective statutes from the mid-1860s to the late 1880s. It raises and answers complex questions about how the rise of an integrated national economy and the judiciary's increasing emphasis on creditors' rights affected married women's property interests in the late nineteenth century.

In late December 1864, the U.S. Supreme Court issued its decision in *Drury v. Foster*, a case that differed from better-known disputes that the Civil War had generated—arguments over presidential powers, habeas corpus, and legal tender, among others. This time, the men who sat on the Court sorted through testimony about good and bad mortgages, deeds, and conveyances, all of which were complicated by uncertainty on both sides over the role of married women in the "male" world of business and finance. Justice Samuel Nelson's majority decision in the case revealed the confusion over married women's economic rights and responsibilities and ensured that this uncertainty would continue to plague husbands, borrowers, and lenders—not to mention women—across the country.

The central figure in *Drury* survives in the legal record only as "Mrs. Foster," wife of Thomas Foster of Minnesota. Shorn of a first name by the court reporter, her situation was common enough in the nineteenth century. She married a man whose successes seldom matched his aspirations. Looking to raise capital for a business venture, Thomas Foster had set his sights on property his wife owned separately.[1] Mrs. Foster disliked the idea of using her property as collateral for her husband's speculative endeavor, but he persisted.

In the 1860s, Minnesota was one of many states with laws meant to "protect" women in Mrs. Foster's position. Under these kinds of statutes,

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married women could not simply sign away their property. Before a wife could convey her land, she had to be questioned in private by a male public official—usually a notary public—in order to determine whether she understood what she was doing. This interview, which took place outside a husband's view, was known as the separate or privy examination. The official also asked if the woman was being coerced into the transaction by her husband. If the examination demonstrated that the wife was knowingly and willingly selling or mortgaging her land, she would then sign a certificate of acknowledgment which was stamped with an official seal and attached to the mortgage or deed. At this point, the transaction could be completed. Ostensibly a nod to the interests of presumably vulnerable married women, as well as eager businessmen, the privy examination had originated in medieval English common law and later was widely used by seventeenth- and eighteenth-century courts in the American colonies. American courts continued to require privy examinations into the first half of the nineteenth century, when most states codified this common-law "protection" of women through statutes.[2]

Though the privy examination procedure appeared fairly straightforward, in practice, it often created complex legal controversies. This was particularly true in the nineteenth century, when women's economic and social roles and the American economy were in flux. The facts in *Drury* provide a clear illustration of the problems that arose. To satisfy Minnesota's privy examination statute, Thomas Foster had a notary draw up a mortgage, present it to his wife, perform the separate examination, and witness her signature on the document. According to Mrs. Foster's testimony, however, events did not proceed in quite that manner. She remembered expressing to the notary reservations about the transaction. "She was fearful that the speculation which her husband was going into would not come out right," the notary later confirmed, and "she did not like to mortgage [her] place, but . . . he wanted to raise a few hundred dollars, or several hundred dollars, something to that effect." To complicate matters further, the notary, at Thomas Foster's request, had left blank the mortgage amount and name of the lender, Gardner P. Drury. Although, as stipulated by law, he was not in the room when the privy examination took place, Thomas Foster's will prevailed. Explaining later that "she did not like to refuse [her husband]," in the end, Mrs. Foster "consented to sign the mortgage."[3]

The mortgage became a subject for litigation when Thomas Foster's business venture failed and the couple defaulted. The lender attempted to foreclose on Mrs. Foster's property. When she refused to relinquish her land, the lender sued. In her defense, Mrs. Foster claimed that the mortgage was not valid because her privy examination had been faulty. Not

only had the notary ignored the wife's hints that her husband was pressuring her, but he also had allowed her to sign a legal document in which key provisions were blank. Since she did not willingly and knowingly consent to the transaction, they maintained, the mortgage was void and unenforceable. Not surprisingly, Drury had a different view of the matter, and the case eventually came before the nation's highest court.

Drury is one of several important, but little-studied, privy examination cases heard by the Court after 1860. These cases almost always arose from disputes over mortgages. Throughout the nineteenth century, mortgages served as the principal mode of financing land, and, despite the rise of securities markets after the Civil War, land remained an important asset for much of the population and the mortgage a key financial instrument. As a result, mortgage litigation filled state and federal court dockets, and changes in law that involved mortgages affected the financial community. Thus, the privy examination played an important role in transactions at the center of the nineteenth-century economy.[4] Privy examination cases also reflect the legal establishment's changing views of women's social, economic, and legal status during the Civil War (1860–1865), Reconstruction (1865–1877), and Gilded Age (1878–1899). When courts' justices were asked to interpret various state privy examination statutes, they were implicitly affirming or rejecting the paternalistic values on which the laws were based. In an era when women were taking tentative yet tangible steps into the public sphere, privy examination cases required the courts to consider statutes that originated in ancient assumptions about married women. In the process, jurists found themselves in an uncomfortable position, as they had to choose between traditional "protections" of women, on the one hand, and the needs of the business community, on the other. The latter, in order to further its own interests, wanted women involved in commercial transactions to be treated as competent adults. Standing in the way, however, was a tradition in politics, society, and the law that saw women as inferior, dependent, and in need of special protection.

Post–Civil War privy examination cases are also important because they were decided at a time when married women's economic and legal status was changing dramatically. Understanding these cases adds nuance and complexity to the historiography of a crucial period for American women. Between the late 1830s and early 1870s, every state legislature passed married women's property acts. These laws helped to dismantle the common-law principle of coverture, a legal doctrine that deprived married women of many basic rights of citizenship: the right to claim their own wages, serve as executor of a will, sue or be sued, or independently own property.[5] Although the statutory language varied from state to state,

the new laws generally restored to married women the same control over wages, land, and personal property that they had possessed while single. And, although historians disagree about who deserves credit for these acts, as well as their ultimate effects on women's lives, all conclude that such legislation marked an important shift in married women's legal status.[6] Many states west of the Mississippi also enacted community property laws, which dramatically altered the common law and dower rights to one-half of any property acquired during marriage.[7]

In the United States, changes in married women's property laws took place over a number of decades, but, during the twenty years after the Civil War, the pace quickened. The shift from a small-scale agricultural economy to one more modern, industrial, and urban drove many of these changes. During these years, for example, a majority of men and women in the workforce became wage laborers, a transformation with profound implications for the economics of marriage. Because working-class families needed the wages of both spouses in order to survive, the notion that husbands were providers and protectors was challenged. Much of the common law regarding married women's property was premised on this traditional view. As historian Amy Dru Stanley has shown, postbellum feminists criticized this model for being out of touch with the changing realities of men's and women's lives. Using language designed to appeal to male lawmakers, they indignantly described situations in which women had become primary wage earners for their families yet had no legal control over their wages. In response, sympathetic state legislatures passed laws designed to protect women's earnings from husbands' creditors, laws that for the first time gave married women the right to their wages. This change in married women's property laws primarily affected working-class women, who had gained only limited benefits through earlier property laws, which aided those most concerned about inheritances and protecting landed property—the upper classes.[8]

During the postbellum period, a central dilemma facing state and federal courts was whether a flawed privy examination should exempt married women (and their property) from responsibility for husbands' debts or whether a woman's signature on a privy examination certificate finalized the transaction and rendered her liable. The latter decision would unravel a safety net that had long protected married women. If wives were unable to prove that their privy examinations had been fatally flawed, then the examination itself became a mere formality. At a time when most marriages were still inscribed by pronounced power imbalances between husbands and wives, the demise of the privy examination represented a blow to women's property interests. However, one could also argue that new interpretations of the laws reflected women's changing roles; if women

controlled their wages and property, why was the privy examination necessary? The new view treated married women as equals and took them seriously as commercial actors.

Although some state courts dispensed with separate examinations, many others continued to enforce the statutes vigorously, even after legislatures had passed married women's property laws. Although married women in such jurisdictions had (nominally) gained legal control of their property, many judges, lawyers, and legislators suspected that overbearing husbands could still coerce or fool wives into selling or encumbering that property. These men believed they held "a deep insight [into] the marriage relation." One judge invoked the image of a "timid, shrinking wife" who would always be vulnerable to the "storm of passion, the torturing reproach or the heartbreaking unkindness of the husband," arguing for the continued relevance and value of privy examinations.[9] Fifteen states required strict adherence to privy examination statutes well into the Gilded Age, and some into the twentieth century.[10]

The role of the privy examination in American law and women's lives after the Civil War has gone largely unstudied. Historian Marylynn Salmon has recounted how colonial courts wrestled with questions about whether land sales required separate examinations and, if they did, whether interviews were carried out in an effective and honest manner.[11] She studied the period before 1830, however, and no one has investigated the privy examination in the following years. Historians working in the period after 1830, have, instead, turned their attention to wage laws and the origins and effects of states' married women's property acts.[12]

This attention is well deserved. Whereas both sets of laws constituted a dramatic break with the common law, privy examination statutes—and the legal cases they spawned—held tightly to that past. Few nineteenth-century statutes were more firmly rooted in centuries-old assumptions about the naiveté and dependence of married women and the legal, economic, and social power husbands wielded over them. In some states that passed married women's property laws, moreover, state courts ruled that the privy examination statutes had been superseded by the new laws. As wives gained the same rights as their husbands, some jurists found the special protection provided by the privy examination unnecessary.[13]

In this light, the privy examination appears to be a vanishing artifact of an earlier era. Such a conclusion, however, is misleading. The fact that many states defended the use of the privy examination reflects the view that when wives entered the world of business and commerce they still needed special care and protection. Such tenacity, however, testifies to the power and resonance that the ideology of separate spheres continued to exert throughout the nineteenth century.[14] Although working-class women

had long been toiling in fields and factories, and more middle-class women entered the workforce during and after the Civil War, the bourgeois ideal of the mother—gentle and pious, homebound and in petticoats—continued to dominate Americans' perceptions of women's "true" nature and role. Avenues of economic opportunity for wives of all classes remained limited. It continued to make sense to many lawyers and jurists that the law provided the protection of a privy examination for women vulnerable to spousal coercion and systematic exclusion.

Nevertheless, continued use of the privy examination was a barrier to women's progress. Most women's historians agree that women's economic and social status underwent significant changes in the second half of the nineteenth century. Earlier, women had embraced their designated role and used it to create powerful bonds among themselves and develop a moral mission in the public arena. They then used that self-image to combat slavery, alcohol, and prostitution.[15] As the century wore on, some women's organizations continued to emphasize female moral superiority and women's nurturing qualities, but others challenged the concept of separate spheres and called for women's political, economic, and legal equality with men. Some also moved physically out of fathers' or husbands' homes into higher education and a handful of professions.[16] However small a minority these women were among Americans, their words and deeds helped undermine the doctrine of separate spheres. In this context, the continued use of the privy examination reflects male judges' and legislators' inability to discard traditional assumptions about married women.

During and after the Civil War, the status of privy examination statutes became increasingly unclear as some state courts enforced them and others overturned them. Eventually, litigants turned to the U.S. Supreme Court in search of a clear ruling which would help remove the uncertainty that plagued privy statutes. These cases had generally arisen from disputes between creditors and debtors in states where courts still required adherence to the privy examination statutes. Many involved such technical questions as whether the lease of a married woman's land required a privy examination. (Most courts said no.[17]) The most interesting cases, however, dealt directly with the question of gender. In them, the course of events leading to the lawsuit tended to follow that in *Drury*. Creditors usually argued that they had lent the money in good faith and had no reason to question a wife's signature on the document of conveyance. In response, lawyers representing husbands and wives often appealed to the paternalistic sympathies of male judges by emphasizing woman's special, domestic, and, above all, vulnerable nature.

The crucial issue that state and federal courts had faced in these cases

was whether to admit parol (oral) evidence that placed the legitimacy of the privy examination in doubt. If a married woman's signature appeared on a written document, should courts allow for less dependable oral evidence to impeach the contract?[18] A few state courts ruled that such testimony could not be admitted. In those states, a wife's signature served as incontrovertible evidence of her assent to the transaction. Once she signed, she had no legal right to claim she had been duped.[19] Such decisions, however, essentially gutted the privy examination of its effectiveness and original intent. If women could not later show that they had been coerced, deceived, or misinformed during privy interviews, then unscrupulous husbands in cahoots with notaries could easily maneuver around the law. Or, bumbling notaries or other public officials might mislead women into giving assent even though they had not performed the examination correctly. In either case, it is easy to see how this imperfect system could victimize women.

Many states, however, allowed parol evidence. In those jurisdictions, the main issue was how convincing the oral testimony had to be. Must the evidence of a flawed examination be clear and convincing? Or, did wives merely have to cast a reasonable doubt upon the interview's efficacy? Again, assumptions about women and their capacities underlay these cases. If courts demanded clear and convincing proof that a privy examination had failed, they treated women, in effect, as competent commercial actors who, in all but the most egregious cases, were responsible for their actions.

The lack of statutory unanimity among states confused lenders and investors. How sure could they be about land titles in states that required the separate examination of married women? Any mortgage or deed might be vulnerable to claims after the fact that the privy examination had been improperly administered. Such uncertainty hampered investments and the smooth flow of capital. Judges who sided with a married woman in one of these cases incurred the investing community's wrath. At the same time, however, rulings in favor of creditors meant to both judges and businessmen a troubling abandonment of the paternalistic ethos that had long permeated the law. It was into these murky waters that the Supreme Court first waded in *Drury*.

When prominent Washington, D.C., attorney J. M. Carlisle, representing Mrs. Foster in *Drury*, presented his oral argument before the Court on 23 December 1864, he offered the clearest analysis that the tribunal had ever heard of traditional assumptions underlying privy examination statutes. In previous cases before the Court, these issues had only arisen as secondary questions in complex land cases. Never before had these justices confronted a case where the efficacy and purpose of privy examina-

tions were central issues.[20] In *Drury*, Minnesota's privy statute took center stage and Carlisle asked the Court to affirm clearly and definitively the need for rigorous enforcement of a law designed to protect wives from coercive husbands and inept or dishonest public officials.

In his argument, Carlisle directed the Court's attention to the testimony of the notary who had administered Mrs. Foster's separate examination. During questioning, Carlisle recounted dramatically, Mrs. Foster had told the notary that she was

> "*fearful* that the speculation which her husband was going into would not come out right; she did not like to mortgage *that* place;" her paternal property, perhaps, the home of her own childhood. "But he"—her husband—wanted to raise money, and "she did not *like* to refuse him, and *so* she consented to sign." The case is an affecting illustration of the extent to which a woman becomes in marriage, "subdued to the very quality of her lord." Her woman's fears had foreseen what her husband's intelligence never suspected; but like a woman, lovely and confiding, she yielded everything to *him*.[21]

How, Carlisle mused aloud, could the man who examined Mrs. Foster and presumably heard her concerns, have certified that she willingly signed the document? Calling him "the great offender in the case," Carlisle charged that the notary had utterly failed in his official duties under Minnesota law.[22] But that was not the full extent of his failure, according to the attorney. The notary had also neglected to ensure that Mrs. Foster knew exactly what she was signing. He had, in fact, allowed her to sign a document on which the name of the lender and the amount of the loan had yet to be filled in. As proof of Mrs. Foster's ignorance of the full financial ramifications of her acquiescence, Carlisle asked the Court to compare "Mrs. Foster's declaration at the time she signed it, that it was intended to be a security for a 'few hundred dollars,'" to the actual amount of the mortgage—$12,785. Given that the deed was blank, he added for emphasis, "it might as well have turned out [to be] a mortgage for a million dollars."[23]

Similar to many of his contemporaries, Carlisle believed that privy examination statutes provided necessary protections to married women, who, as a class, were different from and more vulnerable than men. The examination itself, declared the attorney, "is the protection with which the law hedges the gentle nature of a woman—her crowning grace and glory—from the dangers, and perhaps the ruin, which, without the law's protection, it is certain in many cases to bring upon her. The argument which treats her as an independent person, and would approximate her

actions to those of our own sex . . . violates the central germ of truth upon the subject, the law of the inherent moral differences of our natures."[24] Repelled by the underlying assumptions and dangerous implications of treating a married woman as an "independent person," Carlisle asked that the Supreme Court acknowledge the potentially far-reaching effects of removing the protective cloak of the privy examination and rule in Mrs. Foster's favor.

The lawyers for Mrs. Foster's creditor, Drury, entreated the Supreme Court to move instead into the modern commercial age. Drury's lead attorney, Robert Peckham, called upon the justices' "sense of equity." His client had acted "in perfect good faith" and had supposed that Thomas Foster and his wife "were acting in equal good faith." Presented with a mortgage and Mrs. Foster's signed privy examination certificate, Drury had loaned the couple over twelve thousand dollars. Now, years later, having squandered the money, the Fosters were reneging on their end of the bargain. Would the Court really allow Mrs. Foster "at this late date, in conjunction with her husband, to disavow her acts, and thus, in effect, defraud an innocent third party?"[25]

Peckham expressed doubts about Mrs. Foster's integrity. He implied that she was feigning having been coerced to escape her debts. She had not, after all, raised a protest while her husband was spending Drury's money. "Even if Mrs. Foster were entirely innocent," Peckham added, "and was the victim of the fraud of her husband," it should not be Drury, an innocent third party, who suffered the consequences. Mrs. Foster had signed the certificate fully aware that her husband was going to use it to obtain a mortgage. By signing, she was "instrumental in bringing [Drury] into his present position" and "no principle is better settled than that where a loss must fall upon one of two innocent parties, it must be borne by that one who is most at fault. There is no reason for exempting the wife from the operation of this rule."[26]

Peckham also discounted Mrs. Foster's claim that the mortgage was invalid because the notary had presented her with an incomplete mortgage. Instead of an amount or lender's name, Peckham insisted, the blanks "were designedly left by [Mr. and Mrs. Foster] to facilitate the negotiation of the loan." He continued, "In this case, when separate and apart from her husband, Mrs. Foster gave her voluntary consent to a sealed instrument, with blanks; in that same manner, she authorized these blanks to be filled in at the discretion of her husband, to whom she knew it would be handed over."[27] In short, Mrs. Foster was an adult, knew the mortgage amount had yet to be filled in, and still signed. She was thus responsible for her actions.

Peckham asked the Court to consider the ramifications of a decision

that allowed wives to escape such responsibility. "It would be against public policy," the attorney implored, "and expose transactions in real estate to hazard, to allow a married woman to screen herself from the consequences of her own acts. . . . Such a doctrine would subordinate all other interests to those of married women."[28] His concern, of course, was for Drury and other lenders. But he nonetheless appealed to the justices to reject Mrs. Foster's position that women, because of their "gentle nature" and "inherent moral differences," needed special protections within the law. Rather, argued Peckham, in the commercial arena, at least, women should be considered men's equals.

Drury and Peckham had good reason to believe their arguments would find a receptive audience in the Supreme Court. Throughout the antebellum period, the Court had shown a willingness to discard common-law principles and overturn statutes that slowed the march of economic progress.[29] In addition, President Abraham Lincoln recently had stacked the Court with five new Republican justices who were committed to economic growth.[30] Moreover, earlier in 1864, in *Gelpcke v. Dubuque* and *Mercer County v. Hackett*, the Supreme Court had issued two overwhelmingly procreditor decisions. Although these particular cases involved railroad bonds rather than privy examinations, the principle the Court relied upon was similar to that advocated by Peckham and Drury: protect investors. In *Gelpcke* and *Mercer County*, the justices ruled that taxpayers were obligated to pay for municipal bonds, even if those bonds were issued fraudulently. The Court's primary concern lay with "innocent" investors, who put their money into bonds that appeared valid on their face. Drury, who had loaned money based on a privy certificate that appeared valid, was very similar to the investors in these two cases, who were allowed to collect their revenue even though they had duped taxpayers into approving sale of the bonds.[31]

The opposing sides in *Drury* clearly outlined the questions before the Court. On the one hand, a decision for Mrs. Foster would reinforce the paternalistic role of the law and courts as protectors of defenseless women. It would affirm that the privy examination procedure still served an important purpose in the commercial age. To be sure, Drury would suffer an injustice, but his financial loss would be an unfortunate side effect of preserving a necessary and noble practice. Deciding for Drury, on the other hand, would conform to the Supreme Court's recent decisions which protected investors and freed commerce from cumbersome legal practices. Moreover, it could serve as a bold proclamation that women participating in a modern economy should be treated as competent adults.

The Court, of course, did not have to reach a decision that definitively favored one of these two principles. Instead, it could employ the common

practice of deferring to the decisions of state courts (in this case, Minnesota) on matters of state law. After all, the status of Minnesota's privy examination law was at issue. By deferring, the Court would confirm that states could decide how to enforce their individual privy examination statutes. This would allow the nation's highest tribunal to resolve the dispute between Drury and Mrs. Foster without committing itself to a position on larger issues about married women and their property.[32]

If the Court did defer to the previous decisions of Minnesota's courts, Mrs. Foster would win the day. Only a few years earlier, the Minnesota Supreme Court had decided *Dodge v. Hollinshead*, a case similar to *Drury*.[33] *Dodge* involved a married woman, Ellen Hollinshead, who had been given a separate examination by a notary who, she alleged, had failed to explain clearly what the mortgage she signed actually contained. She later testified that she believed she had agreed to mortgage her husband's land, not her own. Now that the lender, David Dodge, had attempted to foreclose on her land, she felt justified in resisting. Dodge felt cheated; he had loaned money in good faith and relied on the validity of the notarized privy examination certificate signed by Hollinshead.

The Minnesota Supreme Court ruled in favor of Hollinshead. As justification for its decision, the court stated that Hollinshead's signature was only prima facie evidence of the validity of her privy examination and, therefore, could be challenged by parol testimony. More important than Dodge's investment, however, was the need to maintain strict enforcement of the privy examination requirement. The court argued, "The reason for this separate examination exists just as strongly in the present day as ever, since the power and control of the husband over the wife is, in theory, if not in practice, the same as it has ever been."[34] Yet, neither Minnesota nor any other state took steps to eliminate the laws that kept married women dependent; rather, such decisions as this represented an ameliorative approach to gender inequity. The Minnesota court recognized that Dodge, an innocent lender, would suffer an unfair loss. But so would Hollinshead.[35] Faced with the difficult choice of allowing hardship to befall a commercial lender or a married woman, the state court sacrificed the lender.

It may have been this Minnesota precedent that led Drury to take his claim to federal rather than state court. He could only hope that the Supreme Court would rule as it had in such cases as *Swift v. Tyson* and *Gelpcke*, where the justices had diverged from state courts' interpretations of state law and come to their own conclusions based on the merits of each case.[36]

On 23 January 1865, the Supreme Court announced its decision in *Drury*. Justice Samuel Nelson wrote and read the opinion. The selection of

staid, white-maned Nelson to write the opinion did not bode well for Drury, who hoped for a bold decision—one that rejected the position of Minnesota's court and resolutely protected creditors' rights, rather than adhering to an archaic statute. At seventy-two years old, however, Nelson was something of a relic, a conservative jurist and unlikely candidate to weaken a statute designed to "protect" married women. In the end, even Nelson's younger counterparts on the Court joined unanimously in his opinion for Mrs. Foster.[37]

As it unfolded, the opinion in *Drury* seemed to hedge the larger issues that the lawyers from both sides had brought forth. Though the Supreme Court did not opt simply to defer to the Minnesota court, Nelson did initially focus on the point that the mortgage Mrs. Foster signed was incomplete. However, he did not accept Drury's contention that, by signing the mortgage with blanks, Mrs. Foster had implicitly agreed to let her husband fill them in after he negotiated the loan. Instead, the Court took the position that any mortgage a woman signed that was incomplete was automatically void.[38] Nelson explained the Court's fear that a decision for Drury would implicitly validate Thomas Foster's decision to have his wife sign an incomplete mortgage. If the mortgage Mrs. Foster signed were held valid, Nelson worried, then unscrupulous husbands across the land would ask notaries to create blank documents for unsuspecting wives to sign. Nelson envisioned countless married women so commercially naïve and deferential that they would sign anything—even a blank sheet—and leave every detail to their husbands.[39]

At this point, Drury had lost the case. Moreover, it seemed as though the Supreme Court planned to leave privy examination statutes and the assumptions upon which they were based wholly unexamined. But Nelson had saved his most important and dramatic point for last. In his conclusion, he issued a strong cautionary message to investors, creditors, lenders, and other men of finance: though the justices sympathized with Drury's hardship, they would not abrogate "the protections which the law for ages has thrown around the estates of married women." He admonished his audience that "losses of the kind [suffered by Drury] may be guarded against, on the part of dealers in real estate, by care and caution; and we think this burden should be imposed on them rather than that a sacrifice should be made of the rights of a class who are dependent enough in the business affairs of life, even when all the privileges with which the law surrounds them are left unimpaired."[40] For Drury and others like him, this must have been a bitter pill.

Nelson made it sound remarkably uncomplicated. All real estate investors or lenders had to do was exercise simple "care and caution." But, in practice, commercial transactions rarely were so clear-cut. If, for ex-

ample, a secondary investor had wanted to purchase the Fosters' mortgage from Drury, it would have been impossible for him to have known whether the blanks on the mortgage had been originally filled in. He could ask Drury, but, if Drury lied or did not remember, then the investor unknowingly would be buying a void mortgage. Investors who followed Nelson's standard could no longer rely on privy examination certificates. Instead, Nelson's "care and caution" requirement implied that lenders and investors would have to track down every married woman whose property had been conveyed and somehow determine whether she had been tricked, misled, uninformed, or coerced. If they failed to do so, they assumed the risk that any real estate transaction might later be invalidated. In the new national economy, however, in which lenders and lendees rarely knew or had even met one another, and secondary investors transacted business in multiple states, locating and querying individual women was an impractical and unreasonable obligation.

The Court's unanimous decision in *Drury* answered some questions but left others up in the air. Though Nelson's conclusion strongly affirmed the need for privy examinations, he provided little guidance for the numerous state and federal courts still wrestling with the one question that continued to surface in these cases: should married women be allowed to testify, after the fact, that a separate examination had been performed improperly?

Although the concern for vulnerable married women expressed in *Drury* indicated that the Court would probably admit wives' testimony, the decision was far too vague on that point to send a clear message to lower courts. The Supreme Court, however, unequivocally revealed that it still considered married women to be a commercially incompetent, subordinate class that needed strict enforcement of special legal protections.

Perhaps the most interesting result of *Drury* was how little sway Nelson's opinion ultimately had over the lower courts. Although Nelson had reiterated the need to uphold the traditional protections with which the law surrounded married women, throughout the next decade, privy examinations would come under judicial attack in state courts around the country. To be sure, state courts were not bound to follow the Supreme Court's ruling on this question. Nevertheless, the nation's highest court had thrown its moral and judicial weight behind the principle of maintaining age-old protections, and, surprisingly, few jurists around the country listened.[41] Though lawyers for married women often pointed to *Drury*, by the 1870s, most state courts had concluded that the privy examination had become a means for unscrupulous wives—or, more likely, married couples—to escape legitimate debts. Courts were more concerned with the pressing demands of investors and businessmen who traded in mort-

gages and other commercial paper in an increasingly open and impersonal market.

State courts justified their new interpretations of privy examination statutes in different ways. In the 1876 Alabama Supreme Court case *Miller v. Marx*, the justices concluded that parol evidence should not be admitted in separate examination cases because it gave married women an incentive to lie. The court could not trust a wife's after-the-fact testimony that her husband had forced her to sign the certificate. "When families are about to . . . be turned homeless upon the world," the court argued, "it is but human that they should resort to every means within their power to avert so dire a calamity. . . . Wives rarely join in a conveyance or encumbrance of a homestead, without a suppressed misgiving or reluctance." Therefore, when trouble struck, "and the family [was] dispossessed, how easy to prove by the wife herself . . . that she did not assent to the conveyance." In language strikingly different from Nelson's paternalistic proclamations in *Drury*, the Alabama court added, "it is much less hurtful that cases of individual hardship should be endured, than that, on testimony always open to distrust, the repose of society should be disturbed by so fearful discredit cast on the titles to real estate."[42]

State courts across the country echoed the opinion of the Alabama Supreme Court. "It is better to run the risk of occasional harm to married women," held a Mississippi court, "than of producing the incalculable mischief of inviting efforts on the part of married women to vacate their deeds. There is far more danger that deeds of married women will be improperly sought to be set aside, if it could be done by questioning the manner of acknowledging them, than that wives will be imposed on in acknowledging deeds."[43] Some courts even questioned whether the privy examination had ever had any practical value and called it a "vain thing,—a needless, useless requirement, productive of no possible beneficent result."[44]

In the 1880s, after nearly two decades of silence on the issue, the Supreme Court returned to the question of whether parol evidence could be used to impeach a privy examination. In *Drury*, the Court had failed to provide a clear ruling on this matter. Now, fueled by trends in state courts, creditors asked the Supreme Court to turn Nelson's admonition in *Drury* on its head. In two significant cases, *Young v. Duvall* (1881) and *Hitz v. Jenks* (1887), the justices again grappled with the thorniest issue privy examination statutes raised: the question of parol evidence.[45]

The facts in *Young* were similar to those in *Drury*. In November 1875, Washington, D.C., resident Virginia Young, along with her husband Mark Young, signed documents mortgaging her property for $8,000. Pursuant to Washington, D.C., law, whenever a married woman conveyed real es-

tate, she had to appear before a public officer who would "examine her privily or apart from her husband" and "explain to her the deed fully."[46] In *Young*, justice of the peace for the District of Columbia B. W. Ferguson performed the required privy examination. Virginia then signed the certificate and Ferguson attached his seal. A few years later, when the Youngs defaulted on their debt, John Holtzman, who had acquired the note, advertised Virginia's property for sale at public auction. At this point, Virginia sued, claiming that her examination had been flawed because the officer failed to explain the contents of the deed and her husband was present during the interview.[47] A lawsuit ensued, and, in November 1883, the case reached the U.S. Supreme Court.

By the time the Court heard *Young* that year, its composition had changed dramatically from the one that had ruled on *Drury* twenty years earlier. Nelson had died in 1873.[48] Roger Taney, James Wayne, John Catron, Robert Grier, and Nathan Clifford, justices who had been raised in a largely agricultural America, were gone as well. In their place sat a host of Republican appointees, many of whom were former railroad attorneys acutely sensitive to the needs of the business community.[49] Though Virginia's lawyers pointed to the *Drury* decision and asked the Court to follow it, this new cast of justices was less likely to favor married women's needs over creditors' interests.

Fifty-year-old John Marshall Harlan wrote the Court's opinion for *Young*. Famous today for his ringing dissents in the *Civil Rights Cases* (1883) and *Plessy v. Ferguson* (1896), Harlan was nevertheless a tireless defender of creditors' interests. Throughout the Gilded Age, Harlan guarded property rights and railed, in particular, against towns, cities, and states that tried to repudiate their debts. In *Young*, he faced a woman similarly trying to escape her personal debt.

On 17 December 1883, Harlan delivered the Court's unanimous decision in *Young*, in an opinion that revealed how much the Court had changed in twenty years. In a matter-of-fact tone, Harlan wrote a terse opinion notably lacking any sentimental language about women. Harlan offered a straightforward public policy analysis. Creditors, he concluded, must be able to rely on women's signatures on privy examination certificates, or else doubt would be cast upon all land titles. In the absence of proof that a wife's signature had been forged, once a woman put pen to paper she could not thereafter renounce the deal. Harlan seemed to recognize that women might suffer under this rule, but maintained that society's need for sound land titles took precedence over individual cases of injustice to married women. Parol evidence of coercion or other chicanery could not block creditors' claims to women's property. "The mischiefs that would ensue from a different rule could not well be overstated," Harlan con-

cluded. "The cases of hardship upon married women that might occur under the operation of such a rule, are of less consequence than the general insecurity in the titles to real estate which would inevitably follow from one less rigorous."[50]

Any doubt remaining about the Supreme Court's new position was quelled when the Court revisited the issue four years later in *Hitz*, another case that arose in the District of Columbia.[51] The facts in *Hitz* differed only slightly from those in *Drury* and *Young*. On 26 January 1876, Mr. and Mrs. Hitz signed a $20,000 note which mortgaged land that Mrs. Hitz had inherited. When the Hitzes later defaulted, the bank holding the note moved to take Mrs. Hitz's land. In response, she sued, alleging that she had been fraudulently induced to execute the conveyance. Called as a witness on her own behalf during the lower court trial, Mrs. Hitz admitted her signature, but did not recollect that she had executed or acknowledged the deed in question, and denied that it was explained to her. The notary who performed the privy examination admitted that he never fully explained the contents of the mortgage to Mrs. Hitz, despite local law that required him to do so. In *Hitz*, the Supreme Court confronted a case in which the notary public admitted that the privy examination he performed did not comply with the law.[52] In *Drury*, Nelson had admonished that "all the privileges with which the law surrounds" married women should be left "unimpaired" and Mrs. Hitz's lawyer now cited *Drury* as precedent. Unfortunately for his client, however, the Gilded Age Supreme Court now frowned upon allowing parol evidence.

In his November 1887 opinion for a unanimous Court, Justice Horace Gray ruled in favor of Mrs. Hitz's creditors. Famous for his lengthy opinions, which often read like historical treatises, Gray kept his analysis relatively brief. To support his position, he relied heavily on Harlan's opinion in *Young* and tried to dispel the notion that protecting married women was the privy examination's primary purpose. For Gray, the object of the separate examination was "twofold: not only to protect the wife . . . but also to facilitate the conveyance of the estates of married women, and to secure and perpetuate evidence, upon which innocent grantees as well as subsequent purchasers may rely."[53] The privy examination, in the 1880s, thus was as much a device to ensure fluid transmission of land titles as a measure to protect vulnerable women. As such, after-the-fact oral testimony could not be allowed to undermine the validity of a privy examination. To do so would pose too great a risk to land transactions.

Absent in both the *Young* and *Hitz* decisions were references to women's fragile and gentle nature, or their ill-suitedness to the rough-and-tumble world of business. Rather, the opinions are pragmatic, single-minded public policy position papers. Both Harlan in *Young* and Gray in

Hitz officially declared that the need for sound land titles outweighed the need to protect women from bullying husbands. However, one also wonders whether widespread judicial assault on the privy examination also reflected a genuine ideological shift by lawyers and judges away from traditional paternalistic conceptions of women. If justices had developed a different view of women, they never stated it directly in any court decision, state or federal. Instead, they repeatedly rationalized undermining the privy examination by emphasizing public interest in sound land titles. Moreover, in contemporary cases that did not involve land titles or privy examinations, justices continued to use the paternalistic, protective language that had pervaded the *Drury* decision. Justice Joseph P. Bradley's infamous concurring opinion in *Bradwell v. Illinois* (the 1873 case that upheld an Illinois decision barring women from practicing law), concluded that "Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life."[54] If lawyers and jurists insisted on maintaining such presumptions about women's nature and role, then the rationale for the privy examination should have resonated just as sharply in the late nineteenth century as it had one hundred years earlier. But it did not. Instead, traditional views of women largely remained intact while demands of a developing national market increasingly dictated the Court's decisions.

Unlike *Drury*, which had limited influence, lower courts followed and cited *Young* and *Hitz* for decades. Most lower courts had never been bound to follow *Drury* and, despite attorneys' efforts on behalf of married women, Nelson's cautionary language about the need to protect women went unheeded. Lower courts, of course, could have similarly ignored *Hitz* and *Jenks*, but they did not. Time and again, the cases served as cornerstones in judicial decisions that denied women the ability to question the efficacy of privy examinations. In *Colonial Building & Loan Ass'n v. Griffin* (1915), for example, Margaret Griffin signed her privy acknowledgment after twice trying to resist her husband's pressure. As her husband and his lawyer grew "very angry," Griffin, "not desiring to destroy her husband's success in business," consented "after considerable persuasion." She claimed to have signed the certificate while her spouse stood nearby. The Georgia state court, applying *Young* and *Hitz*, declared the examination valid and allowed the Griffins' creditors to take Griffin's property.[55] *Colonial Building* is only one of many in which a married woman's legal position (not to mention her property) succumbed to the *Young* and *Hitz* precedents. Over the decades, these cases featured a parade of allegedly drunk or angry husbands and unscrupulous or bumbling notaries who purportedly convinced "subservient" women to sign away their own property.[56] By the

last quarter of the nineteenth century, however, the specter of this kind of victimization of women no longer pricked the conscience of jurists. The demands of an integrated market economy carried the day.

The manner in which courts interpreted women's wage laws that were also passed during this period bolsters this point. In the twenty years following the Civil War many state legislatures passed laws designed to protect married women's wages from husbands' creditors.[57] Later, however, many state courts undermined these statutes by reverting to traditional notions of the marriage relationship. Courts concluded that, despite women's economic progress, wives properly remained under husbands' protective wings and thus any mingled family assets, including wages wives had contributed, were under husbands' control and liable for their debts. In this situation, courts utilized paternalistic ideas to protect creditors. In the privy examination cases, by contrast, courts gutted ancient protections premised on traditional views of the institution of marriage, again protecting creditors. In the crucial years during which the United States developed a fully integrated, market economy, courts—including the Supreme Court—often manipulated traditional notions about husbands and wives as the needs of creditors in the new economy dictated.

Supreme Court decisions in privy examination cases support the general thesis that legal historian Lawrence Friedman, among others, has made: in the nineteenth century, common-law rules that slowed the speed and efficiency of the market did not survive long. "Inherited doctrines did not last," Friedman concludes, "if they seemed to clash with the needs of the American economy." Whether it was the common-law practice of dower, or, in this case, the privy examination, courts did not tolerate laws that injured creditors, clouded land titles, or caused a good faith investor to suffer, even if married women suffered as a result.[58]

As we have shown, the Court's change of heart between *Drury* and *Hitz* did not come about as the result of any noble impulse to improve women's legal status. Instead, it reflected the needs of a fluid and impersonal national economy. As historian Suzanne Lebsock has written of married women's property reforms in the South during Reconstruction, they "stood a chance for the same reason that woman suffrage did not—there was something in it for men, and they had nothing to do with feminism."[59] In other cases, the Supreme Court continued to manipulate traditional notions of womanhood. It selectively chose to abandon this language in the privy examination cases in order to satisfy the needs of businessmen in a national economy.

Still, *Hitz* and *Young* exemplified a more modern view of women's economic role. In these cases, the unflattering assumptions about women that lawyers and judges used to defend privy examinations also began to

disappear from the case record. Nevertheless, some women may have legitimately benefited from traditional protections the privy examination no longer could provide. Thus, while economic expediency led to changing interpretations of privy examination laws, the effects of these changes, especially for married women, were ambiguous. In the midst of economic and social transformations of the late nineteenth century, tensions between the past and the present left propertied wives in a position that was at once less protected and less constrained.

NOTES

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[1] The legal concept of equity that came to America along with the English common law allowed a woman to maintain in her own name and apart from her husband's holdings any property she inherited or brought to a marriage. See Norma Basch, "Equity vs. Equality: Emerging Concepts of Women's Political Status in the Age of Jackson, *Journal of the Early Republic* 3 (fall 1983): 297–318; and Suzanne Lebsock, *The Free Women of Petersburg: Status and Culture in a Southern Town, 1784–1860* (New York: Norton, 1984), chap. 3.

[2] The best analysis of the role of the privy examination in the American colonies and early national period can be found in Marylynn Salmon, *Women and the Law of Property in Early America* (Chapel Hill: University of North Carolina Press, 1986), 14–40.

[3] *Drury v. Foster*, 68 Wallace 24, 31 (1864).

[4] Lawrence Friedman, *A History of American Law*, 2d ed. (New York: Touchstone, 1985), 429.

[5] The most widely known statement of the principles of coverture is William Blackstone, *Commentaries on the Laws of England*, ed. Edward Christian (Philadelphia: J. B. Lippincott, 1855). There were, however, certain limits to this doctrine. Equity courts in America had carved out exceptions to the common law that allowed women, through a premarital agreement or protective trust, to retain ownership of her personal property. Tapping Reeve, *The Law of Baron and Femme, of Parent and Child, Guardian and Ward, Master and Servant, and the Powers of Courts of Chancery*, 2d ed. (Burlington, Vt.: Chauncy Goodrich, 1846), 162–63, 229–322; and James Kent, *Commentaries on American Law*, ed. George F. Comstock, 11th ed. (Boston: Little, Brown, 1867), 4:139–41. Two well-known works that discuss women's property laws in the American colonial period are Mary Beth Norton, *Liberty's Daughters: The Revolutionary Experience of American Women, 1750–1800* (Boston: Little, Brown, 1980); and Linda K. Kerber, *Women of the Republic: Intellect and Ideology in the American Revolution* (Chapel Hill: University of North Carolina Press, 1980).

[6]See, for example, Richard Chused, "Married Women's Property Law: 1800–1850," *Georgetown Law Journal* 71, no. 5 (1983): 1359–425, esp. 1397; Kathleen Lazarou, *Concealed under Petticoats: Married Women's Property and the Law of Texas, 1840–1913* (New York: Garland Press, 1986); Linda E. Speth, "The Married Women's Property Acts, 1839–1865: Reform, Reaction, or Revolution?" in *Women and the Law: A Social Historical Perspective*, ed. D. Kelly Weisberg (Cambridge: Schenkman, 1982), 2; Norma Basch, *In the Eyes of the Law: Women, Marriage, and Property in Nineteenth-Century New York* (Ithaca, N.Y.: Cornell University Press, 1982); Elizabeth Warbassee, *The Changing Legal Rights of Married Women, 1800–1861* (New York: Garland Press, 1987); Reva B. Siegel, "The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings, 1860–1930," *Georgetown Law Journal* 82, no. 7 (1994): 2127–211, esp. 2127; Carole Shammas, "Re-Assessing the Married Women's Property Acts," *Journal of Women's History* 6, no. 1 (1994): 9–30; and Zorina B. Khan, "Married Women's Property Laws and Female Commercial Activity: Evidence from United States Patent Records, 1790–1895," *Journal of Economic History* 56, no. 2 (1996): 356–88.

[7]Hendrik Hartog, "Lawyering, Husbands' Rights, and 'the Unwritten Law' in Nineteenth-Century America," *Journal of American History* 84 (June 1997): 67–96, esp. 67, 94; Carole Shammas, Marylynn Salmon, and Michel Dahlin, eds., *Inheritance in America from Colonial Times to the Present* (New Brunswick, N.J.: Rutgers University Press, 1987); Michael Grossberg, *Governing the Hearth: Law and the Family in Nineteenth-Century America* (Chapel Hill: University of North Carolina Press, 1985); Basch, *In the Eyes of the Law*; Chused, "Married Women's Property Law"; Reva B. Siegel, "Home as Work: The First Woman's Rights Claims concerning Wives' Household Labor," *Yale Law Journal* 103 (March 1994): 1073–217; Elizabeth B. Clark, "Matrimonial Bonds: Slavery and Divorce in Nineteenth-Century America," *Law and History Review* 8 (spring 1990): 25–54; Elizabeth B. Clark, "Religion, Rights, and Difference in the Early Woman's Rights Movement," *Wisconsin Women's Law Journal* 3, no. 1 (1987): 29–58; Amy Dru Stanley, "Conjugal Bonds and Wage Labor: Rights of Contract in the Age of Emancipation," *Journal of American History* 75 (September 1988): 471–500; and Martha Minow, "'Forming underneath Everything That grows': Toward a History of Family Law," *Wisconsin Law Review* no. 4 (1985): 819–98.

[8]Stanley, "Conjugal Bonds and Wage Labor."

[9]*Rumfelt and wife v. Clemens and wife*, 46 PA 456 (1864).

[10]These fifteen states were Alabama, Arkansas, California, Florida, Kentucky, Minnesota, Mississippi, Missouri, New Jersey, North Carolina, Pennsylvania, Rhode Island, South Carolina, Tennessee, and Vermont. As late as 1945, for example, North Carolina mandated separate examinations of married women before they signed any legal document. The legislature finally abolished this on 7 February 1945. Chap. 31, sec. 21, 1945 NC Session Laws 84, 91. See *Ferguson v. Kinsland*, 93 NC 337 (1885); *Townsend v. Brown*, 16 SC 91 (1881); *Armstrong v. Ross*, 20 NJ Eq. 109 (1869); *Bingler v. Bowman*, 194 PA 210, 45 Atl. 80 (1899); and *Danglarde v. Elias*, 80 CA 65, 22 Pac. 69 (1889).

[11]Salmon, *Women and the Law of Property in Early America*, 14–40.

[12]Warbassee, *Changing Legal Rights of Married Women*; Peggy A. Rabkin,

Fathers to Daughters: The Legal Foundations of Female Emancipation (Westport, Conn.: Greenwood Press, 1980); Basch, *In the Eyes of the Law*; and Joan Hoff, *Law, Gender, and Injustice: A Legal History of U.S. Women* (New York: New York University Press, 1991), 121–35.

[13] Among the many cases that illustrate this point are *Charaleau v. Woffenden*, 1 AZ 243, 25 Pac. 652 (1876); *Miller v. Fisher*, 1 AZ 232, 25 Pac. 651 (1875); *Roberts v. Wilcoxen*, 36 AR 355 (1880); *Shryock v. Cannon*, 39 AR 434 (1882); *Bryan v. Winburn*, 43 AR 28 (1884); *Stone v. Stone*, 43 AR 160 (1884); *Simms v. Hervey*, 19 IA 272 (1865); *Grapengether v. Fejervary*, 9 IA 163 (1859); *Watson v. Thurber*, 11 MI 457 (1863); *Blood v. Humphrey*, 17 Barb. (NY) 660 (1854); *Andrews v. Shaffer*, 12 How. Pr. (NY) 441 (1855); *Yale v. Dederer*, 18 NY 265 (1858); *Richardson v. Pulver*, 63 Barb. (NY) 67 (1872); and *Hayes v. Frey*, 54 WI 503, 11 N.W. 695 (1882). English courts shared the view of these state courts that their country's Married Women's Property Act ended the need for a privy examination. *Riddell v. Errington*, 54 L.J. Ch. N.S. (Eng.) 293, L.R. 26 Ch. Div. 220, 50 L.T.N.S. 584, 32 Week. Rep. 680 (1884); and *Re: Batt's Settled Estates*, 2 Ch. (Eng.) 65, 66 L.J. Ch. N.S. 635, 45 Week. Rep. 614 (1897).

[14] See Barbara Welter, "The Cult of True Womanhood," *American Quarterly* 18, no. 2 (1966): 151–76; Nancy F. Cott, *The Bonds of Womanhood: "Woman's Sphere" in New England, 1780–1835* (New Haven, Conn.: Yale University Press, 1977); and Carroll Smith-Rosenberg, "The Female World of Love and Ritual: Relations between Women in Nineteenth-Century America," *Signs* 1, no. 1 (1975): 1–30. For a critique of women's historians' continuing reliance on separate spheres as an organizing theme in their scholarship, see Linda K. Kerber, "Separate Spheres, Female Worlds, Woman's Place: The Rhetoric of Women's History," in *History of Women in the United States: Historical Articles on Women's Lives and Activities*, ed. Nancy F. Cott (New York: K. G. Saur, 1992): 4:173–203.

[15] Cott, *Bonds of Womanhood*; Nancy A. Hewitt, *Women's Activism and Social Change: Rochester, New York, 1822–1872* (Ithaca, N.Y.: Cornell University Press, 1984); Christine Stansell, *City of Women: Sex and Class in New York, 1789–1860* (New York: Knopf, 1986); and Jean Fagan Yellin, *Women and Sisters: The Antislavery Feminists in American Culture* (New Haven, Conn.: Yale University Press, 1989).

[16] Widespread evisceration of privy examination statutes came at a time when expansion of women's educational and economic opportunities and political activism placed the doctrine of separate spheres in question. See Barbara Epstein, *The Politics of Domesticity: Women, Evangelism, and Temperance in Nineteenth-Century America* (Middletown, Conn.: Wesleyan University Press, 1981); Ellen Carol DuBois, *Feminism and Suffrage: The Emergence of an Independent Women's Movement in America, 1848–1869* (Ithaca, N.Y.: Cornell University Press, 1978); Sheila M. Rothman, *Woman's Proper Place: A History of Changing Ideals and Practices, 1870 to the Present* (New York: Basic Books, 1978); and Kathryn Kish Sklar, *Florence Kelley and the Nation's Work: The Rise of Women's Political Culture, 1830–1900* (New Haven, Conn.: Yale University Press, 1995).

[17] See, for example, *Darden v. Neuse & T.R.S.B. Co.*, 107 NC 437, 12 S.E. 46 (1890). For the opposite position, see *Harbert v. Miller*, 4 W.N.C. (PA) 325 (1868), affirming 6 Phila. 531 (1868). For those that decided that a privy examination was necessary, see *Butterfield v. Beall*, 3 IN 203 (1851); and *Dampf's Appeal*, 97 PA 371

(1881). For the opposing view, see *Adams v. Schmidt*, 68 NJ Eq. 168, 60 Atl. 345 (1905); and *Reis v. Lawrence*, 63 CA 129, 49 Am. Rep. 83 (1883). For a rare example of a highly technical question involving privy examinations that did reach the Court, see *Dubois v. Hepburn*, 10 US 1, 9 L. Ed. 325 (1836). In this case, the Court held that a privy examination was necessary for a woman to execute a power of attorney in a case involving a deed of partition of her land.

[18] This question was part of the larger and longstanding debate about parol evidence and whether it could be used to place the validity of a written contract in doubt. See Arthur Linton Corbin, *Corbin on Contracts* (St. Paul, Minn.: West, 1960), 3:573–96.

[19] See, for example, *Greene v. Godfrey*, 44 ME 25 (1857); and *Jamison v. Jamison*, 3 Whart. (PA) 457 (1838).

[20] See, for example, *Elliot v. Peirsoll*, 26 US 328, 7 L. Ed. 164 (1828); *Peirsoll v. Elliot*, 31 US 95, 8 L. Ed. 332 (1832); and *The Agricultural Bank of Mississippi et al. v. Rice et al.*, 11 L. Ed. 949, 45 US 225, 4 Howard 225 (1846). The efficacy of the privy examination played a more important role in *Daviess v. Fairbairn*, 44 US 636 (1845).

[21] *Drury v. Foster*, 24, 25, 31.

[22] Ibid., 32.

[23] Ibid., 31.

[24] Ibid., 32.

[25] Ibid., 25.

[26] Ibid., 25–26.

[27] Ibid., 29.

[28] Ibid., 26.

[29] Morton Horwitz, *The Transformation of American Law, 1780–1860* (Cambridge, Mass.: Harvard University Press, 1977); and Stanley Kutler, *Privilege and Creative Destruction: The Charles River Bridge Case* (Philadelphia: Lippincott, 1971).

[30] David M. Silver, *Lincoln's Supreme Court* (Urbana: University of Illinois Press, 1956); and Robert McCloskey, *American Conservatism in the Age of Enterprise, 1865–1910* (Cambridge, Mass.: Harvard University Press, 1951), chap. 4.

[31] *Gelpcke v. Dubuque*, 68 US 175 (1864); and *Mercer County v. Hackett*, 68 US (1 Wallace) 654 (1866).

[32] Had both the plaintiff and defendant in *Drury* been from Minnesota, the case would never have reached the U.S. Supreme Court, because, when a case involves state law and all the parties are from that state, state courts have sole jurisdiction. When a plaintiff is from out of state, however, he or she has the option of bringing the case in federal rather than state court. Here, Drury probably chose to do so in order to avoid recent Minnesota precedents that allowed parol evidence in privy examination cases.

[33] *David B. Dodge v. Ellen R. Hollinshead*, 6 MN R. 1 (1861).

[34] Ibid., 10.

[35] Here the Supreme Court was quoting favorably from the decision of the trial court. Ibid., 13.

[36] *Swift v. Tyson*, 41 US 1 (1842); and *Gelpcke v. Dubuque*.

[37] Had Chief Justice Salmon P. Chase selected one of the new breed of young, Republican appointees, such as Noah Swayne or Stephen J. Field, to write the opinion, Drury might have had a better chance.

[38] *Drury v. Foster*, 35.

[39] Ibid., 34.

[40] Ibid., 35.

[41] Some courts followed Nelson's recommendations. In Michigan (for example, *Fisher v. Meister*, 24 MI 447 [1872]), the court allowed parol evidence to impeach the validity of a married woman's privy examination where the husband had been in the room when she signed her acknowledgment certificate.

[42] *Miller v. Marx*, 55 AL 322, 339 (1876).

[43] *Johnston v. Wallace*, 53 MS 331 (1876).

[44] *Charaleau v. Woffenden*.

[45] *Young v. Duvall*, 109 US 573 (1883); and *Hitz v. Jenks*, 123 US 297 (1887). See also *Northwestern Mutual Life Insurance v. Nelson*, 103 US 545 (1881).

[46] *Young v. Duvall*, 573, 574, 575; and R.S. Dist. Col. Secs. 450, 451.

[47] *Young v. Duvall*, 576.

[48] *Drury v. Foster*, 35.

[49] Charles Fairman, "The Education of a Justice: Justice Bradley and Some of His Colleagues," *Stanford Law Review* 1 (January 1949): 217–55; Robert G. McCloskey, *American Conservatism in the Age of Enterprise, 1865–1910: A Study of William Graham Sumner, Stephen J. Field, and Andrew Carnegie* (Cambridge, Mass.: Harvard University Press, 1951); and Paul Kens, *Justice Stephen Field: Shaping Liberty from the Gold Rush to the Gilded Age* (Lawrence: University Press of Kansas, 1997).

[50] *Young v. Duvall*, 577.

[51] *Hitz v. Jenks*.

[52] Ibid., 305.

[53] Ibid., 303.

[54] *Bradwell v. Illinois*, 83 US (16 Wallace) 130, 141–42. In the famous case of *Muller v. Oregon* (208 US 412 [1908]), Justice David Brewer resorted to traditional conceptions of womanhood when he argued that "woman has always been dependent upon man. He established his control at the outset by superior physical strength, and this control, in various forms, with diminishing intensity, continues to the present" (ibid., 421–22).

[55] *Colonial Building & Loan Ass'n v. Griffin*, 96 Atl. 901, 902, 905 (1915).

[56] See, for example, *Mather v. Jarel*, 33 Fed. Rep. 366 (1888); *Linton v. National Life Insurance Company of Vermont*, 104 Fed. Rep. 584 (1900); *Linder v. Hyattsville Auto & Supply Co.*, 84 A. 2d 541 (1915); *Hamling v. Hyattsville Auto & Supply Co.*, 34 Fed. 2d 112 (1929); *Phillips v. Bishop*, 53 N.W. 375 (1892); *Springfield Engine & Thresher Co. v. Donovan*, 49 S.W. 500 (1899); *Northwestern Loan & Banking Co. v. Jonasen*, 79 N.W. 840 (1899); *Adams v. Smith*, 70 P. 1043 (1903); *McGuire v. Wilson*, 99 N.W. 244 (1904); *First-Trust Joint Stock Land Bank of Chicago v. McNeff*, 264 N.W. 105 (1935); and *Picetti v. Orcio*, 58 P. 2d 1046 (1936).

[57] Amy Dru Stanley, *From Bondage to Contract: Wage Labor, Marriage, and the Market in the Age of Slave Emancipation* (New York: Cambridge University Press, 1998), 175–217.

[58] Friedman, *History of American Law*, 211, 413, 431.

[59] Lebsock, "Radical Reconstruction and the Property Rights of Southern Women," *Journal of Southern History* 43 (May 1977): 197.